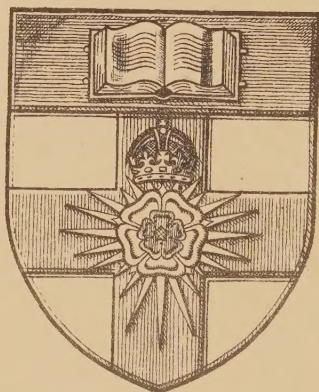


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AND

COURTS OF SPECIAL JURISDICTION

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The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

A reference to a volume as "1st Re-issue" refers to the first re-issue of the appropriate volume of Halsbury's Statutory Instruments.

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The reference 15 ENCY. FORMS & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

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CORRIGENDA

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- p. 155. CASTLE LAUNDRY (LONDON), LTD. v. READ. Counsel: read “*J. P. Widgery* for the tenants *C. Lawson* for the landlord.” instead of as printed. Page 157, solicitors: read “*Moon, Gills & Moon* (for the tenants); *Sydney Morse & Co.* (for the landlord).” instead of as printed read “*D. L. Wilkes*”.
- p. 321. JOHN W. GRAHAME (ENGLISH FINANCIERS), LTD. v. INGRAM. Counsel: for “*D. L. Wickes*” read “*D. L. Wilkes*”.
- p. 330. PAISNER v. GOODRICH, Line F. 1: for “successive” read “concurrent,” and in the next succeeding line for “concurrent” read “successive”.
- p. 405. HUYTON-WITH-ROBY U.D.C. v. HUNTER. Solicitors: for “*Oswald Goodier & Co., Preston*” read “*H. E. H. Lawton, Huyton*”.
- p. 457. MERRICKS v. HEATHCOAT-AMORY. Solicitors: for “*Treasury Solicitor*” read “*Solicitor Ministry of Agriculture, Fisheries and Food*”.
- p. 555. Re BONE (dec'd.). Title: for “*MIDLAND BANK, LTD.*” read “*MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD.*”
- p. 630. Re CORY (dec'd.). Counsel: for “*D. O. Thomas*” read “*D. A. Thomas*”.

THE ALL ENGLAND LAW REPORTS

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LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

MARJORAM v. MARJORAM.

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), February 15, 16, 1955.]

Justices—Husband and wife—Maintenance order—Procedure—Husband not legally represented—Inadequate cross-examination of wife—Duty of court—Husband's letter to court put to him at end of his evidence—Wife's application for adjournment refused—Refusal by justices to hear legal submission on behalf of wife—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 61.

Divorce—Desertion—Constructive desertion—Sluttishness of wife—Whether justification for husband leaving matrimonial home.

F On Oct. 17, 1954, the husband left the matrimonial home and went to live in the house of a Mrs. B. On Nov. 17, 1954, the wife caused a summons to be issued against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on her complaints that he had deserted her and had committed adultery with Mrs. B. On Dec. 8, 1954, the husband wrote a letter to the clerk to the justices in which he complained of the wife's dirty habits. On Dec. 10, 1954, the wife's complaints were heard by the justices. The wife was legally represented, the husband was not. G The wife gave evidence to the effect that the husband had been associating with Mrs. B. before he went to live at her house and that he had admitted to her, the wife, that he was sleeping with Mrs. B. The wife was not cross-examined on any of the matters set out in the husband's letter of Dec. 8, 1954. The husband then gave evidence. He admitted that he left home on Oct. 17, 1954; he said that he agreed with the wife's "evidence of association", but he denied that he had ever committed adultery with H Mrs. B. He concluded his evidence in chief by saying that he would not have his wife back and that he felt he was justified in leaving her. His letter of Dec. 8, 1954, was then produced to him and he was asked whether it was in his handwriting and was true, to which he replied that it was in his handwriting and was all true. The husband gave no other evidence I in chief to rebut the charge of desertion. Until the moment when the letter was produced the wife's representative was unaware of its existence or of the nature of the husband's complaints against the wife. The justices having asked the wife's solicitor through their clerk whether he was going to call evidence in corroboration of the charge of adultery and having been told "No", dismissed the charge for want of corroboration. The husband was then cross-examined and stated that the wife was "dirty in every respect". The wife's solicitor applied for an adjournment in order to call witnesses to refute the husband's allegations. The justices

refused the application but allowed the wife to be recalled. The wife's representative then sought to make a submission on a point of law, to the effect that the husband had failed to put forward a defence in law to the charge of desertion. The justices declined to hear the submission, and dismissed both complaints. On appeal by the wife,

Held: the following irregularities in the conduct of the proceedings taken in conjunction made it impossible for the justices' decision to be supported: (i) in view of the husband's admission of the wife's evidence as to his association with Mrs. B., and of his failure to deny the wife's evidence that he admitted adultery with Mrs. B., it was impossible to say there was no corroboration of that charge; and the justices' intervention at the end of the husband's evidence in chief was unjustified both as regards the charge of adultery and as regards the charge of desertion; (ii) the clerk to the justices should either have handed the husband's letter of Dec. 8, 1954, to the wife's representative at the opening of the case, or have read out the letter in open court; further, it was the duty of the court under the Magistrates' Courts Act, 1952, s. 61, to see that the matters set out in the husband's letter were put to the wife in cross-examination; (iii) it was wrong to elicit the husband's evidence on the charge of desertion by producing to him his letter of Dec. 8, 1954, and asking him whether it was in his handwriting and was true and to deny the wife the opportunity to call witnesses to refute the husband's allegations; (iv) it was also wrong to refuse to hear the submission of the wife's solicitor on a point of law after the conclusion of the evidence; accordingly, the case would be remitted for re-hearing.

Bartholomew v. Bartholomew ([1952] 2 All E.R. 1035) and *Lang v. Lang* ([1954] 3 All E.R. 571) discussed.

Per LORD MERRIMAN, P.: so far as the court is aware, there is no decision in which "sluttishness" alone has been held to be a sufficient ground for a charge of constructive desertion (see p. 8, letter G, post).

Appeal allowed.

[**Editorial Note.** Although the decision on the appeal is concerned with the conduct of the proceedings before the justices, LORD MERRIMAN, P., in giving guidance to the justices for the re-hearing, refers to the two schools of thought concerning intention as a test for a defence to constructive desertion. The decisions in *Boyd v. Boyd* ([1938] 4 All E.R. 181) and *Bartholomew v. Bartholomew* ([1952] 2 All E.R. 1035) support the subjective test depending on wish rather than intention, whereby if, e.g., a husband in fact wishes his wife to remain with him she can never prove constructive desertion. In *Lang v. Lang* ([1954] 3 All E.R. 571) the Privy Council considered the subjective test and the rival test which depends on the natural inference to be drawn from acts and leaves the doer of the acts to rebut the inference, so that if, e.g., a husband is guilty of such conduct towards his wife that he must know that it will probably result in her departure from their home, it is not a good defence that he in fact wished her to remain. In *Lang v. Lang* the Privy Council adopted the latter test, and in the present case LORD MERRIMAN intimated that the most authoritative guidance would be found in that case (see p. 8, letter F, post).

As to Constructive Desertion—Husband forced out of Matrimonial Home, see 10 HALSBURY'S LAWS (2nd Edn.) 655, 656, para. 964 text and note (k); and for cases on the subject, see 27 DIGEST (Repl.) 352, 2912 and 3rd Digest Supp., Vol. 27, 2912a.

For the Magistrates' Courts Act, 1952, s. 61, see 32 HALSBURY'S STATUTES (2nd Edn.) 469.]

Cases referred to:

- (1) *Bartholomew v. Bartholomew*, [1952] 2 All E.R. 1035; 117 J.P. 35; 3rd Digest Supp.

- A (2) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, 2908.
- (3) *Lang v. Lang*, [1954] 3 All E.R. 571.
- (4) *Price v. Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 27 Digest (Repl.) 85, 636.
- B (5) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627.
- (6) *Thomas v. Thomas*, [1946] 1 All E.R. 170; 115 L.J.P. 75; 110 J.P. 203; 27 Digest (Repl.) 697, 6660.

Appeal.

The wife appealed against an order of the Wallington justices dated Dec. 10, 1954.

- C The parties were married on Nov. 16, 1946, and there were two children of the marriage, born in 1947 and 1951. In August, 1954, the wife went to Ireland with the children. She made arrangements with a neighbour across the road, a Mrs. B., that the husband should have his meals at Mrs. B.'s house while the wife was away. The wife returned with the children on Sept. 21, 1954. On Oct. 17, 1954, the husband left the matrimonial home and went to live at Mrs. B.'s house. On Nov. 17, 1954, the wife caused a summons to be issued against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on her complaints that he had deserted her on and from Oct. 17, 1954, and that he had committed adultery with Mrs. B. during October and November, 1954. On Dec. 8, 1954, the husband wrote a letter to the clerk to the justices, in which he stated:

- E "I have been married about eight years and during this time I have tried to reason with my wife about her dirty habits such as going to bed with her clothes on, or never taking them off from one week to another, wearing under-clothes until they fall off her, not washing from day to day . . . not being able to use a needle, throwing my socks on the fire rather than trying to darn them.

- F "I have always had to do my own mending . . . The only time the children got a bath was when I gave it to them. I sent my wife home to Ireland with the two children for three weeks, and the boy came home with dermatitis and I don't think the poor kid had a wash all the time he was over there to look at the state of him when he got home . . . I would have taken a room farther away but I wanted to keep my eye on the children, they come across to me every night for two or three hours, then I take them over and put them to bed. I could go on complaining about my wife on many other things but they're too bad to put on paper, so I had better end."

- G The complaints were heard on Dec. 10, 1954. The wife in evidence stated, *inter alia*:

- H "At 11 p.m. on about Oct. 5, 1954, I saw my husband's motor bike parked outside Mrs. B.'s house. I went across and into the kitchen and the dining room of Mrs. B.'s house; this was at 11.25 p.m. I put my hand on door to open it. I did so about two inches when my husband put bolt on from inside. I stood outside two minutes and my husband then unlocked the door and stood in the doorway. Mrs. B. was in the room, she had her back to sideboard standing. I said 'What's going on here?' Mrs. B. said: 'I've not been doing anything.' I then said: 'Why lock the door?' No reply was given and my husband made no reply. My husband then dragged me back to our own house by my hair. After this my husband continued to visit Mrs. B. every evening for about two hours from 9.30 p.m. to 11.30 p.m. On Oct. 17, 1954, my husband left home. He said 'I'm packing up and going to live with Mrs. B.' On Oct. 18, 1954, my husband came in to see the children. I asked him if he was sleeping with Mrs. B. He replied: 'Yes,

I

and it's lovely, and no matter what happens we shall always be together.' A
My husband has not returned to me . . ."

Cross-examined by the husband, the wife said:

"There was a bolt on the door and I heard it slide. I did call Mrs. B. a prostitute. You told me that you preferred Mrs. B's company to mine."

The husband then gave evidence and stated, *inter alia*:

"I agree with wife's evidence of association. I did say I preferred Mrs. B.'s company. I am not in love with Mrs. B. We do not go out together. I do agree I left wife on Oct. 17, 1954, and I will not have her back. I do agree I was in the room with Mrs. B. I agree wife was unable to get into room. We were sitting on settee together listening to radio and she was reading a book. I have not committed adultery with Mrs. B . . . On Oct. 17, 1954, it was not my intention to break off relationship between wife and me for the other woman. I will not go back to my wife now. I intend to live at the address of Mrs. B. I feel I was justified in leaving my wife."

The husband's letter of Dec. 8, 1954, was produced and put to him with the words "Q.—Is that your writing? A.—Yes. Q.—Is it true? A.—The letter produced is in my handwriting and is all true."

The justices through their clerk asked the wife's solicitor whether evidence in corroboration of the charge of adultery was going to be called, and having been told that it was not, announced that they found that the charge of adultery had not been proved. The husband was then cross-examined by the wife's solicitor and stated:

"Wife was dirty. She has always been dirty. I decided to leave wife years ago but I decided to wait until children were school age. Wife dirty in every respect . . . I decided not to go back home because my wife called out 'prostitute' to Mrs. B."

Two witnesses were called by the husband and then the wife was recalled. She stated:

"I admit I am untidy but I deny the allegations made by my husband. Sheets and bedding are not dirty. I share bathroom. I sent sheets to 'Bendix' at Croydon. I deny sleeping in my clothes. I have had sanitary inspector to see kitchen. The council are finding me a house."

Cross-examined by the husband the wife said:

"I had a bath two weeks ago—and before that a fortnight ago."

The justices dismissed both complaints, giving as their reasons:

"Adultery. From the evidence we have heard we are satisfied that the wife had good reasons for some suspicion with regard to her complaint of adultery. As the allegation is completely denied by the husband, we feel bound to be guided by the principle that the standard of proof necessary for an allegation of this kind is such that it must be beyond all reasonable doubt. In this regard we are far from being satisfied that the adultery complained of has been proved. We therefore dismiss this complaint."

"Desertion. It is not in dispute that the husband left the matrimonial home on Oct. 17, 1954. We are prepared to accept his evidence with regard to his reasons for leaving his wife. His reasons were that of her filthy habits of going to bed with all her clothes on, and not taking them off from one week to another, not washing or bathing herself, not bathing the children and many other serious complaints which have gone on for over a very long period. We accept the evidence of the husband on this and reject that of the wife. We are of opinion that the wife's dirty habits must have been apparent to her and that she ought to have realised that sooner or later they were bound to bring about discord in their relations. We therefore find from the

A evidence that the husband's complaints were in our view grave and weighty and that the wife must be held responsible for breaking off the relations with her husband and that the husband was justified in taking the course he did. We therefore dismiss this complaint also."

The wife appealed.

B *H. P. B. Dow* for the wife.

Miss M. Morgan Gibbon for the husband.

LORD MERRIMAN, P.: In my opinion the trial before the justices took such an unsatisfactory course that it is impossible to support the decision, having regard to the way in which it was reached. It is plainly a case which we cannot possibly decide for ourselves in the absence of seeing and hearing the witnesses, and it is inevitable, therefore, in my opinion, that there must be a re-hearing of both complaints. I must go in some detail into the reasons why I say that the trial was unsatisfactory, but I propose, so far as it is possible to do so, to avoid giving any indication of any opinion as to what the decision on either of these complaints should be. It was a case of simple desertion in the sense that it is common ground that on Oct. 17, 1954, the husband left the matrimonial home. It is true that he said emphatically that he did not do so for the purpose, as the wife suggested, of continuing an association, which she said had already begun, with Mrs. B. He made it plain to the court, however, that, whatever his views on the matter may have been at the moment of parting, he had not at the time of the hearing the slightest intention of going back to the wife. For that attitude, manifestly, some justification was required.

[His LORDSHIP stated the facts and continued:] The husband's justification, was, in my opinion, vital to a consideration whether this trial can be regarded as satisfactory. On Dec. 8, 1954, the husband wrote a letter to the clerk to the justices setting out, in effect, his case. It was, of course, a very irregular thing to do, and I must not be taken, in what I am about to say, to be palliating the impropriety of one litigant writing ex parte to the court, behind the back of the other, and stating his view of the matter. If, however, the matter had been properly handled there would not have been much harm in it, and I say that for this reason. The husband was not represented, though the wife was represented by her solicitor. Although there were other witnesses, the two witnesses who mattered were the husband and the wife, and I confine my remarks to them. It was the duty of the justices [under the Magistrates' Courts Act, 1952, s. 61] if they thought that the husband, as a party to the proceedings who was not legally represented, was unable effectively to examine or cross-examine a witness, to ascertain from him what were the matters about which the witness might be able to depose or on which the witness ought to be cross-examined and to put, or to cause to be put, to the witness such questions in the interest of the husband as might appear to the justices to be proper. If the clerk had done what one would have thought was elementary, that is to say, if at the moment when the court assembled he had informed the wife's solicitor that he had received from the husband this letter dated Dec. 8, 1954, and either had handed it to him in open court to read, or had read it out in open court, and so had made it a public document, and if the court had then considered any application for an adjournment which might have been made if the communication contained some matter of surprise; and ultimately, if the points raised in the communication were not adequately dealt with by the wife's advocate, or the husband required assistance either in cross-examining the wife or in bringing out the story himself, the clerk had assisted him to do so; there would not, as I have said, have been much harm done. Unfortunately none of these things occurred. The wife gave evidence as to the history of the marriage and the association with Mrs. B. which was the basis of her charge of adultery, including, be it remembered, the husband's alleged admission that he had already slept with her. Not one single

word, however, was put to her in cross-examination nor was any form of question put by anybody about the husband's complaint against her, which, in a word, was sluttishness. [HIS LORDSHIP read the letter from the husband dated Dec. 8, 1954, referred to the wife's evidence in cross-examination and continued:] The wife left the witness-box without one single question, so far as one can judge from the note, having been addressed to her about the complaints which, the husband said, justified him in leaving the wife. It is impossible to say that the communication did not influence the decision of the justices, because the statement of their reasons bears in many respects a striking resemblance to the allegations in the letter, both in substance and in form. A

I think it is necessary to point out (for it is strictly relevant to the duty of the court under s. 61 of the Act of 1952) that of the husband's evidence about the charge of adultery not a single sentence is directed to the evidence of the wife that he had in terms admitted having slept with Mrs. B. It is plain that, if his evidence was to be of real value to the court on the issue of adultery (and not only on the issue of adultery, as I shall point out), he ought to have been reminded by the clerk that there was that evidence with which he ought to deal. Instead of that, having said that it was not his intention to break off the relationship with his wife for the other woman, he said: B

"I will not have her (the wife) back . . . I will not go back to my wife now. I intend to live at the address of Mrs. B. I feel I was justified in leaving my wife." C

At that point, for the first time, the letter dated Dec. 8, 1954, was produced and he said: "The letter produced is in my handwriting and is all true." D

The wife's solicitor was about to cross-examine. I do not in the least retreat from or retract what this court has said many times, that if justices think there is nothing in a case when they have heard one side of it they are entitled to stop it; but I also do not retract the warning that, speaking generally, it is extremely unwise to do so until they have at least heard the whole of the evidence. In the present case, it is manifest, to put it at its lowest, that there is a *prima facie* case of adultery, and, as things stood at that moment, the question, in relation to the charge of desertion, was whether the wife's "sluttishness" (a word which I use to summarise the whole contents of the husband's letter) was indeed the true and effective cause of his decision to leave the matrimonial home, or whether there was not another, and even more potent, reason. Plainly, therefore, it was extremely unwise of the clerk, who, on the information we have, appears to have taken a considerable part in the proceedings, to have suggested to the justices, in effect, that this was the moment to get rid of the charge of adultery. It was done in this way. It is not disputed that the wife's solicitor was asked by the clerk: "Are you going to call any evidence in corroboration of the charge of adultery?" to which he replied: "No". Whereupon the clerk, turning to the justices, obviously gave them some advice, and then said: "The justices dismiss the charge of adultery for want of corroboration". "For want of corroboration" does not appear in the notes, but there is plainly a misdirection, because counsel for the husband naturally has not suggested for a moment that even on the husband's own evidence as it stood, there was no corroboration. The husband agreed with the wife's evidence about the "association"; he said that he preferred Mrs. B.'s company; then he added that he was not in love with her and they did not go out together; he agreed that his wife was unable to get in; he said that they were sitting together on the settee (the wife complains that they were by this settee) and listening to the radio, it was fairly late at night (he did not specify which particular programme was still running at the time the wife did get in) and Mrs. B. was reading a book; and he denied the adultery. E F G H I

It is impossible on that evidence to say that the husband himself had not provided some corroboration. I repeat that he had not dealt with the wife's evidence that he had, in effect, confessed adultery to her, and I do not in the least dispute

A the proposition, which has been established for many years, that apart altogether from special cases, where there is some evidence of a witness being an accomplice, it is always desirable in matrimonial cases to have corroboration of the story, if possible. There is no law that it is essential, and there is no law that it is essential with regard to adultery any more than in other cases, though here, again, courts have always been cautious about accepting alleged confessions of adultery which depend solely on the evidence of the other spouse. To that extent, at the proper time, no doubt, some caution might have been given to the justices about this so-called confession, but at any rate the time to deal with it was not then, but when it had been seen, one way or the other, whether the husband denied or admitted having made that statement to the wife, or gave some explanation for making it. I consider that the stopping of the case as regards adultery at that moment was so manifestly wrong from the point of view of both complaints that that alone would almost oblige us to order a new trial.

Though I do not accept the contention that this ruling absolutely precluded the wife's advocate from cross-examining about the association with Mrs. B. in relation to the charge of desertion, it goes without saying that, at the least, as a matter of common sense, the fact that the justices had already dismissed the charge must certainly have acted as some discouragement to pursue that line of cross-examination. We are told by counsel for the wife that the wife's solicitor up to that moment had no idea that this charge of "sluttishness" was being made. It has been said that he ought to have known. If that means no more than that if the charge of "sluttishness" is true then the wife ought to have instructed him about the truth, and in that sense he would have known, good and well; but otherwise I am not sure that he should assume, or be expected to assume, knowledge that this detailed history of "sluttishness" throughout the marriage was what he ought to have come prepared to meet as the alleged justification for the withdrawal of the husband from cohabitation. At any rate, speaking for myself, I am prepared to accept the assurance that he was completely taken by surprise. Having had a hurried consultation with his client the solicitor made it known to the court that he would be in a position, given an adjournment, to call witnesses who could refute the charge. This application was refused, and, in effect, it was intimated to him that he must be content with the privilege, which was graciously accorded, of recalling the wife to deal with something which had never been put to her in cross-examination at all. She was recalled. [HIS LORDSHIP referred to the wife's evidence on her recall and intimated that it did not support the imputations made by the husband in his letter of Dec. 8, 1954, and continued:] The justices having refused the adjournment, having given the wife no opportunity of calling witnesses to refute this charge that was sprung on her advocate, if not on her, the wife's solicitor then wanted to argue that the husband had not put forward a defence to the charge of desertion. We are told that in particular he wished to cite *Bartholomew v. Bartholomew* (1). They did not allow him to say anything. He was not allowed to cite that case, or to argue the matter as a point of law. It is true that the complainant's advocate, who has the opportunity of addressing the court at the beginning, is not entitled to address the court on the facts again, but it is common ground between counsel that, speaking generally, the practice is that if a point of law is raised the complainant's advocate has the right to address the court on the law as a matter of courtesy. It is a matter not of statutory right, but of discretion, and is the general practice, as one would naturally suppose. Counsel for the husband has found that it is so stated, at any rate with regard to the criminal jurisdiction proper, in one of the older editions of *STONE'S JUSTICES' MANUAL**. It is so obviously sensible a practice that it is a great pity it was not followed in the present case, particularly having regard to the fact that

* E.g., 74th Edn., at pp. 190, 192.

the defence put forward on the charge of desertion only emerged in the way I have described, and that the justices had refused an adjournment to enable the facts about that particular defence to be fully elucidated from the wife's point of view. In other words, it seems to me that in a short space of time the clerk contrived to accumulate a considerable store of errors in the conduct of these proceedings, which, even if they were all matters of discretion, made this trial so unsatisfactory that we cannot let the dismissal of these two complaints stand, and I think that there must be a re-hearing. A B

That brings me to what I must say by way of supplement. We can give the justices little guidance, for it all depends on what view they take of the facts when the case comes on again. The wife's solicitor was minded to cite to the justices, in rebuttal of this justification which the husband had put forward, *Bartholomew v. Bartholomew* (1), decided by the Court of Appeal. I can well understand why C he wished to cite that case, because, without going into detail, it bears, so far as the facts are concerned, a striking resemblance to the alleged facts of the present case. It was a case of a husband, returned from active service, who found the house, as he said, in a dirty condition, and gave his wife a warning that if it was not put right within some time limit, that would be the end. According to his version of the facts, which had been accepted by the learned commissioner who D tried the case, matters had not been put right within the time limit. Accordingly, he treated himself as being expelled from the matrimonial home, and, after the lapse of the statutory period, brought a petition on the ground of constructive desertion. The Court of Appeal overruled the commissioner, who had pronounced a decree nisi. It is necessary to add this caution about the case. The two leading judgments, those of SINGLETON and DENNING, L.J.J., adhere to what has been called one school of thought, which, in fact, begins with a case called *Boyd v. Boyd* (2) and ends with the case of *Bartholomew v. Bartholomew* (1) itself. I do not propose to review that school of thought or to set out against it the rival school of thought, for both are set out in full and dealt with in detail in *Lang v. Lang* (3), a recent decision of the Judicial Committee of the Privy Council on an Australian appeal. In that case, the particular school of thought which is exemplified E by *Boyd v. Boyd* (2) down to *Bartholomew v. Bartholomew* (1) is decisively rejected, and, indeed, if the justices want the most authentic guidance on the point of constructive desertion they cannot do better than to look at the statement of it as laid down in that latest and most authoritative case. Having said that, it does not follow, of course, that *Bartholomew v. Bartholomew* (1), though two of the judgments were apparently based on that "line of thought," may not F have been correct. It is only right to point out that HODSON, L.J., does not arrive at the result by that process of reasoning. Equally, it is right to point out that, so far as the careful argument on both sides has gone, and so far as the court is aware, there is no decision in which "sluttishness" alone has been held to be a sufficient ground for a charge of constructive desertion. G

I think, however, that the most helpful suggestion to the justices who re-try H the present case will be to remind them of another principle which is well established. In their reasons, having accepted the evidence of the husband and rejected that of the wife on this question of sluttishness, they say:

"We are of opinion that the wife's dirty habits must have been apparent to her and that she ought to have realised that sooner or later it was bound to bring about discord in their relations." I

Some criticism has been directed to the use of the word "discord". Plainly, according to the husband's evidence there had been discord for a long time; but I think that the justices meant to use the word in the sense of being "bound to, or likely to, bring about a disruption of the consortium", for they go on:

"We therefore find from the evidence that the husband's complaints were in our view grave and weighty and that the wife must be held responsible for breaking off the relations with her husband and that the husband was

A justified in taking the course he did. We therefore dismiss this complaint also."

B If that statement of their reasons had been a judgment in a suit for restitution of conjugal rights, to which in answer it had been pleaded that there was just cause for refusing to return, coupled with a cross-charge of desertion alleging that the wife had expelled the husband from the matrimonial home, it is established by the recent decision of the Court of Appeal in *Price v. Price* (4) (not, incidentally, for the first time), that precisely the same principles would apply to the answer to the restitution suit and to the cross-charge of desertion. I am omitting deliberately any complication introduced by the allegation of adultery one way or the other. That this is so in relation to a charge brought in the High Court of wilful neglect to provide reasonable maintenance for the wife appears quite plainly from the judgment of HODSON, L.J. After setting out the decision in *Jones v. Newtown & Llanidloes Guardians* (5), in which the EARL OF READING, C.J., gave the leading judgment, and reading a passage from that judgment ([1920] 3 K.B. at p. 384) HODSON, L.J., says ([1951] P. at p. 420):

D "That passage draws attention to something which, I think, is perhaps not always clearly remembered, namely, that the husband's obligation to maintain his wife is prima facie complied with by providing a home for her. A wife has no right to separate maintenance in a different home unless she can justify the fact that she is living apart from her husband."

E Then he deals with that and with the proposition that at any moment she may not only have put herself right but may, by the same process, have made the husband into a deserter, and he refers to the decision of this court in *Thomas v. Thomas* (6), to which I do not think it is necessary to refer. He then says (*ibid.*, at p. 421):

F "I should not have mentioned that point had not my brother DENNING mentioned that proceedings for restitution of conjugal rights might differ in their result from proceedings under this section [Matrimonial Causes Act, 1950, s. 23]. For my part I think that the proceedings under s. 23 of the Act of 1950 are on the same footing as proceedings for restitution of conjugal rights: if a wife becomes a deserter she would not be entitled to maintenance just because she is a wife, that is to say, to separate maintenance. The question of her right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned. It is necessary that those conditions should be clearly defined, and I think that they were clearly defined by LORD READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (5)."

H SOMERVELL, L.J., who had not dealt specifically with that proposition, though he had dealt with it by indirect reference to *Thomas v. Thomas* (6), though not by name, added as a supplement to his judgment ([1951] P. at p. 422):

I "I agree with what has been said about the cross-appeal. On the question of the relationship between rights under this section and the right to a restitution plea, I agree with what has been said by HODSON, L.J."

On the re-hearing, therefore, the justices will be well advised to ask themselves this question of fact: Was the wife's alleged "sluttishness" the real and effective cause of the husband leaving the matrimonial home? Or was the cause, in whole or in part, the husband's desire to continue what the wife says was an improper association with the woman mentioned? In effect, was the "sluttishness", either wholly or partly, a pretext to enable the husband to carry on an

improper association? It is, perhaps, worth calling attention to one point. Unlike the facts in *Bartholomew v. Bartholomew* (1), so far as the note before us goes, I see no evidence of anything in the nature of a warning given by the husband immediately before his departure. It is true that he says in his letter and evidence that he had been intending to go for years but had put it off until the children reached school age. One of the children was over seven, and the other was almost four years of age, and it will be a question for the justices whether, if sluttishness was the real cause, his departure had not been unduly delayed, and whether it was a mere coincidence that it happened to occur about the time that he had plainly formed a friendship with the woman with whom the wife charges him with committing adultery. Their answer to this question of fact may be decisive of the whole case, because, if they take the view that the sluttishness was not the effective cause of his departure, then there appears to be nothing further to discuss. On the other hand, if their view, after having heard all the evidence, is that that was the cause of his leaving home, then they will have to do their best to answer the question whether that alone was the cause, in the light of what is said in *Lang v. Lang* (3), and in the light of the fact that the same sort of facts in *Bartholomew v. Bartholomew* (1) were held not to justify a charge of desertion, and that there is, as I have already said, no known case at present where sluttishness alone has been held either to be a complete answer to a plea for restitution of conjugal rights or to support a charge of desertion.

Further than that I do not think it is possible for us to go. In my opinion, this appeal must be allowed and the order dismissing the wife's complaint set aside, and both complaints remitted for re-hearing by a fresh panel of justices. I might perhaps add, finally, that we were told that an assistant or deputy clerk was acting on this occasion. It might be as well if the real clerk acted on the re-hearing.

COLLINGWOOD, J.: I agree. [His Lordship stated the facts and continued:] In my opinion, it is impossible to support the conclusion of the justices arrived at in this way. In the first place, as to the adultery, the justices say that they found that the wife had good reason for suspicion of an adulterous association, but that, as it was denied, and it must be proved beyond reasonable doubt, they were far from satisfied that it had been proved. At the time when they stopped the proceedings so far as the adultery issue was concerned it was intimated on their behalf that they decided that there was no corroboration of the wife's charge. It is obviously impossible to say that there was no corroboration, having regard to the husband's own admission with regard to the wife's story of his association with Mrs. B. Coupled with that is the fact that he had failed to give any denial of the wife's evidence that he expressly admitted adultery with Mrs. B. and said how pleasant he found it. In my opinion the justices' intervention at the point at which it took place was quite unjustified. Furthermore, the husband's relationship with Mrs. B. was clearly relevant in regard to the question of his reason for leaving the wife. Was it the shortcomings of his wife that made him leave her, or was it the attractions of Mrs. B.? I think that the intimation by the justices at that stage was clearly embarrassing to the solicitor in his cross-examination on that issue. As Lord Merriman, P., has said, it did not preclude him from pursuing that matter but it certainly made it difficult for him after the justices had intimated that so far as they were concerned they were not having anything more to do with a charge of adultery.

The second matter on which this trial is open to criticism is that no questions were put to the wife, prior to her recall to the witness-box, about the dirty habits which constituted the husband's sole defence to her charge of desertion, although the clerk to the justices had in his possession, even before the court assembled, a letter setting out in detail the charges which the husband proposed to bring against the wife. One would have thought that the first thing when the case was called on would be for the clerk to hand that letter down to the representative of

A the wife and let him know the information which had been put into the hands of the court. Even if he did not follow that course, his obvious duty was to ensure compliance with the court's duty under the Magistrates' Courts Act, 1952, s. 61, to put to the wife seriatim the allegations which the husband had intimated he proposed to bring, and to ask whether or not they were accepted by her.

B The next complaint is that the first intimation of any of these charges of dirty habits was the husband's evidence: "The letter produced . . . is all true", this being his evidence in relation to the whole defence to the charge of desertion. It would be bad enough if evidence on such an issue were elicited by a series of leading questions, but to read out the witness's proof and confine his evidence on those issues to the words "That is all true" is a matter which cannot possibly be supported; and the effect of that letter on the minds of the justices is obvious

C when one finds that their reasons, in a number of instances, are taken verbatim from the letter itself. As if that were not bad enough, the justices then refused the application by the solicitor for the wife for an adjournment to enable him to call evidence to meet these charges, introduced in such a way and at such a time, and he had to content himself with putting the wife back into the witness-box and asking her to what extent she accepted them.

D Finally the justices refused to hear the wife's solicitor when he wished to make a submission on a point of law. The exact point of law on which he wished to make a submission was, I gather, as to what constituted or was capable of constituting grave and weighty matters in regard to the reason for one spouse leaving the matrimonial home. I imagine at that stage it was too late for him to make any submission on a point of law with regard to the question of what may or

E may not constitute corroboration of evidence of adultery. However, it is clear that he did wish to cite to the justices *Bartholomew v. Bartholomew* (1), and they refused, very unfortunately, to listen to him.

In my opinion each of these matters individually constituted a serious defect in this trial, and taken in conjunction with one another their force is quite overwhelming. They are irregularities of such a character, and there are so many

F of them, that it is impossible to support the justices' decision and there must be a re-hearing. As to the matters for consideration by the justices who sit at that re-hearing, I wish to say that I agree entirely with what LORD MERRIMAN, P., has said, in particular with regard to the question whether or not the wife's dirty habits, as deposed to by such witnesses as were called, constituted grave and weighty matter sufficient to justify the husband in leaving the wife, and in

G particular, also, with regard to *Bartholomew v. Bartholomew* (1), subject to the modification of that decision as pointed out in *Lang v. Lang* (3). Another matter to which they should pay particular attention is the effect of such finding on the position of the wife, as explained in the decision in *Price v. Price* (4) and cases which are there referred to. I agree that the present case should be sent back for a re-hearing before another panel of justices.

H *Appeal allowed. Case remitted for re-hearing.*

Solicitors: *McMillan & Mott* (for the wife); *Copley Singleton & Billson*, Croydon (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

CROOKALL v. VICKERS-ARMSTRONG, LTD.

[LIVERPOOL ASSIZES (Glyn-Jones, J.), January 26, 27, February 17, 1955.]

Master and Servant—Duty of master—Provision of safe system of working—Steel foundry—Risk of silicosis—Duty to provide masks and to persuade workmen to wear them—Measure of damages.

Factory—Removal of dust—“All practicable measures” to be taken—Masks provided, but failure to take reasonable steps to induce workmen to wear them—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 47 (1).

From 1930 to March, 1951, the plaintiff was employed as a moulding machinist in the defendants' steel foundry. The sand used in the foundry was siliceous sand, but the risk of silicosis from the processes carried out in the foundry was not realised until about 1942. In 1939 the defendants provided a small number of masks for the use of the workmen when they were engaged on dusty jobs. From about 1942, when it began to be recognised that the processes carried out in the foundry might cause silicosis and that the use of masks might diminish the risk, the defendants provided, and kept in store, a sufficient number of masks for all their workmen, but, although the foundry manager spoke to the men from time to time about wearing the masks, very few of them did so. In March, 1951, the plaintiff was certified to be suffering from silicosis. According to the medical evidence, he had begun to suffer from the disease in or about 1939, and the disease was caused by his having inhaled, throughout the period of his employment, the silica particles arising from the work done in the foundry. The plaintiff claimed damages against the defendants for breach of their statutory duty under s. 47 (1) of the Factories Act, 1937, and of their duty at common law, as the plaintiff's employers, to take reasonable care of his health and safety.

Held: (i) once an employer knew, or ought to have known, that his workmen were exposed to a material risk of contracting a serious disease, and that the risk could be diminished, if not eliminated, by the wearing of masks, it was his duty to take all reasonable steps, by clearly warning the men that they refrained at their own risk from wearing the masks, and, by encouragement and exhortation, to seek to persuade them to do so; on the facts the defendants should have appreciated in 1942-43 that workers on the foundry floor were exposed to risk of silicosis, and failed in their duty to endeavour to persuade the men to wear masks, and accordingly the defendants were in breach of their duty at common law to take due care for the safety of the plaintiff.

(ii) “practical measures . . . to protect the persons employed against inhalation of the dust”, within s. 47 (1) of the Act of 1937, included the provision of masks and the taking of steps to induce the workmen to wear them, and accordingly, the defendants were also in breach of their statutory duty under the sub-section.

(iii) the liability of the defendants in damages was limited to the damage attributable to their breach of duty, viz., to the extent to which the plaintiff's condition, which had started before the defendants ought to have been aware of the danger to their workmen on the foundry floor and thus before they were in breach of duty to them, had worsened since the defendants' breach of duty began.

[**Editorial Note.** In *Adsett v. K. & L. Steelfounders & Engineers, Ltd.* ([1953] 1 All E.R. 97, affirmed C.A. [1953] 2 All E.R. 320), the employers had provided masks, but it was impossible to get the workmen to use them, and PARKER, J., was satisfied, on the evidence, that the employers had taken all reasonable steps to induce their workmen to use the masks.

The present case may be compared with *Clifford v. Charles H. Challen & Son, Ltd.* ([1951] 1 All E.R. 72) where a failure by employers in their duty to encourage

A workmen to use, as distinct from merely making available to them, protective material resulted in a workman recovering damages although he knew what precautions he ought to have taken and failed to take them. In some contrast with the law under s. 47 of the Act of 1937, as illustrated by the present case, is the position under s. 49 of that Act, where, in relation to the process of fettling, the obligation to protect the eyes is satisfied by the mere provision of suitable goggles, see *Daniels v. Ford Motor Co., Ltd.* (ante, p. 218).

As to Master's Duty to Provide a Safe System of Work, see 22 HALSBURY'S LAWS (2nd Edn.) 187-190, paras. 313-317; and for cases on the subject, see 34 DIGEST 194-198, 1583-1623.

For the Factories Act, 1937, s. 47 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1038.]

C Case referred to:

(1) *Adsett v. K. & L. Steelfounders & Engineers, Ltd.*, [1953] 1 All E.R. 97; *affd.* C.A., [1953] 2 All E.R. 320; 3rd Digest Supp.

Action.

D The plaintiff, who had contracted silicosis during his employment as a moulding machinist in the defendant company's steel foundry, claimed damages against the company for personal injuries and/or physical harm and consequential losses and expenses occasioned to him by the company's negligence and/or breach of statutory duty.

F. Atkinson, Q.C., and *G. Heilpern* for the plaintiff.

D. J. Brabin, Q.C., and *C. M. W. Elliott* for the defendant company.

E *Cur. adv. vult.*

Feb. 17. GLYN-JONES, J., read the following judgment: For rather more than twenty years, ending in March, 1951, the plaintiff was employed as a moulding machinist at the defendant company's steel foundry at Barrow-in-Furness. On Mar. 1, 1951, he was certified by the Pneumoconiosis Board to be suffering from silicosis; and it is common ground that he contracted that disease in the course of, and as a result of, his employment. He claims by his statement of claim in this action that he contracted this disease because the defendant company was guilty of various breaches of its statutory duty under s. 4 and s. 47 of the Factories Act, 1937, and of its duty at common law, as his employers, to take reasonable care for his health and safety. In the course of the trial counsel for the plaintiff abandoned all allegations that his client's condition had been caused by any negligence or breach of statutory duty, save such as might be based on the defendant company's alleged failure to provide a suitable mask or respirator, and to take reasonable steps to induce him to wear it. Counsel submitted that such failure, if established, constitutes a breach, as well of s. 47 of the Act as of the defendant company's duty at common law.

H In the defendant company's foundry steel castings are made by the usual process of pouring molten steel into moulds of sand contained in steel moulding boxes or casting boxes. The processes involved, so far as they are relevant, are as follows. The moulding boxes, or casting boxes, are built up in segments, square or circular, clamped together, and having a top and bottom to complete the box. The moulding machine, at which the plaintiff worked, is a metal "table" which may be vibrated rapidly. The bottom of a moulding box and as many segments as are needed, depending on the size and shape of the casting to be made, are assembled and built up on the table, and, within the box so made, is placed a pattern of the casting. Fresh sand, called facing sand, is applied moist to the surface of the pattern. A layer of damp sand is placed behind the facing sand, and the remainder of the space left between the sand-covered pattern and the side or sides of the box is packed with dry sand which has already been used before. When the mould is full, the table is set in motion and vibrates rapidly for a short time so as to shake the sand firmly down. Finally, the mould

is covered by a layer of wet sand and the box closed. So far the process is carried A
out by the moulding machinists, of whom the plaintiff was one. The casting
box containing sand and pattern is then taken to the moulders, who break out
and remove the pattern and repair any damage done to the inner surface of the
mould. Then the casting box, with the mould within it, is taken to an oven and
heated to dryness. When the box is removed from the oven the sand is baked B
hard, but within the mould and on the box there is a quantity of coke breeze
dust. The mould must be cleaned of this dust before the molten metal is poured
into it. The dust was formerly blown out by the blast from a compressed air
pipe, but for some time now a suction pipe has been used in its place.

After the cleaning of the mould and the placing therein of the core by the
moulders, the box is closed and the metal poured. Next comes a process known
as "easing". When the metal has solidified but is still red hot, the mould is C
opened, one or more segments of the box taken off, and some of the sand
surrounding the casting is removed. The object of this process is to enable the
casting to set and contract freely, thus avoiding the risk of cracking. At this
stage the sand is hard and dry. It is hard work to move it, and hot work too,
because of the heat of the casting. The segments are replaced and the metal
left further to cool. From time to time the plaintiff took part in this process also. D
Next comes the knocking-out process in which the casting is lifted from the box, and
at that stage there is still much hard dry sand sticking to it. As much as possible
of this sand is removed in the knocking-out, but there still remains a quantity
of sand as hard as stone, and burnt on to the casting so firmly that it can be
removed only by the use of special tools or appliances such as pneumatic chisels.
The removal of this burnt-on sand, and of any other removable matter, is the E
first step in the process of cleaning the casting. Finally, the rough surface of
the metal is smoothed and finished to the dimensions required. The process of
removing the very hard burnt-on sand and the metallic excrescences with
pneumatic chisels, and the final smoothing of the casting is known as "dressing"
or "fettling".

By 1931 it was generally known that workmen engaged in dressing or fettling F
steel castings were exposed to the risk of contracting silicosis; and by the
Various Industries (Silicosis) Scheme, 1931, it was provided that a workman in
a foundry or metal works, engaged in the process of "freeing . . . steel castings
from adherent sand or other siliceous substance, *excepting work done upon the
foundry floor*",* should be entitled to workmen's compensation if he contracted
silicosis due to his employment. It was not then thought, apparently, that the G
other processes described above, other than fettling or dressing, all of which are
carried out on the foundry floor, involved a risk of silicosis; but, as methods of
diagnosis improved after further study and research, it came in due course to be
realised, and now has been well known for some time, that workmen engaged
in work on the foundry floor in such other processes may also contract silicosis,
as the plaintiff has done. H

Some of the processes which I have described cause considerable quantities
of dust to rise into the air. For example, the used dry sand, which the plaintiff,
as a moulding machinist, required in order to pack it into the moulding box,
was brought to him in a tub suspended from an overhead crane or gantry, from
which tub the sand was tipped either directly into the moulding box, or on to
the floor by the side of the vibrating table. As the sand was tipped, a cloud of I
dust arose. So also when the moulding box was vibrated, dust arose from the
box, and from the floor round the table. The process of "easing" created much
dust, and so did the process of "knocking-out". This dust was uncomfortable
to breathe and irritating, and it was the duty of the employers under s. 4 (1)
and s. 47 of the Factories Act, 1937, to provide such ventilation as would dispose

* See para. 2 (viii) (b) of the Various Industries (Silicosis) Scheme, 1931 (S.R. & O. 1931 No. 342).

A of it and render it harmless. So far as ventilation alone could dispose of this dust, it is not now alleged that the defendant company were in breach of their duty, so as to cause the plaintiff's silicosis; although, as hereinafter appears, the plaintiff and his workmates appear to have thought that this visible dust created a risk of silicosis, they were mistaken. I accept the evidence that the visible particles of dust, though unpleasant to breathe, and the possible cause of some
B respiratory diseases, do not cause silicosis. Silicosis is caused by tiny particles of freshly fractured silica, not exceeding five microns in diameter, a micron being a one-thousandth part of a millimetre. Such particles are visible, if at all, only as motes in a beam of light.

The moulding sand used by the defendant company was siliceous sand. It came straight from a sand-pit without being subjected to any crushing or other
C process which could fracture the particles, and, as supplied to the foundry, contained no particles which could cause silicosis. But in the process of "easing", of "knocking-out", and of removing the burnt-on sand from the casting with pneumatic chisels, freshly fractured particles, small enough to cause silicosis if inhaled in sufficient quantity and over a long enough period of time, were and are produced; and these freshly fractured particles retain their noxious property
D for a month or more. All these processes were carried on within the foundry. At some time before the enactment of the scheme of 1931, the whole of the process of fettling or dressing was also carried on within the foundry. By the time the plaintiff began to work in the foundry most of the fettling or dressing was being done in a separate room; but the preliminary work of removing some, at least, of the burnt-on sand with pneumatic chisels, continued to be done
E within the foundry until about 1951 or 1952.

It is of some significance that by the Various Industries (Silicosis) Amendment Scheme, 1946, para. 2, the scheme of 1931 was amended by, inter alia, the deletion [from para. 2 (viii) (b)] of the words "excepting work done upon the foundry floor". Thus, as it seems to me, a workman in a steel foundry who, after 1946, could prove that he had contracted silicosis as a result of his employ-
F ment in the process of easing, or knocking-out, as well as in the removal of burnt-on sand in the first stage of the dressing process, could recover workmen's compensation, notwithstanding that his work was done on the factory floor; and it is obvious that, from that time at least, a reasonable employer ought to have known that these last named processes involved the workmen in the foundry in the risk of contracting silicosis, and placed him, therefore, under a
G duty to take all proper steps to protect the workmen from that risk.

I am satisfied that the plaintiff's silicosis has been caused gradually by his having inhaled, throughout the period of his employment, fine particles of freshly fractured silica arising from all these processes. These particles are so light that they do not fall to the floor with the visible dust which settles. They remain floating in the air as it circulates within the foundry. It appears from
H *Adsett v. K. & L. Steelfounders & Engineers, Ltd.* (1) that the device of fitting a perforated grid in the floor of the foundry, with a down draught intended to suck the dust through the floor, was thought at one time to be a method of eliminating dust which might cause silicosis; but I doubt whether this method would dispose of the tiny noxious particles. I accept the evidence of Mr. Rogers, an engineer and former factory inspector, that, so far, at least, as the process of
I easing is concerned, the great heat of the casting would cause swift upward convection currents of air, which would render ineffective any attempt to suck these light particles through the floor.

Since the plaintiff did contract silicosis as the result of the cumulative effect on his lungs of the silica particles which he had inhaled over many years, it follows that any efforts which were made by the defendant company to improve the atmosphere had not succeeded in eliminating the risk. As I see them, the questions which I must answer are: Ought the defendant company to have appreciated this risk? If so, when? And, once the risk had been appreciated,

ought not greater efforts to have been made by the company to provide masks, and to see that the workmen, including the plaintiff, used them ? A

On the subject of masks my attention has been invited to the second report of the Committee on Dust in Steel Foundries, dated Mar. 31, 1951, in which appears, in para. 50, the following sentence:

“ While we cannot say that we consider personal protection to be the ideal method, we do think it has a vital purpose, and we consider all parties should wear masks in an attempt to make them more comfortable and more efficient.” B

Workmen, however, find it very uncomfortable to do heavy work wearing masks and are reluctant to wear them. The difficulty created by this reluctance was discussed in the judgment of PARKER, J., in *Adsett's* case (1), and I approach the subject with full sympathy for the employers' difficulty. Mr. Williams, who was the defendant company's foundry manager from 1943 to 1953, and Mr. Marsh, who succeeded him, both said that, short of dismissing a man who did not wear his mask when told to do so, there was no way in which they could compel a man to wear one; and dismissal would “ cause a riot ” in the foundry. Nevertheless, there is, in my opinion, a half-way house between, on the one hand, merely providing masks and leaving it to the men to decide whether or not they will wear them, and, on the other hand, proceeding to the length of dismissing a man caught working without a mask. Once the employer knows, or ought to know, that his workpeople are exposed to a material risk of contracting a serious disease, and that the risk can be markedly diminished, if not eliminated, by the wearing of masks, he must take all reasonable steps, by clearly warning the men that they refrain at their own risk from wearing the masks and by encouragement and exhortation, to seek to persuade them to do so. C D E

I have come to the conclusion that by about the years 1942-43, the defendant company, in the particular circumstances of this foundry, should have appreciated that their workers on the foundry floor were exposed to a risk of silicosis. I base this conclusion largely on the fact that the first stages of the dressing process were carried on on the foundry floor. From that time onward more effort should have been made than was made to make the masks freely available and to induce the men to wear them. It follows that, in my opinion, the company was guilty in this respect of a breach of its duty at common law to take due care for the safety of its workmen. F

Counsel for the defendant company desires to keep open the point that s. 47 (1) of the Act of 1937 is concerned only with measures such as the provision of adequate ventilation, etc., for eliminating harmful dust from the atmosphere in the foundry, and does not extend to the provision of masks, or other protection for men working in an atmosphere from which the dust has not been eliminated. I am of opinion that the “ practicable measures . . . to protect persons employed against inhalation of the dust ” include the provision of masks, and the taking of steps to induce the workmen to wear them. In my opinion, therefore, the defendant company has been guilty of a breach of s. 47 (1) of the Factories Act, 1937. G H

The facts on which I base this conclusion are as follows. Mr. Rogers, the defendant company's witness to whose evidence I have already referred, told me that by 1942 the risk that the processes carried out on the foundry floor, particularly easing and knocking-out, might cause silicosis, was beginning to be recognised, and that he knew of no satisfactory method of protecting the men against that risk other than the provision of masks. He said that, if an employer knew of that risk, he should attach the highest importance to seeing that the men wore masks, and he thought that masks should have been made available from 1942 onwards. In view of Mr. Rogers' evidence that the risk arising from the processes of easing and knocking-out was only beginning to be recognised in 1942, I do not think that I should have found the employer negligent in not then I

A appreciating that the risk existed in the foundry; but when I add the fact that part of the dressing process was carried on there too, I think that the combined risk should have been appreciated. Mr. Williams, the foundry manager, said that masks were introduced to reduce the incidence of silicosis and other respiratory diseases, and that by the time the masks were introduced he appreciated that there was some risk of silicosis not only to fitters and dressers, but also to
 B other workers. I think the time to which he refers was about 1941 or 1942, although, in fact, masks were introduced earlier. The original purpose was, I think, to protect the men from the clouds of visible dust rather than against the specific risk of silicosis. From October, 1940, there was a works committee of representatives of the workers and management which met frequently, and at these meetings the men's representatives often complained of conditions in the
 C foundry, as appears from the extracts from the minutes of the committee which were tendered in evidence; and on one occasion (Dec. 4, 1942) specific reference was made by the men's representative to the risk of silicosis. It is true that the men were asking for protection against the visible dust clouds which they thought, though mistakenly, caused silicosis, but their complaint clearly called the company's attention to the possibility of the risk. Masks were first provided
 D in small numbers shortly before the war. The plaintiff says that the men could draw them for use on dusty jobs, and would then return them to store where they might be re-issued to other men. He says that he thought this undesirable and never asked for one. When Mr. Williams heard of men wearing one another's masks he stopped the practice, and thereafter there were plenty of masks; and certainly, I think, by 1941 or 1942 a sufficient number of masks was provided and
 E kept in store, so that any man who asked for one could have had one.

This brings me to the question of what steps were taken to persuade and encourage the men to wear them, and it is on this question that I find that the plaintiff succeeds. I think that the attitude of the defendant company is in the observations of Sir Robert Beaman recorded in the minutes of Dec. 4, 1942. It amounts to this: "We have provided the best masks we have been able to
 F obtain: what a pity the men don't use them!" There was a failure to press on the men's representatives with earnestness and ardour, the need for these masks, so as to try at least to secure their strong help in persuading the men to wear them, and to wear them not merely for a few minutes in dusty conditions but as much as possible. I draw the inference that after a somewhat half-hearted attempt to persuade the men to wear the masks, the attempt was given up as
 G hopeless, with the result that, as Mr. Williams said, by the time he ceased to be foundry manager in 1953, and although he had from time to time spoken to men about wearing masks, very few men wore them.

I now come to the question of damages. I accept the medical evidence that the plaintiff is suffering from a moderate degree of pneumoconiosis which produces some shortness of breath on exertion, and renders him, if he should suffer from diseases like bronchitis or pneumonia, less able to resist them. I accept
 H the evidence that the plaintiff was beginning to suffer from silicosis before the war, and that the progress of the disease was somewhat accelerated during the war—no doubt by black-out conditions. The progress of the disease is slow and insidious, and, no doubt, every particle of silica which the plaintiff has inhaled has played its part in bringing about his present state. If a man is once diagnosed
 I as a result of an X-ray examination to be suffering from industrial silicosis, whether or not he feels any symptoms of disease, he ought not to continue to work on the process to which the silicosis is due; and it may be that an X-ray examination made much earlier than 1951 would have discovered that the plaintiff had begun to suffer from the complaint.

Counsel for the plaintiff puts his case simply. Since the plaintiff was prohibited in March, 1951, from working as a moulding machinist, he has had to take lower paid work. Up to the date of the trial his loss of wages amounts to

£389 19s., and is continuing at the rate of £3 4s. 8d. a week. Counsel says that at the date when first the defendant company was in breach, the plaintiff was capable of doing the full work of a moulding machinist, and that it is the further progress of the disease since then which has caused him to suffer loss of earning capacity; and, therefore, that the defendant company must compensate him to the full without taking into account the fact that he was already suffering (if he was so suffering) from incipient silicosis at the time of the first breach.

Counsel for the defendant company, on the other hand, argues that the breach, if any, by the defendant company, has not caused the whole of the plaintiff's damage but has caused only a part, and that I must take into consideration the fact that, to the extent to which the plaintiff was already suffering from silicosis when the defendant company's breach began, the defendant company is not to blame for the whole of his present condition. I test these contentions by a hypothetical case. The reason why the plaintiff ceased to be employed as a moulding machinist was not that his symptoms prevented him from working; it was that a routine examination was made (as in these days is often done) of all the men who consented to be examined. Assume that the defendant company's breach took place a very short time before the X-ray examination revealed silicosis—say six months. The progress of the disease during those six months might have been almost imperceptible, and, had the examination taken place six months earlier, the same diagnosis would have been made; yet the argument of counsel for the plaintiff would, presumably, have been the same, and would bring about in such a case, I think, a manifest injustice. So, also, if the plaintiff's employment had been shared between two employers, each of whom had been in breach. It would be unjust, I think, to make the first employer pay for damage done after the plaintiff left his employment, and equally unjust to make the second employer liable for damage done by the first. Under the Workmen's Compensation Act, 1925, s. 43 (1) (c), the liability to pay compensation was placed on the second employer, with a right in certain circumstances to recover contribution from the first. There are also other considerations. The wearing of a mask by the plaintiff, assuming that the defendant company had succeeded in persuading him to wear one, would have checked the progress of the disease, though probably would not have prevented some slight worsening. It could not have repaired the damage already done; and the extent to which his lungs were already affected would have tended, as he grew older, to shortness of breath, so as to make it more difficult for him to wear his mask. What I have to assess, I think, is the extent to which the defendant company's breach has aggravated the plaintiff's condition, and to award damages for that. No arithmetical calculation of loss of earnings can help. I think that all I can do is to assess as a lump sum what I think is fair compensation for the part played by the defendant company's breach in bringing about the plaintiff's present condition. This I assess at £750, to include special damage.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Hart Jackson & Sons, Barrow-in-Furness* (for the defendant company).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

A

SMITH v. EAST ELLOE RURAL DISTRICT COUNCIL
AND OTHERS.

[COURT OF APPEAL (Hodson and Parker, L.J.J.), March 4, 1955.]

B

Compulsory Purchase—Compulsory purchase order—Jurisdiction to question validity of order—Bad faith alleged—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 Geo. 6 c. 49), Sch. 1, Part 4, para. 16.

C

The plaintiff was the owner of land in relation to which a compulsory purchase order was made and confirmed in 1948. In 1954 the plaintiff began an action against the defendants (of whom two were the authorities who made and confirmed the order) claiming, among other relief, a declaration that the compulsory purchase order was made and confirmed in bad faith. The defendants applied that the writ and all subsequent proceedings should be set aside for want of jurisdiction, as by para. 16 of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946, the compulsory purchase order could not be questioned in any legal proceedings. An order to set aside the proceedings having been made, the plaintiff appealed, contending that para. 16 applied only to compulsory purchases of land of a character within Part 3 (i.e., paras. 8-14) of that schedule, which this purchase was not.

D

E

Held: the reference in para. 16 of Sch. 1 to the Act of 1946 to a compulsory purchase order applied generally to all such orders made under s. 1 (1) of the Act of 1946.

Appeal dismissed.

[For the Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. 1, Part 4, para. 16, see 3 HALSBURY'S STATUTES (2nd Edn.) 1080.]

F

Appeal.

The plaintiff appealed from an order of HAVERS, J., dated Oct. 4, 1954, whereby it was ordered that the writ in the action and all subsequent proceedings be set aside.

G

The plaintiff was the owner of land and a dwelling-house which had been requisitioned in 1940 by the first defendants, the East Elloe Rural District Council. On Aug. 27, 1948, while the property was still requisitioned, the first defendants made a compulsory purchase order in respect of the plaintiff's property and on Nov. 29, 1948, that order was confirmed by the Minister. On Jan. 12, 1951, the property was de-requisitioned and on the same day the first defendants entered on and occupied it. On July 6, 1954, the plaintiff issued a writ against the first defendants, the Ministry of Health, the clerk to the East Elloe Rural District Council, and the Ministry of Housing and Local Government claiming, inter alia, declarations that the compulsory purchase order and confirmation thereof were wrongfully made and in bad faith. On July 27, 1954, the second and fourth defendants, and the first and third defendants respectively took out summonses for the writ and all subsequent proceedings to be set aside on the ground that the writ in the action was invalid for lack of jurisdiction, it being provided by the Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. 1, Part 4, para. 16, that save by the procedure specified by the said schedule, a compulsory purchase order confirmed in accordance with the provisions of the said Act should not, either before or after it was confirmed, be questioned in any legal proceedings whatsoever.

H

I

On Aug. 6, 1954, the master ordered that the writ and all subsequent proceedings be set aside and that order was confirmed by HAVERS, J., in chambers.

F. H. Collier for the plaintiff.

W. L. Roots for first defendants.

N. N. McKinnon (with him *Rodger Winn*) for the second and fourth defendants.

The third defendant was not represented.

HODSON, L.J. : I will ask **PARKER, L.J.**, to deliver the judgment of the court.

PARKER, L.J., stated the facts and continued: It has not been necessary for the court to go into the facts of the case, but it is quite clear that the plaintiff in her claim against these defendants is seeking to allege that a compulsory purchase order made in respect of her land is invalid because it was made in bad faith. The provision in the Acquisition of Land (Authorisation Procedure) Act, 1946, which was relied on before the master and before the learned judge is Sch. 1, Part 4, para. 16, which reads:

“Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part 3 of this schedule shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever . . .”

Counsel for the plaintiff has urged before us that that provision is limited to a case of compulsory acquisition of land of the type dealt with under Part 3 of Sch. 1.

It is first necessary to explain the scheme of this Act. By s. 1 (1) authorisation is provided for the compulsory purchase of certain lands by means of the well-known process of compulsory purchase orders. That is quite general. Sub-section (2) provides:

“The purchase, in a case falling within the last foregoing sub-section of land—(a) which is the property of a local authority . . .”

or land which forms a common or open space or an ancient monument, is to be subject not only to compulsory purchase orders, but to the special procedure laid down in Sch. 1, Part 3. Amongst other things Sch. 1, Part 3, provides that there shall be no compulsory purchase order unless the Minister is satisfied as to certain matters and certifies accordingly. Counsel argues that this bar against questioning compulsory purchase orders provided for by para. 16 applies only in the case where the land being purchased is land of the character dealt with under Sch. 1, Part 3, and it is quite clear that the land in this case was not such land. Accordingly counsel says that that being the sole ground, as appearing in the summonses, and that being the sole matter argued before the master and the judge, the plaintiff is entitled to succeed.

The point is a short one. I am perfectly clear that in para. 16 the reference to a compulsory purchase order is to a compulsory purchase order in general, viz., to all compulsory purchase orders, and is not limited to a compulsory purchase order in respect of land which forms the subject of the special procedure laid down in Part 3. It seems to me that it is necessary to go back to the preceding paragraph (para. 15) which lays down the procedure whereby provision is made for compulsory purchase orders being challenged, and for their being quashed. That paragraph provides as follows:

“If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s. 1 (1) of this Act . . .”

—that is dealing with a case where a compulsory purchase order is said not to have been authorised. The paragraph continues—

“or if any person aggrieved by a compulsory purchase order or a certificate

A under Part 3 of this schedule desires to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with . . .”,

B he may take certain action within six weeks. That second part of the paragraph is dealing with the well-known case where some requirement of the Act has not been complied with—such as that the owner has not been served, or some notice has not been published in the local newspaper, and matters of that sort. That applies to all compulsory purchase orders whether they are of land which forms the subject of the procedure in Part 3 or not. On the other hand, the certificate under Part 3 naturally comes in there because there is no question of challenging a certificate because authorisation is not empowered; the certificate can only
C been challenged because some procedure relating to a public local inquiry has not been complied with.

Counsel for the first defendants points out, as is perfectly true and, I think, conclusive, that in fact one obtains no authorisation for a compulsory purchase order under Part 3 although of course, compulsory purchase orders have to be made in respect of land the subject of the special procedure set out in Part 3.
D Accordingly in my view the reference to compulsory purchase order in para. 16 is to compulsory purchase orders generally, whether or not they are in respect of land which forms the subject of the procedure in Part 3.

E Counsel for the plaintiff did faintly suggest that, even if he were wrong, by reason of the allegation of fraud in this case it would be open to the plaintiff to challenge the compulsory purchase order at any time. As I say, that was only faintly suggested; and in my view once para. 16 is construed against him, there is no room for challenging the compulsory purchase order thereafter on any ground, whether that of fraud or not. In my view, therefore, this appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Lucien Fior*, agents for *A. E. Hamlin*, Sheringham (for the plaintiff); *Lees & Co.*, agents for *Mossop & Bowser*, Holbeach (for the first defendants); *Solicitor, Ministry of Health* (for the second and fourth defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re FOLLETT (*deceased*). BARCLAYS BANK, LTD. v. DOVELL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.J.J.), March 17, 1955.]

Will—Omission—Words of will showing accidental omission or mistake—Literal construction possible—Supplying of words by the court.

By her will dated Aug. 31, 1923, the testatrix who died on July 21, 1932, constituted a residuary trust fund and directed her trustees, in the events which happened, to pay the whole of the income thereof to the first defendant for life, and on her death to hold the residuary trust fund and the future income thereof on trusts declared by cl. 5 (d) in the following words—"in trust for all or such one or more exclusively or others of her child or children or remoter issue or any other person or persons as she should by deed or deeds revocable or irrevocable or by will or codicil without transgressing the rules against perpetuities appoint and in default of or subject to any such appointment in trust for her next of kin". By deed dated Jan. 16, 1953, the first defendant appointed the fund to herself absolutely on the footing that cl. 5 (d) conferred on her a general power of appointment. On the question of the validity of this exercise of the power and whether the power was a general or a special power of appointment,

Held: although the court was satisfied that there was an inadvertent omission from or error in the words of cl. 5 (d), yet it was not clear exactly what had been omitted or what words would truly correct the error made, and accordingly cl. 5 (d) must be construed as it stood, i.e., as conferring a general power of appointment on the first defendant.

Re Smith ([1947] 2 All E.R. 708) considered.

Decision of ROXBURGH, J. ([1954] 3 All E.R. 478) reversed.

[As to Supplying Words in Wills, see 34 HALSBURY'S LAWS (2nd Edn.) 215-217, para. 272; and for cases on the subject, see 44 DIGEST 597, 4214 et seq.]

Cases referred to:

- (1) *Re Smith*, [1947] 2 All E.R. 708; [1948] Ch. 49; [1949] L.J.R. 765; 2nd Digest Supp.
- (2) *Re Redfern*, (1877), 6 Ch.D. 133; 47 L.J.Ch. 17; sub nom. *Redfern v. Hall*, 37 L.T. 241; 44 Digest 564; 3816.
- (3) *Key v. Key*, (1853), 4 De G.M. & G. 73; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 43 E.R. 435; 44 Digest 1279, 11070.

Appeal.

Appeal by the first defendant from an order of ROXBURGH, J., dated Nov. 9, 1954, and reported [1954] 3 All E.R. 478.

The sole trustee of the will and codicil of Georgina Sarah Follett, deceased, applied to the court by originating summons for the determination of the question whether, on the true construction of the said will and codicil and in the events which had happened, the power of appointment conferred on Beryl Emily Cecil Dovell, the first defendant (in the said will called Beryl Edmonds) in cl. 5 (d) of the said will was (i) a general power of appointment which enabled her to appoint the fund therein mentioned by deed or by will or codicil to herself absolutely or (ii) a special power of appointment which enabled her to appoint the said fund therein mentioned in favour of her children or remoter issue only.

The testatrix died on July 21, 1932, having by her will dated Aug. 31, 1923, devised and bequeathed her residuary estate to her executors and trustees on trust for conversion and payment of her debts, funeral and testamentary expenses and legacies, etc. She bequeathed her residuary trust fund on trust after the death of her two nieces (who died in 1950 and 1951) to pay the total income

A thereof (subject to certain annuities which at the material time had ceased) to the first defendant during her life and after her death gave the residuary trust fund on trusts in the terms set out in the headnote.

By deed dated Jan. 16, 1953, the first defendant appointed the testatrix's residuary trust fund to the first defendant absolutely and now claimed to be entitled to it.

B The precedent to which ROXBURGH, J., referred in his judgment ([1954] 3 All E.R. at p. 480), and to which references are made in the judgments of the Court of Appeal, is as follows (KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (11th Edn.), Vol. 2, p. 901):

C "[After the death of my wife] my trustees shall stand possessed of the capital and future income of the trust fund in trust for all or such one or more exclusively of the others or other of my children or remoter issue, at such age or time, or respective ages or times, if more than one in such shares, and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of my wife or after her death) and maintenance and education at the discretion of my trustees or any other person or persons, as my wife shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint, And in default of and subject to any such appointment . . ."

D I. J. Lindner, Q.C., and G. H. Crispin for the first defendant, the donee of the power of appointment.

E M. W. Cockle for the plaintiff, the sole trustee.

J. L. Arnold for the second defendant, one of the next of kin of the first defendant.

F SIR RAYMOND EVERSLED, M.R.: In this rather curious case I have, for my part, come to a different conclusion from that of ROXBURGH, J., though I confess to a feeling of sympathy with him in the attempt which he made to remedy what I think may fairly be called a manifest error by what has to be found to be a no less manifest corrigendum. In that sentence, I think, lies the difficulty. I will follow VAISEY, J., in *Re Smith* (1), in citing as the proper principle in cases of this character a passage which the learned judge took from JARMAN ON WILLS (7th Edn.), Vol. 1, p. 556:

G "Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context."

H As I ventured to observe during the argument, there is, perhaps, some analogy, and, if so, a natural analogy, to the jurisdiction of the equity courts in rectifying instruments, a jurisdiction exercised when it is established not only that the instrument as it has been executed does not accord with the intention of the parties to it but also what exactly their true intention was.

I I must, however, first lay a foundation for my conclusion by a reference to the facts, though the reference is not of any length. We are concerned with the will dated Aug. 31, 1923, of one Georgina Sarah Follett. She made elaborate provisions to benefit various collateral relations, for she was herself a spinster. One of them was her niece, a Mrs. Ella Edmonds. In cl. 5 (c) she provided that the first defendant, being the daughter of the niece Mrs. Edmonds, should have a protected life interest after the deaths of two nieces; and then, in cl. 5 (d), she made the disposition which has caused the present difficulty:

"On and after the death of the said Beryl Edmonds my trustees shall hold my residuary trust fund and the future income thereof in trust for all or such

one or more exclusively or others of her child or children or remoter issue or any other person or persons as she [Beryl Edmonds] should by deed or deeds revocable or irrevocable or by will or codicil without transgressing the rules against perpetuities appoint and in default of or subject to any such appointment in trust for her next of kin."

That clause shows at its beginning and at its end strong marks of affinity to the elaborate formulae which form part of the stock-in-trade of the conveyancer; but in the middle it falls far short of any such elegance. Indeed, it is obviously wrong, and wrong in two respects. In the first place, the words which I emphasised in reading, "or others" immediately after "such one or more exclusively", are obviously there by mistake for something else. Secondly (though this error is not quite of the same quality), it seems equally plain that, with regard to the words which next ensue, "of her child or children or remoter issue or any other person or persons as she should by deed or deeds revocable or irrevocable . . .", something has also gone amiss; either some provisions have been accidentally omitted in copying; or in the course of the actual building up of the final form of this will something originally in it has been struck out, and the strikings out have either not been properly carried out or have not been sufficiently extensive.

ROXBURGH, J., came to the conclusion (and he called it a compelling conviction) that he was able not only to discern the errors, but also to discern exactly what it was that had gone wrong, and what were the words which should have been and were intended to have been incorporated; and ROXBURGH, J., was correct in saying that only on the basis that he could entertain such a compelling conviction could he do the work, in effect, of remodelling this disposition. Otherwise, as he would be the first to agree, he would plainly be going beyond the permitted limits of judicial interpretation, however tempting it may sometimes be for a judge to improve on the performance of testators.

The solution which the learned judge accepted was this. He said that these words "or others" were a plain slip for the well-known formula "of the other or others". He was referred to the form which is to be found in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (11th Edn.), Vol. 2, pp. 901, 902. It seemed to him that at its beginning and at its end this clause so clearly followed the precedent in the book I have mentioned, and the one error which I have already mentioned was so plainly caused by a slip, an accidental omission of some of the words to be found in that precedent, that he was able to go on to what he felt to be not only the compelling, but also the logical, conclusion that cl. 5 (d) was intended to be a reproduction (with only the essential changes, having regard to the personality of the donee of the power of appointment) of the precedent clause which I have mentioned. When he had reached that stage in the argument, all else followed; he was able to read in words which entirely transformed cl. 5 (d) and resulted in the power of appointment given to the first defendant being a strictly limited power to appoint among children or issue.

In the absence of some such emendation, it seemed to the learned judge (and I agree with him, and, indeed, counsel for the second defendant has not contended to the contrary in this court) that the words as they stand, construed without further additions, can only mean that the first defendant has a general power of appointment. In that event the references to the "children or remoter issue" were quite unnecessary and otiose. As JENKINS, L.J., pointed out during the course of the argument, if this were really intended to confer a general power of appointment, then indeed it was a slavish following of an inappropriate precedent to include the caution against transgressing the rule against perpetuities; for the real necessity to put in that caution is, of course, referable to a special power of appointment which must take effect, for the purposes of the perpetuity rule, as though the appointee's directions were written into the instrument conferring

A the power. That again, however, is merely to say in other words that something clearly has gone wrong.

I must now examine whether it is really a case in which the necessary compelling conviction emerges from the material which we have. I confess that I am not so convinced myself. In the first place, I feel some doubt about the reference to KEY AND ELPHINSTONE. We have not been referred to the numerous alternative precedents which can be found in the books. Conveyancers of experience will have in mind the general shape of powers of appointment of this kind. But, as counsel for the first defendant pointed out in the course of his argument, if this clause is laid alongside the passages from KEY AND ELPHINSTONE, Vol. 2, pp. 901, 902, it will be found that there is no precise verbal correspondence; and in the absence of precise verbal correspondence I am not myself satisfied that it is right to assume that it was this text-book which the testatrix, or those who were doing this testamentary work for her, had by their elbows. I do not propose to take time by pointing out the verbal differences, save in the one important instance of the first error, i.e., the words "or others". It is not the fact that this precedent states "exclusively of the other or others"; it puts it in fact the other way round, "exclusively of the others or other". The point is, of course, a small one; but it suffices to show that one cannot remedy this defect by the expedient of a mere writing-in, and no more, of words which are omitted. It seems to me that it would be perfectly legitimate to treat the error here as being no more than the error of transcribing or typing "or" for "of", and that what it should have said was "such one or more exclusively of others". Unless one finds oneself firmly tied to this particular precedent, it seems to me that the most compelling reason for treating the rest of this clause as an erroneous and accidental transcription of this precedent is absent.

E I observe, further, that the words which, according to the judge's view, have been omitted are not few. According to the argument, these are the omitted words which the court must supply:

F "at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement either during the life of".

I will assume that then one reads "Beryl Edmonds", "or after her death and maintenance and education at the discretion of my trustees"; and then one is back on to the permanent way, so to speak, of the clause in the will. That is a very considerable and very elaborate addition. Putting the matter interrogatively, can the court be absolutely sure that those precisely were the words which were somehow omitted? Might there not have been at some stage, for example, the introduction of a further general power? In that connection emphasis was rightly put by counsel for the first defendant on the final trust in default of appointment; for it is a trust in default for the next of kin of the donee of the power and not of the testatrix. Though I have followed the argument of counsel for the second defendant that in practice there would perhaps be nothing so very startling about it, since, if the first defendant, Miss Beryl Edmonds, as she then was, did have issue and omitted to appoint, then, *prima facie*, those issue would be the next of kin, still it is a very surprising thing that, if one starts by limiting the scope of the benefit which one is conferring to a particular person and her issue only, if that is the apparent limit of one's testamentary wish for that family, one should then, in default of appointment, let the property go to persons who might be far more remotely connected with the person in question. These arguments are really only by way of showing that to my mind the necessary assurance, both as to the nature and wording of what has been left out as well as to the fact of there having been an error or omission, is not to be found here.

I We have not been referred to all the cases, but I do not myself think that cases are of much assistance, except to express or enshrine a principle. For that

reason I have already made sufficient reference to *Re Smith* (1), but I venture to add one other point. In *Re Smith* (1) what had plainly gone wrong was that there had been a total omission of a disposition. It was a case in which a lady who was, as the judge observed, living on terms of normal affection with her husband and who was making as regards particular items of her property gifts to her husband and her husband's relations, made a provision for the disposition of her estate in the event of her husband dying within a month of her own death or predeceasing her, but omitted to make any disposition at all in favour of anybody in the event of the husband surviving her by more than a month. What, therefore, the court did in that case (and it could do it in very few words) was to fill a striking and obvious gap.

In this case, if the argument of counsel for the second defendant were to prevail, the court would not be filling an obvious gap; it would be so remoulding a particular clause as entirely to transform the effect of the clause which, as it stands, gives a general power of appointment. I asked counsel whether he had found any case in which the court had felt so convinced of the error that had been made that it had transformed, and produced an effect wholly contrary to, a provision which was, on its fair construction, effective according to the will as it stood, and counsel told me that he was not aware of any such case. I do not say that, if the error is obvious enough, and if it also appears precisely what it is that has gone wrong, one might not have such a case; but, in my judgment, it would need a very much stronger case to justify the court in taking a step, as I think, as bold as that.

I have already given, I hope, sufficient reasons for showing that, however one may suspect the nature of the error (and I am putting it rather higher than I feel is quite justified), still there is, as it seems to me, far too much to be said on the other side to make that first suspicion free from reasonable doubt. The cases referred to in argument in *Re Smith* (1) included the case in which SIR JAMES BACON, V.-C., made his well-known allusion to the error of the blundering attorney's clerk (see *Re Redfern* (2) 6 Ch.D. at p. 138). In fact, the full quotation, as appears from the report, is "clerk or law stationer", and it may indeed be that the learned vice-chancellor meant rather the attorney's blundering clerk. It may be that someone here has blundered, but, to borrow from the happy phrase of KNIGHT BRUCE, L.J., in *Key v. Key* (3) (4 De G.M. & G. at p. 84), I am not here satisfied that the spirit has been made clear enough to justify the court in overcoming, and, indeed, in entirely transposing, the letter.

The matter is, in the end, rather a short one, but such is my regard for ROXBURGH, J., in a matter of this kind that I have thought it appropriate that I should give at a little length the reasons why I have not felt able to follow his opinion. It may be that I am a little less bold, but I think that I have perhaps approached the problem somewhat differently. If I had felt the same assurance that he did, then I think the court would have been entitled and bound to have given effect to the conviction, but the suggestions to which I have referred and which do not, I think, find a place in the judgment of ROXBURGH, J., are, in my judgment, such as to make it really impossible, consistently within the well-established limits of the judicial interpretation of documents, to do other than say that this will must take effect according to its terms, i.e., as ROXBURGH, J., himself observed ([1954] 3 All E.R. at p. 480), that cl. 5 (d) of this will conferred on the first defendant a general power of appointment and not one limited to a particular class. I would therefore allow the appeal.

JENKINS, L.J.: I agree. It is possible to give effect to cl. 5 (d) of the will as it stands as a clause conferring on the first defendant a general power of appointment. On the other hand, the clause undoubtedly contains language which would be suitable to the creation of a special power of appointment among her children or remoter issue and which is not appropriate to a general power. These indications suffice to satisfy me that something has gone wrong with the

A drafting of cl. 5 (d). Nevertheless, the clause, unusual as its form is, must be construed and given effect to as it stands unless we can be satisfied, as my Lord has said, not only that something has gone wrong, but also what are the words which have been inadvertently omitted.

B The theory which commended itself with compelling conviction to ROXBURGH, J., was to the effect that the draftsman, when he reached cl. 5 (d) of the will, set about providing, in accordance with instructions which he presumably had obtained, a special power of appointment for the first defendant among her children or remoter issue; and with that object in view the draftsman was either copying from or making use of his recollection of the precedent in KEY AND ELPHINSTONE (11th Edn.), Vol. 2, p. 901, to which my Lord has already referred, and that, in the process of copying out, or writing out from memory, that precedent, he reached without mishap the words "children or remoter issue" and then, for some unexplained reason, omitted the passage which my Lord has read in extenso beginning "at such age or time" and ending "at the discretion of my trustees" and went straight on, after writing "children or remoter issue", with the words "or any other person or persons", thus turning the persons who in the precedent were persons to whom the various discretionary powers of maintenance, education and so forth might be delegated, into objects of the power of appointment. By that process, it is said, the draftsman converted what was intended for a special power of appointment among children and remoter issue into a power of appointment among that class together with any other person or persons, thus inadvertently converting it, in effect, into a general power of appointment.

E I confess that I find that theory attractive, and it provides an interesting exercise in textual criticism, but I find it impossible to be satisfied that this theoretical explanation is the right one, i.e., that the words to which I have referred in the precedent which find no place in cl. 5 (d) of the will were in truth words intended to be inserted (with certain admittedly necessary modifications) in this part of the will, and inadvertently omitted. It seems to me, with all respect to the learned judge, that this theory, attractive though it may be, is no more than speculation.

It is possible to suggest other reasons for the draftsman's departure from the form which he very possibly had in mind. It might have been intended to insert a general power in default of objects of, or of appointment under, a preceding special power. It might have been intended to insert a trust in default of appointment for the primary objects of the special power, viz., the child or children of the first defendant. It might be that the form of this clause had been a matter of discussion between the testatrix and the draftsman, and that the first intention was to make it a special power, but that in the end it was thought better to make it a general power, and words were struck out with that object in view, but inadvertently the reference to children or remoter issue was left in the draft and thus found its way into the will. There are far too many possible explanations of the curious form in which this cl. 5 (d) appears to make it possible, in my judgment, for us, in construing this will, to alter its effect by adding the very considerable number of words and the somewhat elaborate provisions which the learned judge found able to incorporate in it, on the ground that the testatrix must have intended their inclusion.

I I agree, therefore, that the clause must be construed as it stands, and that there is no sufficient justification for incorporating the words which ROXBURGH, J., found it possible to incorporate in it. Accordingly, I agree with my Lord that this appeal should be allowed.

ROMER, L.J. : I also agree. I only wish to add a very few words for myself, as we are arriving at a different conclusion from that which commended itself to ROXBURGH, J.

The principle which is applicable to cases of this kind was accepted by VAISEY, J., in *Re Smith* (1) as being accurately formulated in JARMAN ON WILLS (7th Edn.), Vol. 1, p. 556, in the following terms:

“Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.”

The rule as so expressed has two limbs. The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in the will. It is the second part of the rule that, I think, presents the greatest obstacle to the second defendant. Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it. ROXBURGH, J., found that the difficulty was capable of solution, in this way. He found that the words “exclusively or others” obviously were the result of a mistake. He was then referred to the edition of KEY AND ELPHINSTONE which was current at the time when the testatrix made her will, in which the words appeared “exclusively of the others or other”. He then regarded that as a sufficient guide to the conclusion at which he arrived that this will was being drawn by a draftsman who was using KEY AND ELPHINSTONE as a precedent, and that the draftsman, through inadvertence or mistake, departed from the text of that work. Therefore, having satisfied himself that that was the position, he was able to find with precision what the words were which the testatrix had subsequently omitted, viz., the words in the relevant form in KEY AND ELPHINSTONE.

It is primarily with that view taken by the learned judge that I find myself unable to agree. It appears to me, in the first place, from the internal evidence of the document itself, that KEY AND ELPHINSTONE was not in fact the form of precedent which was being used. There are differences, to which SIR RAYMOND EVERSHEED, M.R., has referred, in phraseology between the form in KEY AND ELPHINSTONE and the form used here, apart altogether from the words which were suggested as being omitted. I do not repeat them; counsel for the first defendant drew our attention to them in detail. Further, the words “exclusively of the others or other” are to be found, I imagine, in dispositions of this character in every precedent book that has ever been published, and they are not the monopoly of KEY AND ELPHINSTONE alone. Therefore, I think that the starting point from which the learned judge began is open to considerable question, and, as I say, I am not convinced myself that KEY AND ELPHINSTONE was the form which the draftsman of the will was using. Therefore one is deprived, as the learned judge himself thought he was not deprived, of the certainty as to what the words were which had been omitted. It may well be that most of the well-known books of precedent follow in substance the same or similar dispositions as appear in the form in KEY AND ELPHINSTONE, to which reference has been made. On the other hand, it is at least possible that this firm of solicitors had precedents drawn up by themselves containing other or different dispositions. Again, it is possible that, even if the draftsman was using a form like KEY AND ELPHINSTONE’S, he desired to depart from it in some ways, but there is no certainty of the precise manner in which he did intend to depart from it. All kinds of difficulties follow on this uncertainty to which my Lord and JENKINS, L.J., have drawn attention, with the result, as I think, that one cannot say that the second requirement of this rule or principle as stated in JARMAN has been satisfied in the present case. This language can be given effect to as it stands, although one may suspect that it does in some way or other

A depart from what was intended. But what we are asked to do, notwithstanding this want of certainty in the matter, is to cut down a power which, on the face of it, is a general power, to a limited or special power, and, in my judgment, there is no warrant for doing so in the present case. I agree, for these reasons, that the appeal must be allowed.

Appeal allowed.

B Solicitors: *Moon, Gilks & Moon*, agents for *Campion Symons & Co.*, Exmouth (for the first and second defendants); *Terrence O'Shea, Lake & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* UNIVERSAL GRINDING WHEEL CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Porter, Lord Morton of Henryton, Lord Reid and Lord Cohen), March 14, 15, 30, 1955.]

F *Profits Tax—Distribution—Exclusion of “sum applied . . . in reducing the share capital”—Redemption of preference shares—Price equal to nominal amount of share plus a premium—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 36 (1), proviso.*

G By the proviso to s. 36 (1) of the Finance Act, 1947, “. . . no sum applied . . . in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution” for, in effect, the purposes of the provisions of that Act relating to reliefs from profits tax for non-distribution and to distribution charges.

By the articles of association of a limited company the redemption price of each of its £1 redeemable preference shares was £1 7s. The premium of 7s. per share had to be provided out of profits. The company duly redeemed the preference shares.

H **Held:** the amount of the premiums included in the aggregate sum paid in redeeming the preference shares was a “sum applied . . . in reducing the share capital” within the proviso to s. 36 (1) of the Finance Act, 1947, and, therefore, must not be treated as a distribution for the purposes of profits tax.

Re Serpell & Co., Ltd. ([1944] Ch. 233) approved.

Decision of the COURT OF APPEAL ([1953] 2 All E.R. 1592) affirmed.

I [For the Finance Act, 1947, s. 36, see 12 HALSBURY'S STATUTES (2nd Edn.) 780.]

Cases referred to:

- (1) *Re Serpell & Co., Ltd.*, [1944] Ch. 233; 113 L.J.Ch. 165; 170 L.T. 335; 2nd Digest Supp.
- (2) *Ex p. Westburn Sugar Refineries, Ltd.*, [1951] 1 All E.R. 881; [1951] A.C. 625; 1951 S.C. (H.L.) 57; 2nd Digest Supp.

Appeal.

Appeal by the Crown from an order of the Court of Appeal, dated Nov. 27, 1953, and reported [1953] 2 All E.R. 1592, affirming an order of UPJOHN, J., dated May 7, 1953, and reported [1953] 2 All E.R. 133, on a Case Stated by the Special Commissioners of Income Tax. The facts appear in the first opinion.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), C. Montgomery White, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.

R. Borneman, Q.C., and G. W. H. Richardson for the company.

The House took time for consideration.

Mar. 30. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a question of construction of a few words in the Finance Act, 1947, on which the Crown invite your Lordships to reject the view entertained by the Commissioners for the Special Purposes of the Income Tax Acts and UPJOHN, J., and by the majority of the Court of Appeal.

The question arises on an assessment to profits tax on the respondent company in respect of the profits of its business for the accounting period of twelve months ending Sept. 30, 1948, and, shortly stated, it is whether the payment of a premium by the company on the redemption of certain £1 preference shares of the company was a "distribution" within the meaning of s. 36 of the Act, so as to restrict the non-distribution relief allowed in respect of profits tax under s. 30 (2). The shares in question were £1 shares redeemable under the articles of the company at 27s. per share, that is, at a premium of 7s. per share. It is common ground that relief must be given in respect of the £1: the dispute relates solely to the 7s. premium, the Crown contending that it is, and the company that it is not, a "distribution" within the meaning of the section.

To explain the question further, I think it necessary to refer only briefly to the Act. Profits tax was first imposed by the Finance Act, 1937, under the name "national defence contribution", and that name was changed to "profits tax" by the Finance Act, 1946. In 1947, by the Finance Act of that year, the scheme of the tax was amended and its rate varied. In particular, by s. 30 (1) and (2), relief described as "non-distribution relief" was provided by way of reduction of the rate of tax on so much of the taxable profit as is not covered by what is called in the Act "net relevant distributions to proprietors". I need not explain these somewhat turgid expressions except to say that they pave the way to the definition of "distribution" which is contained in s. 36 (1) and is in the following terms:

"Subject to the provisions of the next succeeding sub-section, wherever—(a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or (b) assets are distributed in kind to any person; or (c) where the trade or business is carried on by a body corporate the directors whereof have a controlling interest therein, an amount is applied, whether by way of remuneration, loans or otherwise, for the benefit of any person, there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets: Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

Nothing else is involved in this appeal than to determine, in relation to the facts of the case, which I will now state, what is the meaning of those few words "sum applied . . . in reducing the share capital".

- A The company was incorporated on Mar. 8, 1935, with a capital of £600,000 divided into four hundred thousand five per cent. cumulative participating preference shares of £1 each, and four hundred thousand ordinary shares of 10s. each. Under art. 8 of the company's articles of association, provision was made, in accordance with the powers granted by s. 46 of the Companies Act, 1929, for redemption of the preference shares. I think it necessary only to refer to para.
- B (A) of the article, which provided (inter alia) that in any event any amount to be applied in redemption of the shares in excess of their nominal amount should only be provided out of profits which would otherwise have been available for dividend on shares ranking behind the preference shares, and to para. (D) of the article, which provided that the redemption price of a share should be the nominal amount of the share plus a premium of 7s. per share, and a sum equal
- C to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less tax) calculated down to the date of the repayment of capital. The article also provided for certain additional payments to be made, which I need not particularise. I have stated this article at some length because some argument was founded on it, but in this case the only concern is with the 7s. premium which, by the terms of the article, was
- D payable only out of profits.

- In due course, in December, 1947, the company redeemed the preference shares at the redemption price stipulated by the articles, viz.: 27s. per share together with a sum equal to certain dividends. It is, I think, irrelevant to the question that a new issue was made in order to provide part of the redemption price and that, for that purpose, an agreement was made with certain brokers
- E who, in effect, underwrote the issue. The only material facts were that the shares were redeemed at the stipulated redemption price, and that quoad any excess over their nominal amount the payment was made, as it was bound to be, out of profits. In these circumstances, an assessment to profits tax was made on the company which treated the payment of the 7s. per share premium as having been "distributed", with the result that the company did not get relief in respect of
- F the sum so paid. The company appealed to the Special Commissioners, who allowed the appeal, holding that the sum paid to the shareholders in respect of premium was a sum applied in reducing the share capital within the meaning of the proviso to s. 36 (1), which I have already set out. At the request of the Crown, the Special Commissioners stated a case for the opinion of the court, and their decision was upheld by UPHOHN, J. I think it worth while at this stage to pose
- G the question as it appeared to the learned judge, and to state his conclusion, since I find myself in complete agreement with him. He asked ([1953] 2 All E.R. at p. 137):

"Ought one as the Crown says, to explore the application of this sum of 27s. per share into the company's balance sheet and find that 20s. goes to reduce the capital and 7s. to reduce the profit and loss account? Or ought one to treat this as one transaction and say that, in order to get rid of these shares and thereby reduce the capital by that amount, the company was compelled by its articles to apply the 27s. per share?"

Having thus posed the question, the learned judge concludes (*ibid.*):

"A company may reduce its capital in many ways, and one way is by redeeming its preference shares if so authorised by its articles. To reduce the capital by that method, the company was bound by its articles to apply 27s. for the redemption of every £1 nominal of capital reduced."

He, therefore, affirmed the decision of the Special Commissioners.

The Court of Appeal, to whom the case was then carried, affirmed the decision of the learned judge by a majority (SINGLETON and BIRKETT, L.JJ., dissentiente HODSON, L.J.). SINGLETON, L.J., stated the question in a sentence ([1953]

2 All E.R. at p. 1594) "What amount did the company 'apply' to reduce its capital?" Some criticism was levelled at the form of the question, and it is true that per incuriam the learned lord justice substituted "to reduce" for "in reducing", but it is clear that he was not making any distinction between the two phrases, for his conclusion was that the word "applied" in the proviso has the same meaning as "paid", and he proceeded thus (ibid.):

"The company could not redeem the preference shares unless it paid 27s. a share to the holders of those shares. In paying that amount it was applying it to redeem the preference shares and in reducing the share capital of the company. Thus the sum which it paid was applied in reducing the capital of the company, and does not fall to be treated as a distribution."

My Lords, the case for the company could not, I think, be put more concisely or cogently. BIRKETT, L.J., agreed, emphasizing that the operation of reducing the capital and the operation of redeeming the preference shares were really indivisible since, by the very act of redeeming the shares, the capital was, in fact, reduced. HODSON, L.J., dissented, and in his judgment will be found the argument which the Crown have pressed on your Lordships.

In the first place, the Crown rely on the use of the words "in reducing", and contend that they have a different meaning from "for the purpose of reducing" or "in connection with reducing" or even "to reduce". They then urge that the maximum sum which can be applied in reducing the capital of a company is the amount of the capital itself. HODSON, L.J., propounds this as a mathematical truth, and whether regarded as a matter of mathematics or not, it is a proposition to which the argument of the Crown continually recurs. Thus, in the seventh of their formal reasons, they urge that

"share capital can be reduced only by the payment or loss of money or money's worth out of it and no greater sum in money or money's worth can be paid or lost out of a sum of share capital than a sum equal to the nominal amount; so soon as its nominal amount has been applied in reducing it, it is reduced to nothing and no further sum can be applied in reducing it."

This, my Lords, is, I think, the whole argument, though it may be elaborated and repeated in different forms, and I need hardly add, that, as is usual in such cases, each side invokes the plain ordinary meaning of the English language, and claims that, judged by that test, the words can bear only one, but a different, interpretation.

My Lords, I think it worth while to pause for a moment and ask what effect the redemption of preference shares has on the capital structure of a company. If I had any doubts on this matter, they would have been set at rest by the decision of UTHWATT, J., a judge particularly well versed in company law, in *Re Serpell & Co., Ltd.* (1). In that case, a company had an original capital of one hundred and ten thousand seven per cent. redeemable preference shares of £1 each and one hundred thousand ordinary shares of £1 each. Of these preference shares, twenty-four thousand five hundred were redeemed before April, 1939. In 1943, the company resolved to reduce its capital which, according to the resolution, then consisted of £185,500 divided into eighty-five thousand five hundred seven per cent. redeemable preference shares and one hundred thousand ordinary shares of £1 each to £100,000 divided into one hundred thousand ordinary shares of £1 each, and that such reduction be effected by extinguishing the said redeemable preference shares. On a petition to the court to sanction the reduction, the question arose whether the twenty-four thousand five hundred preference shares which had been redeemed in 1939 continued to form part of the capital of the company, a question which might be posed in another way by asking what, in law, is the effect of the redemption of redeemable preference shares on the capital of a company. The learned judge held, and in my opinion rightly

A held, that, where redemption has been effected, the shares redeemed disappear for every purpose, that the nominal as well as the issued and paid-up capital represented by the redeemed shares disappears, and that, in the instant case ([1944] Ch. at p. 235),

B “ . . . the redemption of cumulative preference shares effected some years ago reduced the nominal, as well as the issued and paid-up, capital of the company.”

C My Lords, this means nothing else than that the act of redemption itself reduces the capital: reduction does not, in this case, depend on any sanction of the court, nor is it imperfect until its effect has been disclosed in a balance sheet which is adjusted to the new capital conditions. This analysis appears to me to justify the proposition advanced by the company that redemption of preference shares is a way of reducing the capital of a company and it may be added that, by 1947, it was a familiar way of doing so.

D I turn then to the present case, and must proceed on the footing that, when the company redeemed its preference shares in 1947, it by that act reduced its nominal and issued capital by £400,000. I must then ask what sum it applied in so reducing its capital. That seems to me a pure question of fact. So long as the provisions of the Companies Act, which are intended to safeguard the rights of creditors, shareholders and the public, are observed, it is open to the company to make what bargain it likes with its preference shareholders as to the terms of redemption, and the sum of money which it applies in the redemption will depend on those terms. It is obvious that that sum may, or may not, correspond with the nominal amount of the redeemed shares. But, whatever the sum may be, it is a sum applied in the redemption and, since redemption is itself a way of reduction, I cannot escape the conclusion that it is applied in reduction of the capital of the company. It may well be that, as a matter of accountancy, if the sum so applied is larger than the nominal amount of the redeemed shares, some other alteration must be made in the balance sheet beyond the change in the capital structure. But this is, in my opinion, irrelevant to the question what sum was applied in reducing the capital. Your Lordships were referred to *Ex p. Westburn Sugar Refineries, Ltd.* (2), and it has this importance, that this House there decided that, in a reduction of capital, it is competent for a company to pay off share capital by transferring to the shareholders assets of which the value may exceed the amount by which the share capital is reduced, and that

E the court should sanction the reduction provided that it is satisfied as to the safeguarding of the creditors, the shareholders and the public. From this, it clearly emerges that there need be no precise correspondence between the amount by which the shareholders' capital is reduced and the value of that which is transferred to them, even though the latter exceeds the former. It need, therefore, cause no surprise if the “sum applied in reducing capital”

F exceeds the amount by which the capital is nominally reduced.

G I have not so far referred to the immediate context of the words that I have had to construe, and without them I have come to a clear conclusion in favour of the company. But they certainly support that conclusion; for, if I have to ascertain what sum has been “applied in repaying a loan”, I do not merely ask what sum has been loaned or lent but ask also what sum has been applied in repaying it. I do not conceive that it is even arguable that, if (say) debentures have been issued at a discount, any sum less than that which according to their terms has to be paid and has, in fact, been paid in discharging them, has been “applied in repaying” the loan. It is the facts of the transaction which determine what sum is brought within the scope of the proviso, and this applies, in my opinion, equally to repayment of loan or reduction of capital.

Finally, my Lords, counsel for the company called in aid the contrasting language of the proviso to s. 36 (1) and the final words of s. 35 (1), and also of

s. 46 of the Companies Act, 1929, and s. 71 of the Companies Act, 1947. His purpose was to show that the legislature, when it wished to do so, knew how to distinguish between the nominal amount of a share and that amount together with a premium payable on its redemption. This is an assumption which I do not hesitate to make, but I do not find it necessary to rely on it for the purpose of construing the words of the proviso. I have only to add, in view of some of the arguments addressed to us, that, in this appeal, we are concerned only with the premium which was payable on redemption of the preference shares. The stipulated redemption price contained other ingredients also. There may be special considerations applying to them which were not brought to our notice and nothing that I have said should prejudice any future discussion of them.

The appeal must be dismissed with costs.

LORD PORTER: My Lords, I have had an opportunity of seeing the speech just delivered by the noble Lord on the Woolsack, and I find myself in agreement both with its reasoning and conclusion. In those circumstances, I have not thought it necessary to write any special opinion myself.

LORD MORTON OF HENRYTON: My Lords, I entirely agree with the speech which has just been delivered from the Woolsack, but, out of respect for HODSON, L.J., who dissented in the Court of Appeal, I shall add a few words on a sentence which is, I think, the central point of his judgment. The learned lord justice said ([1953] 2 All E.R. at p. 1597):

“As a matter of arithmetic, the maximum sum which can be applied in reduction of the capital is the amount of the capital itself, namely, £1 per share.”

I would, of course, agree with the proposition that, as a matter of arithmetic, the maximum sum *by which the capital can be reduced* is the amount of the capital itself, namely, £1 per share; but the proposition as stated by HODSON, L.J., is not merely arithmetic, but carries within it a decision of the very question which arose for determination. In my opinion, it is quite possible to apply a greater sum than £1 in reducing the capital by £1, and that is exactly what was done in the present case.

Disregarding the other sums mentioned in art. 8 (D), since no question arises on this appeal in regard to them, under that article the company could only redeem a £1 share by paying 27s. to the holder thereof. That sum was, in fact, paid. This transaction was, undoubtedly, a purchase by the company of one of its own shares, and it is, to my mind, a correct use of language to say that the company applied 27s. in purchasing each £1 share. Moreover, by one and the same transaction, the company achieved two results, namely, the purchase of a £1 share and the reduction of its capital by £1: see *Re Serpell & Co., Ltd.* (1). It thus follows, as I think, that it is equally correct to say that the company applied 27s. in reducing its capital.

My Lords, I do not think that the contrary argument is at all assisted by reference to the company's balance sheet. The 27s. is “applied”, once and for all, when the purchase takes place, and that sum has all come out of the company's pocket. I refrain from developing this point further, as it has been fully dealt with by my noble and learned friend on the Woolsack. I agree that the appeal must be dismissed with costs.

LORD REID: My Lords, the only question raised in this appeal is whether the whole of the 27s. per share paid by the respondent company to redeem four hundred thousand preference shares of £1 each comes within the scope of the proviso to s. 36 (1) of the Finance Act, 1947, which is in these terms:

“Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.”

A The Crown admits that 20s. of the 27s. per share was applied in reducing the share capital of the company, but deny that that remaining 7s. per share was so applied.

B The question turns, in my opinion, on what is meant by a sum applied in reducing share capital, and particularly on the meaning of the word "applied" in this context. The proviso has nothing to do with the amount of profit on which profits tax is to be assessed: that is to be determined on income tax principles and it may not be the actual profit. But, after the amount of profit has been determined, it is necessary to find the amount of distributions to shareholders, because that affects the rate of tax. Distributions are actual payments in money or money's worth, and I did not understand it to be disputed that the purpose and effect of the proviso is to enact that certain actual payments to shareholders, which would otherwise be distributions within the meaning of the Act, are not to be treated as distributions. As the proviso is dealing with actual payments to shareholders, it appears to me that the natural meaning of the words "no sum applied" is "no sum paid by the company to its shareholders", and that this should be held to be their meaning unless there is some compelling reason for giving to them some wider or different meaning. The proviso is concerned with sums paid, and not with the source from which the company takes the money, or with the entries which the company has to make in its accounts and balance sheet consequential on the money being paid.

E The company paid 27s. per share to its shareholders, and the question is whether that money was paid in reducing the share capital or whether part of it was paid in doing something else. The articles of association of the company entitled the company to redeem these shares, and provided that the redemption price should be the nominal amount of the shares plus a premium of 7s. per share and a further sum calculated with reference to dividends. In fact, the company paid a comparatively small sum so calculated in addition to the 27s. per share, but the company have made no claim in respect of this additional sum, and I have formed no opinion about it. I shall consider the case on the footing that the stipulated redemption price was 27s. per share and no more.

G In my opinion, the necessary and immediate effect of paying this sum of 27s. per share to the shareholders was to cancel the shares in respect of which it was paid and so to reduce the share capital of the company by the nominal amount of these shares. I think that this follows from the judgment of UTHWATT, J., in *Re Serpell & Co., Ltd.* (1), and I agree with that judgment. Moreover, the shares could not have been redeemed and the share capital could not have been reduced by any smaller payment. A payment of 20s. per share would not have been effectual to redeem the shares, and so would not have resulted in reducing the share capital. But the payment of 27s. per share was effectual in reducing the share capital, and the whole of it was required to effect that result. I cannot see how it can be said that only part of the money was paid or applied in reducing the share capital, and I do not see what else the balance can be said to have been paid or applied in doing.

I An argument was submitted to the effect that the 27s. per share could be split up, and that 20s. per share could be regarded as having been paid in redeeming and cancelling the share and 7s. per share could be regarded as being compensation to the shareholder for losing his share. This is not an argument that the stipulated redemption price is to be split between the price originally paid for the share and the excess over that price: these shares might have been issued at a premium, say at 22s. per share, but counsel for the Crown made it clear that the argument would still have been that only 20s. was paid in cancelling the share, the remainder being paid in doing something else. The argument appears to me to be artificial and invalid because, as I have said, a payment of 20s. by itself would have achieved nothing, and the whole price of 27s. was paid

in doing one thing and one thing only—redeeming the shares and thereby A
reducing the share capital.

The Crown also submitted an argument to the effect that “applied” does not mean paid to the shareholder, but means applied in the company’s accounts, so that the sum applied in reducing the share capital is only that part of the redemption price which is applied for this purpose in the company’s balance sheet. We do not have the company’s accounts before us, but it appears that B
what happened was that there was a new issue of shares and the redemption price of the old preference shares was paid partly out of the proceeds of the new issue and partly out of accumulated profits in the hands of the company. The result of the payment was to diminish the cash in hand on one side of the balance sheet, and this was met first by cancelling the nominal capital value of the redeemed shares which appeared on the other side, and then by diminishing C
the amount of a reserve account: it would be met to the extent of 20s. per share by cancelling the nominal capital value of the shares and to the extent of 7s. per share by diminishing the amount of this reserve account. The argument, as I understood it, was that the 27s. per share was “applied” when the necessary alterations were made on the liabilities side of the balance sheet; in that view, 20s. was applied in reducing the nominal amount of share capital and 7s. was D
applied in reducing the amount of the reserve account. Of course, if this were right, no more than 20s. per £1 share could ever be applied in reducing the nominal share capital. But I am quite unable to agree with the argument. It appears to me to be an unnatural use of the word “applied” to say that a sum paid out by a trader is applied in diminishing some item which appears on the liabilities side of his balance sheet: the sum has already been applied in paying it, and the consequent entries in his accounts merely disclose the consequences of its having been so applied. That the word is not used in the proviso in the sense for which the Crown contend is apparent from its initial words: “provided that no sum applied in repaying a loan . . .” That appears to me clearly to indicate that the sum repaid is “applied” when it is paid to the lender and not when the liability to make the repayment is deleted from the balance sheet. In my judgment, E
the sum of 27s. per share was applied in this case in reducing the share capital of the company and, therefore, this appeal should be dismissed. F

LORD COHEN: My Lords, I respectfully agree with your Lordships that this appeal should be dismissed. The effect of the proviso to s. 36 (1) of the Finance Act, 1947, is that, for the purposes of the provisions of the Act relating G
to reliefs from profits tax for non-distribution and to distribution charges,

“no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.”

The parties are agreed that these words must be construed according to their ordinary meaning, but they differ as to that meaning. Counsel for the Crown H
says that the sum applied in reducing the share capital cannot exceed the amount by which the capital is reduced. Counsel for the respondent company argues that, on the facts of this case, the sum applied in reducing the share capital is at least the 27s. per share which the company is bound to pay under para. (D) of art. 8 of its articles of association.

The argument of the Crown is, at first sight, attractive since it is plain that share capital cannot be reduced by more than the amount paid up thereon and, as a matter of accountancy, and, indeed, under the terms of s. 46 of the Companies Act, 1929 (the Act in force at the date of the transaction under consideration), the 7s. premium had to be found out of accumulated profits. But the argument seems to me to ignore the words of the proviso which direct that the sum applied I
in reducing the share capital, not the sum by which the share capital is reduced, shall not be treated as a distribution. As a matter of English, I think any layman would say that the whole redemption price payable under para. (D) of art. 8

- A of the articles of association of the company was a sum applied in reducing the share capital of the company, and I see no reason why a lawyer should differ in this matter from the layman. I am fortified in this conclusion by the fact that, as is plain from the decision of UTHWATT, J., in *Re Serpell & Co., Ltd.* (1), redemption is a way of reduction of capital. If that be so, it seems to me reasonable to conclude that the redemption price is a sum applied in reducing the capital.
- B Like UPJOHN, J., I think the proper approach to this question is to treat the whole of what was done as one transaction, and to say that, in order to get rid of the shares in question and thereby reduce the capital by the amount paid up thereon, the company were compelled by their articles to pay 27s. per share and that sum was, therefore, money applied in reducing the capital.

- C In the course of the argument, a question was raised as to the position in relation to the sum equal to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less tax) down to the date of repayment of capital which, under art. 8 (D), had to be added to the 27s. But no such question was raised before the Special Commissioners, and I prefer to express no opinion as to how that sum should be regarded for the purposes of the proviso to s. 36 (1) of the Finance Act, 1947.

- D Some reliance was placed by both sides on the concluding words of s. 35 (1), which deal with the position as regards gross relevant distributions in the case of the last chargeable accounting period in which the trade or business is carried on. They provide that any excess over the paid-up share capital together, where shares have been issued at a premium for cash, with the aggregate of the amounts of the premiums, shall not be treated as a distribution of capital for the purposes of s. 35 (1) (c). Counsel for the Crown said that this showed that, when the intention was that an amount paid in respect of a premium should not be treated as a distribution of profits, the Act so provided. I am, however, unable to derive any assistance from this part of s. 35 (1). It deals with the position in a liquidation when every distribution is strictly a distribution of assets, not of profits, and it imposes a necessary limitation for the protection of the revenue. I cannot
- E rely on it as throwing any light on the proviso to s. 36 (1) which deals with the position while the company is a going concern.
- F

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Linklaters & Paines* (for the company).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re ELLENBOROUGH PARK. Re DAVIES (*deceased*).
POWELL AND OTHERS v. MADDISON AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), March 1, 2, 17, 1955.]

Easement—Right to enjoy pleasure ground—Jus spatiandi—Occupation by military authorities—Entitlement to compensation paid by military authorities—Compensation (Defence) Act, 1939 (2 & 3 Geo. 6 c. 75), s. 2 (2).

Requisition—Compensation—Application of compensation—Deprivation of enjoyment of easement—Compensation for requisition—Compensation for dilapidations—Compensation (Defence) Act, 1939 (2 & 3 Geo. 6 c. 75), s. 2 (2).

In 1855 Ellenborough Park, which is an open piece of land near the seafront at Weston-super-Mare, and surrounding land belonged to H.D. and J.W., who then and in subsequent years sold plots of the surrounding land for building purposes. A typical sale of a plot was one effected by a conveyance dated Dec. 23, 1864, made between H.D. of the first part, J.W. of the second part and J.P. (a builder) of the third part. By the conveyance H.D. and J.W. conveyed the plot in consideration of £180 to J.P. in fee simple together with the full enjoyment "at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land intended to be hereby granted in the centre of the square called Ellenborough Park which said pleasure ground is divided by [a road] but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground". J.P. covenanted to build and also jointly with all other persons to whom the right of enjoyment of the said pleasure ground might be granted to pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants the said pleasure ground. H.D. and J.W. each for himself and his executors administrators and assigns covenanted with J.P. his heirs executors administrators and assigns at the expense of J.P. and all other persons to whom the said right of enjoyment might be granted at all times thereafter to keep the park as an ornamental pleasure ground. There was a further covenant that H.D. and J.W. their heirs and assigns would not at any time thereafter erect or permit to be erected any dwelling-house or other building (except certain ornamental buildings) within or on any part of the park. In 1879 W.H.D. purchased the park and other parts of the original estate from the personal representatives of H.D. and J.W., by which time most of the plots fronting the park had been sold, and the land was conveyed to him subject, as regards the park, to the rights still subsisting of all persons to whom the use and enjoyment of the park had been granted. In 1880 W.H.D. died and the park and other land vested in his trustees. On the question whether the owners or occupiers of the plots fronting on the roads adjoining Ellenborough Park had any enforceable rights over the park,

Held: the conveyances of the plots conferred on the purchasers and their successors in title legal easements to use the pleasure ground known as Ellenborough Park subject (as was conceded) to the obligation to pay a fair and just proportion of the costs of keeping the park in good condition.

Duncan v. Lough (1845) (6 Q.B. 904) and *Keith v. Twentieth Century Club, Ltd.* (1904) (73 L.J.Ch. 545) followed.

Dicta of FARWELL, J., in *International Tea Stores Co. v. Hobbs* ([1903] 2 Ch. at p. 172) and *A.-G. v. Antrobus* ([1905] 2 Ch. at p. 198) not followed.

Dyce v. Lady Hay (1852) (1 Macq. 305) considered.

Land vested in the trustees of the will of W.H.D. was subject to easements vested in adjoining owners to enjoy the land as a pleasure ground. In the terms of the deeds by which their easements had been granted, the adjoining

A owners were obliged to "pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs" the said land. From 1941 until 1946 the land was requisitioned by the military authorities, who paid rental compensation (under the Compensation (Defence) Act, 1939), of £150 per annum, amounting over the whole period, after payment of expenses, to about £589. On
 B relinquishing the land, the military authorities paid (under the same Act) to the trustees about £1,770 as a sum equal to the cost of making good damage caused to the land during the period of requisition.

Held: (i) the rental compensation was by virtue of s. 2 (2) of the Act of 1939 payable to the trustees, but, by analogy with the rights to compensation moneys paid on compulsory purchase, the owners of the dominant
 C tenements were entitled to some portion (to be ascertained by inquiry) of the sum received as compensation for the loss of the enjoyment of their easements during the relevant period.

(ii) the trustees must apply the £1,770 in reinstating the land as a pleasure ground, and must not apply it for the benefit of persons interested under the will of W.H.D.; and the trustees were not entitled to demand further
 D contribution for the upkeep of the land from the owners of the easements until that sum was exhausted.

[**Editorial Note.** In the present case effect is given to a grant between individuals of a private *jus spatiandi*, a right to use a pleasure ground, as a legal easement. Although one of the dicta of FARWELL, J., to the contrary which are not followed was given in a case concerning an alleged public right, the
 E present case does not extend to public rights. Accordingly authorities, among them *Eyre v. New Forest Highway Board* (1892) (56 J.P. 517), which show that the fact that people have roamed over land does not justify the inference that any part of it has been dedicated to public use as a highway, are unaffected by the present case, though it has been suggested that it may be possible to infer an intention to dedicate land for the purpose of public recreation (see 16 HALSBURY'S
 F LAWS (2nd Edn.) 226 note (m)).

As to the Characteristics of an Easement, see 11 HALSBURY'S LAWS (2nd Edn.) 273, para. 502; and for cases on the subject, see 19 DIGEST 9-11, 6-15.

For the Compensation (Defence) Act, 1939, s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 989.]

G Cases referred to:

(1) *Keppell v. Bailey*, (1834), 2 My. & K. 517 (39 E.R. 1042); *Coop. temp. Brough*, 298 (47 E.R. 106); 19 Digest 22, 89.

(2) *Hill v. Tupper*, (1863), 2 H. & C. 121; 32 L.J.Ex. 217; 8 L.T. 792; 159 E.R. 51; 19 Digest 23, 91.

(3) *Ackroyd v. Smith*, (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 138 E.R. 68; 19 Digest 12, 20.

(4) *Dyce v. Hay (Lady)*, (1852), 1 Macq. 305; 19 Digest 16, 42.

(5) *Solomon v. Vintners' Co.*, (1859), 4 H. & N. 585; 28 L.J.Ex. 370; 33 L.T.O.S. 224; 23 J.P. 424; 157 E.R. 970; 19 Digest 57, 326.

(6) *Mounsey v. Ismay*, (1865), 3 H. & C. 486; 34 L.J.Ex. 52; 12 L.T. 26; 159 E.R. 621; 19 Digest 7, 3.

(7) *Millenchamp v. Johnson*, (1746), Willes, 205 n; 125 E.R. 1133; 17 Digest (Repl.) 15, 164.

(8) *Abbot v. Weekly*, (1665), 1 Lev. 176; 83 E.R. 357; 17 Digest (Repl.) 15, 163.

(9) *Copeland v. Greenhalf*, [1952] 1 All E.R. 809; [1952] Ch. 488; 3rd Digest Supp.

(10) *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; 72 L.J.Ch. 543; 88 L.T. 725; 19 Digest 37, 193.

- (11) *A.-G. v. Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 A J.P. 141; 19 Digest 61, 347.
- (12) *Duncan v. Louch*, (1845), 6 Q.B. 904; 14 L.J.Q.B. 185; 4 L.T.O.S. 356; 115 E.R. 341; 19 Digest 115, 759.
- (13) *Keith v. Twentieth Century Club, Ltd.*, (1904), 73 L.J.Ch. 545; 90 L.T. 775; 40 Digest 327, 2759.
- (14) *Carpenter v. Smith*, [1951] 2 D.L.R. 609; O.R. 241; O.W.N. 294; 3rd B Digest Supp.
- (15) *A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.*, [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955; 19 Digest 19, 56.
- (16) *Wright v. Macadam*, [1949] 2 All E.R. 565; [1949] 2 K.B. 744; 2nd C Digest Supp.
- (17) *Paine & Co., Ltd. v. St. Neots Gas & Coke Co.*, [1938] 4 All E.R. 592; 160 L.T. 10; *affd.* C.A., [1939] 3 All E.R. 812; 161 L.T. 186; Digest D Supp.
- (18) *Simpson v. Godmanchester Corpn.*, [1896] 1 Ch. 214; 65 L.J.Ch. 154; 73 L.T. 423; *affd.* H.L., [1897] A.C. 696; 66 L.J.Ch. 770; 77 L.T. 409; 19 Digest 14, 29.

Adjourned Summons.

The trustees of the will of William Henry Davies, deceased, applied by originating summons for the determination of the following questions: (i) whether in the events which had happened the owners of property fronting on a square called Ellenborough Park, Weston-super-Mare, had any enforceable right to the use of Ellenborough Park on payment of a contribution towards the expenses of the upkeep thereof as a private open space; and (ii) whether in the accounts of the plaintiffs in respect of the receipts and payments for the maintenance and preservation of the said park there should be credited to the sum contributed by the said owners towards such expense any and if so what part of the rent of £150 per annum received from the War Office in respect of the occupation of the said park by Her Majesty's Forces during the recent war to compensate for any loss by them of the amenity during such period; and also whether in such accounts there should also be so credited any and if so what part of the compensation received from the War Office for dilapidations during military occupation.

T. A. C. Burgess for the plaintiffs, the trustees.

N. S. S. Warren for the first defendant, beneficially interested in the proceeds of sale of Ellenborough Park.

A. F. M. Berkeley for the second defendant, one of the owners of property fronting on Ellenborough Park.

Cur. adv. vult.

Mar. 17. **DANCKWERTS, J.**, read the following judgment: The subject-matter of this case is a piece of land, open and unbuilt on, at Weston-super-Mare in the county of Somerset, known as Ellenborough Park. It is now surrounded on three sides by roads and houses fronting on them, known as Ellenborough Park North, Ellenborough Park South and Ellenborough Crescent. The fourth side towards the seafront is open and not built on. The land on which Ellenborough Park and these roads and houses are now to be found was formerly part of an estate known as the White Cross Estate, and in 1855 the part of that estate forming Ellenborough Park and the surrounding property belonged to Henry Davies and Joseph Whereat in equal moieties. It appears that these two gentlemen sold off the plots surrounding the park for building purposes and conveyed the plots by a number of conveyances which were in substantially similar form. A conveyance of plot No. 21 in Ellenborough Crescent, dated Dec. 23, 1864, and made between Henry Davies of the first part, Joseph Whereat of the second part, and John Porter (a builder) of the third part, has been put in

A evidence as an example of such conveyances. By this conveyance, in consideration of a payment of £180, Henry Davies and Joseph Whereat conveyed the plot to John Porter in fee simple together with easements (in common with other persons) over the roads and drains on the White Cross Estate "And also the full enjoyment (except as hereinbefore appears)"—this relates to an exception of certain exclusive rights of way and private drains, it seems—

B "at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land intended to be hereby granted in the centre of the square called Ellenborough Park which said pleasure ground is divided by the said Walliscote Road but subject to the payment of a fair and just
C proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground."

John Porter entered into covenants for the completion by him of the dwelling-house and buildings in course of erection on the plot, and he also covenanted jointly with all other persons to whom the right of enjoyment of the pleasure ground thereinbefore mentioned might be granted to pay a fair proportion
D of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs the pleasure ground thereinbefore referred to; and each of them, Henry Davies and Joseph Whereat, for himself, his executors, administrators and assigns, covenanted with John Porter, his heirs, executors, administrators and assigns at the expense of John Porter, his heirs, executors administrators or assigns and all other persons to whom the right of
E enjoyment of the pleasure ground thereinbefore mentioned might be granted at all times thereafter to keep as an ornamental pleasure ground the plot of land thereinbefore referred to and situate in front of and partly encircled by the said Ellenborough Crescent; and there was a further covenant that Henry Davies and Joseph Whereat their heirs and assigns would not at any time thereafter erect or permit to be erected any dwelling-house or other building (except any
F grotto, bower, summer-house, flower-stand, fountain, music-stand or other ornamental erection) within or on any part of the said pleasure ground in the centre of the square or space called Ellenborough Park, but that the same should at all times remain as an ornamental garden or pleasure ground.

By 1879, most of the plots fronting on the park had been sold and houses erected thereon. William Henry Davies purchased from the personal representatives of Henry Davies and Joseph Whereat (who were both then dead)
G Ellenborough Park and such other portion of the White Cross Estate as remained unsold, and this was conveyed to him in fee simple by a conveyance dated May 21, 1879, subject as to the piece of land forming the pleasure ground called Ellenborough Park to the rights still subsisting of all persons to whom the use and enjoyment of the said pleasure ground had been granted, and the
H vendors constituted and appointed William Henry Davies, his heirs and assigns, to be the true and lawful attorney and attorneys of the vendors to commence, carry on and prosecute any actions or other proceedings whatsoever for compelling the observance and performance on the part of all and any such persons and every such person as were or might be liable to the observance and performance of all and any the covenants and every the covenant the benefits or
I benefit of which were by virtue of the conveyance assigned to or otherwise vested in William Henry Davies his heirs and assigns or expressed and intended so to be.

William Henry Davies died on May 11, 1880, having by his will dated Jan. 16, 1868, made provisions which appear to have created in the events which have since happened undivided shares in any land which he left. The plaintiffs in these proceedings are the present trustees of his will and of the statutory trusts arising by virtue of the Law of Property Act, 1925, in respect of Ellenborough

Park, which is the only part of his estate which has not been distributed. The administration and management of the park appears to have been in the hands of the trustees of the will until 1924, when a committee of those persons who contributed to the maintenance of the park (called by the somewhat misleading name of "ratepayers") was formed, and since then this committee has administered the park and collected the contributions from "the ratepayers", except during a period when the park was requisitioned by the War Office, i.e., from February, 1941, to May, 1946. The War Office paid a compensation rental of £150 per annum, and the trustees received after the cessation of military occupation a further sum of £1,770 4s. 7d. on account of dilapidations. A considerable part of this sum has been spent on rehabilitation of the park. Timber has been cut on the park, in the proper course of maintenance, and sold. In addition to these moneys, the trustees have received sums of money as consideration for giving consent to a variation of restrictive covenants or alterations to buildings, and the trustees have paid legal and other expenses and the cost of replanting timber. In the result, a considerable balance remains in the hands of the trustees, and doubts have arisen as to the persons who can claim the benefit of the moneys and whether contributions can still be recovered from "the ratepayers" and generally as to the rights of persons in respect of the park.

The defendants are a representative of the so-called "ratepayers", and a beneficiary under the will of William Henry Davies, who is entitled to a four-sevenths share of the proceeds of sale of the park. It is thought that none of the original purchasers of plots fronting on the park remains in existence. It is conceded on the part of the representative "ratepayer" that if the successors in title of the purchasers retain enforceable rights in respect of the park, they remain subject to the burden of contributing to the upkeep thereof. The legal effect of the transactions between Henry Davies and Joseph Whereat and the purchasers of plots, however, involves questions of some interest and difficulty in regard to which clear authority is singularly lacking. The intention of the parties to these transactions seems to me to be fairly plain. In return for the contributions towards the expense which they were to make, the purchasers of plots and their successors in title were to enjoy the advantages of being able to use Ellenborough Park as a pleasure ground, presumably for perambulation and other reasonable uses incident to a pleasure garden, in addition to the benefit of having an unbuilt-on space in front of their houses. It seems to me that these advantages must benefit the owners of the houses in respect of their occupation of them, and must increase the value of the houses on a sale.

It is contended that the rights conferred in these respects by the conveyances are no longer operative or enforceable against the owners of the park because they do not conform to the essential qualities of an easement, and they amount to a *jus spatiandi* or right of perambulation which (it is contended) is not a right legally capable of creation or known to English law.

The essential qualities of an easement are (i) there must be a dominant and a servient tenement; (ii) an easement must accommodate the dominant tenement, i.e., be connected with its enjoyment and for its benefit; (iii) the dominant and servient owners must be different persons; and (iv) the right claimed must be capable of forming the subject-matter of a grant: see CHESHIRE'S MODERN REAL PROPERTY (7th Edn.), pp. 460-462. It was at one time thought that such cases as *Keppell v. Bailey* (1), *Hill v. Tupper* (2), and *Ackroyd v. Smith* (3), indicated that the class of legal easements was closed and confined to certain well-recognised types. This is now accepted, however, to be an incorrect view. PROFESSOR CHESHIRE in his book, at p. 462, says:

"That doctrine means not that an easement of a kind never heard of before cannot be created, but that a new species of . . . burden cannot be brought into being and given the status and legal effect of an easement. In other

A words, if a right exhibits the four characteristics described above, it is an easement which will run with the dominant and against the servient tenement, even though it may be of a kind which has not figured in practice before, but if it lacks one or more of those characteristics, it may, indeed, be enforceable between the contracting parties, but it cannot, like an easement, be enforceable by or against third parties."

B This, indeed, is the point in the present case. The grant in fact is not a recent one, having been made as long ago as 1864, and, as observed by LORD ST. LEONARDS, L.C., in *Dyce v. Lady Hay* (4) (1 Macq. at p. 313):

C "... I fancy no one supposes that recreation, taking the air, and strolling, are to be regarded as any particular novelties; or that if you are tired in a meadow, and lie down to repose yourself, the refreshment thence arising can reasonably be described as an invention."

If, therefore, the rights claimed in the present case are incidents of an easement, it is not because modern life has created some novel situation.

D In the present case, of course, there are no uncertainties such as occur in the case of a claim by prescription or user. There is an express grant of "the full enjoyment of the pleasure ground set out and made in front of the plot of land" conveyed to the grantee. Presumably this means the right to enjoy the ground as a pleasure ground in all the ways in which a pleasure ground would normally be enjoyed, which would no doubt include the right to walk about on any parts not covered by flower beds and the like and to sit down on appropriate parts of the ground and possibly to picnic there.

E DR. G. R. Y. RADCLIFFE in his book on REAL PROPERTY LAW (2nd Edn.) (1938), p. 146, after observing that

F "The English law of easements is very largely derived from the Roman law of servitudes, and is governed by the general consideration that it is not desirable on grounds of public policy that landowners should be able to subject their land to new and strange burdens",

postulates as one of the qualities of an easement that (*ibid.*, at p. 147):

G "The easement must be calculated to benefit the dominant tenement as a tenement, and not merely to confer a personal advantage on the owner of it."

This I find somewhat difficult to apply, for it seems to me that the benefit received from a right of way is necessarily a benefit to the owner or occupier of the tenement rather than to the tenement itself, though a right of support might be said to benefit the tenement as such. But DR. RADCLIFFE continues (*ibid.*):

H "This principle is directly derived from the Roman law of servitudes and is well illustrated by the Roman jurist Paul when he says that you cannot have a servitude giving you the right to wander about and picnic in another man's land (*'ut spatiari, et ut coenare in alieno possumus, servitus imponi non potest'*. Dig. 8.1.8)".

I If this is true of the English law of easements, it is apt to the situation with which I have to deal, and DR. RADCLIFFE is a writer deserving respect.

In THEOBALD, THE LAW OF LAND (1929), it is stated that an easement "must be a right of utility and benefit and not one of mere recreation and amusement". Two authorities are quoted for this statement. *Solomon v. Vintners' Co.* (5) is one of them. But in that case (which concerned a right of support) POLLOCK, C.B., says (4 H. & N. at p. 593):

"If I build a wall at the extremity of my land, and my neighbour plays

rackets against it for twenty years, is it contended that he would acquire a right to have it kept up ? ”

Whereupon BRAMWELL, B., observed (ibid.): “ Probably a right not to have it pulled down, if he had used it for that purpose as of right ”. The other case cited is *Mounsey v. Ismay* (6), in which there was a claim by custom for the freemen and citizens of a town on a particular day in the year to enter on a close for the purpose of holding horse races thereon, a claim (I would observe) by a fluctuating body of persons quite incompatible with an easement. MARTIN, B. (delivering the judgment of the court) said (3 H. & C. at p. 498):

“ But, however this may be, we are of opinion that to bring the right within the term ‘ easement ’ in the second section it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of LORD TENTERDEN, who framed it (per LORD WENSLEYDALE, 5 M. & W. at p. 404), to include within the Act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson* (7), or to dance upon a green, as in *Abbot v. Weekly* (8), by analogy to which we held this alleged customary right to run horse races a lawful one at common law. What we think he contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure.”

In *Dyce v. Lady Hay* (4), Robert Dyce claimed that he and the other inhabitants of Aberdeen and the public generally had used and enjoyed from time immemorial a footpath along the River Don on the defender’s estate and that a strip of land between the river and the footpath had been used by the inhabitants “ for the purpose of recreation and taking air and exercise by walking over and through the same, and resting thereon as they saw proper ”. The decision of the House of Lords, as expressed in the sidenote, is as follows (1 Macq. at p. 305):

“ There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. *Semble*, that where a claim in the nature of a servitude or easement is incapable of judicial control and restriction, it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription. The law of Scotland agrees with the law of England in holding that the rights to village greens and playgrounds stand upon a principle of original dedication to the use of the public. Where new inventions come into use they may have the benefit of servitudes and easements ; the law accommodating its practical operation to the varying circumstances of mankind.”

LORD ST. LEONARDS, L.C., appears to have been impressed by the invasion on the enjoyment of the defender’s land which might have been caused by all the inhabitants of Aberdeen exercising the rights claimed, but he seems to have thought that an express grant might have lawfully created rights of the same nature. The claim in this case, however, was plainly in the nature of a public right, and has little to do with an easement appurtenant to a dominant tenement. On the question of rights claimed by way of easement being too extensive a reduction of the rights of the owner of the alleged servient tenement this case has been applied by UPJOHN, J., in *Copeland v. Greenhalf* (9).

In *International Tea Stores Co. v. Hobbs* (10), FARWELL, J., was concerned with the use by the plaintiff company’s servants of a way across the defendant’s

- A yard with his permission while the plaintiff company were the lessees of an adjoining house belonging to the defendant. The plaintiff company purchased from the defendant the house leased to them and FARWELL, J., held that a right of way passed under the general words incorporated by the Conveyancing Act, 1881. The case has very little to do with the problem now before me, but FARWELL, J., in dismissing an argument of Lord Coleridge, K.C., says ([1903] 2 Ch. at p. 172):

"The instance suggested by LORD COLERIDGE in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, Would such a man on buying the house with the rights given by s. 6 of the Conveyancing Act acquire a right of way over the drive, and a right to use the gardens and park? My answer is 'Yes' to the first and 'No' to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere *jus spatii*, is not so known."

- D Again in *A.-G. v. Antrobus* (11), FARWELL, J., used similar language. This was the case in which a public right of resort was claimed over the defendant's land to Stonehenge. It was held that the public could not by user acquire a right to visit a public monument or other object of interest on private property. FARWELL, J., said ([1905] 2 Ch. at p. 198):

- E "It is impossible for the court, under those circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is *jus spatii* known to our law as a possible subject-matter of grant or prescription: 'and for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good'."

- F FARWELL, J., also said (*ibid.*, at p. 206):

"Further, the tracks which lead into the circle cease there and do not cross, and the public have no *jus spatii* or *manendi* within the circle."

- G It is necessary now to examine some cases which are difficult to reconcile with the statements already quoted. The first of these is *Duncan v. Louch* (12). This was an action for obstruction of a right of way by the locking of a gate. The plaintiff claimed, as the owner of No. 15, Buckingham Street, Adelphi, a right of way therefrom over a close called Terrace Walk to an erection or building called the Water Gate abutting on the River Thames and back again to his house (which he had purchased in 1836). The evidence in the case, however, disclosed a somewhat different situation. The plaintiff put in a grant dated H March, 1675, containing the following words:

- I "Together with the free liberty, use, benefit, and privilege, for him the said Philip Doughty, [a predecessor in title of the plaintiff] his heirs, tenants or assigns, with other the inhabitants of York House and grounds, of the Tarris Walke of the Water Gate next the river of Thames, he, they and every of them, from time to time, contributing and paying a rateable share and proportion towards repairing and amending the same, with others who shall have the benefit thereof . . ."

It was not shown that the plaintiff had ever been called on to contribute towards the repairs, or that any repairs had been required. In 1675, Buckingham Street was not built, and there was evidence that in the past ten years before the action it had become a public way. The property in the Terrace Walk was, by statute, 29 Geo. 2 c. 90, vested in trustees for the purpose of raising a fund for keeping

it in repair. One of the objections on behalf of the defendant was that the right proved was not a right of way, but a right to use the walk for pleasure only, and was therefore improperly stated in the declaration. *Mr. Peacock*, in argument, said (6 Q.B. at p. 910):

"If this be a right of way, it is a right only of using the way for the purpose of passing from terminus to terminus, and not of walking for pleasure between the intermediate points. But the right is in fact one of a kind altogether different. It is like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden, on condition of keeping it in order."

COLERIDGE, J., thereupon observed (*ibid.*):

"The allegation may be smaller than the proof. Has not the inhabitant of the square a right to cross the square, included in his right to walk about the square?"

A little later LORD DENMAN, C.J., remarked (*ibid.*, at p. 911):

"The right as pleaded is unlimited, to walk, pass and repass at his and their free will and pleasure; there is nothing said about the particular occasions of walking: that is an exact description of the use which parties make of such a terrace."

WIGHTMAN, J., said (*ibid.*): "Does it not come to this, that he has a right of way over every part of the land in question?" In the judgments, which were in favour of the plaintiff, LORD DENMAN, C.J., said (*ibid.*, at p. 913):

"I think there is no doubt in this case. Taking the right, as *Mr. Peacock* suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure, they paying the necessary rates for keeping it in order, I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction, and a stranger would not be permitted to say that the plaintiff's right was only conditional":

this was a reference to the argument for the defence that the plaintiff's right was conditional on the plaintiff's willingness to contribute to repairs. PATTESON, J., said (*ibid.*):

"I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another?"

COLERIDGE, J., said (*ibid.*, at p. 914):

"The defendants have relied on two objections. First that the plaintiff in his declaration has incorrectly described his right as a right of way, whereas, in fact, it is a larger easement. There would be a good objection on the ground of variance if the easement claimed were inconsistent with, or different from, the easement proved; but, if, as in the present case, the thing granted is only larger than the thing claimed, and is not different in kind, it is well known that the allegation may be less than the proof, if the matter alleged be included in the matter proved."

WIGHTMAN, J., said (*ibid.*):

"The right proved in evidence is a right of passage backwards and

A forwards over every part of the close: the right claimed is less than this, but is included in it, being a right of way from one part of the close to another. That is not objectionable on the ground of variance."

This case, of course, proceeded to some extent on the niceties of pleading, but it seems clear that if the four judges comprising the court had thought that the original grant and the evidence of user had disclosed an attempt to impose on the land a right not recognised by the law as an easement, the plaintiff's claim must have failed. *Mr. Peacock's* argument appears to have raised the precise point. In fact the court treated the grant of 1675 as creating a perfectly valid easement, though larger in its terms than the right of way claimed by the plaintiff. This case does not appear to have been mentioned to FARWELL, J., in either *International Tea Stores Co. v. Hobbs* (10), or *A.-G. v. Antrobus* (11). In the latter of those two cases the claim concerned was not an easement but a public right of way, and the industrious Mr. W. H. Upjohn, K.C., if he was aware of *Duncan v. Louch* (12), may not have thought it relevant. In the other case, the reference to *jus spatiiandi* by FARWELL, J., appears merely to have been an incidental remark by that learned judge to illustrate his meaning.

It is difficult to draw useful inferences from the position of square gardens in London and other large towns, because different conditions apply in many cases to such open spaces. It is probable that in many cases the situation depends on the terms of leases, and is regulated by the law of landlord and tenant. Or the position may be regulated by special statutes or general statutes, such as the Recreation Grounds Act, 1859; or the Town Gardens Protection Act, 1863, by which gardens in squares of fifty years' standing may be vested in the Metropolitan Board of Works (whose successors are the London County Council), or other corporate authority, or in a committee of rated inhabitants, and bye-laws may be made.

But *Keith v. Twentieth Century Club, Ltd.* (13), appears to be a case concerning ornamental gardens in London, not complicated by these statutes or the position of leaseholders. By an indenture dated June 25, 1852, Felix Ladbroke, being owner in fee simple of certain houses known as Kensington Park Gardens and of an ornamental garden or pleasure ground lying to the north of them, and on which they abutted at the back, granted to Charles Henry Blake in fee simple a piece of ground lying to the north of the ornamental garden and including the site of certain houses (some of which were then in course of erection and others subsequently built) known as Stanley Gardens, similarly abutting on the garden. This conveyance provided as follows:

"This indenture further witnesseth that for the considerations aforesaid he the said Felix Ladbroke doth hereby give grant and confirm to the said Charles Henry Blake his heirs executors administrators and assigns and his and their lessees and sub-lessees or tenants (being occupiers for the time being of the houses now in course of erection or at any time hereafter to be erected immediately contiguous and adjoining to the hereinbefore mentioned ornamental enclosure or pleasure ground) and for his and their families and friends in his and their company or without free use and right of ingress egress and regress at all times hereafter into out of and upon [the ornamental garden] with all rights privileges advantages and appurtenances whatsoever to the said free use and right of ingress egress and regress belonging to or in any wise necessary for the full and absolute enjoyment thereof respectively he and they nevertheless conforming to such rules and regulations as to the use of the same as shall be ordered and laid down by the said Felix Ladbroke his heirs and assigns and the committee (if any) of the resident inhabitants of the houses adjoining the said ornamental ground to whom the management and control of the said ornamental ground shall be committed for the preservation and the keeping of the same and also contributing towards the

expenses of maintaining and keeping up the same such annual sum not exceeding two guineas per house as shall be contributed by the owners or occupiers of the other houses on the south side of the said ground."

The plaintiff, who was the owner in fee simple and an occupier of a house in Stanley Gardens and the tenants of certain other houses in Stanley Gardens and Kensington Park Gardens, complained that the defendant company, which had purchased four houses in Stanley Gardens used by the company for the purpose of providing furnished residential rooms for educated women workers, were allowing the use of the ornamental garden by the women workers who were members of the club managed by the defendant company, and sought an injunction. A consent order was made in the action for the following questions to be set down as points of law, viz., (i) whether by virtue of the indenture of June 25, 1852, and of the fact that the payment of two guineas per house had been claimed by the committee of management of the garden against, and had been paid by, the company in respect of each of the houses held by the company for the use and enjoyment of the garden, the resident members of the club were entitled as of right during their resident membership to enter into and use the garden; or (ii) whether the defendant company by virtue of the same indenture and fact were entitled to authorise or allow entry and user by resident members; and (iii) whether the defendant company, by virtue as above, were entitled to authorise or allow non-resident members of the club to enter and use the garden. The freehold owner of the garden was not a party to the action, and it was not in the interests of the plaintiffs or the defendant company to contend that the deed of 1852 created no legal rights enforceable by the existing householders in respect of the garden. But it seems to me almost certain that BUCKLEY, J., would have refused to decide the questions depending on the construction of the deed if he had thought that no valid legal rights which could be attached to the ownership of the houses were created by the deed of 1852. In fact, BUCKLEY, J., dealt with the matter, and decided that the members of the club, whether resident or not, were not "lessees" or "sub-lessees" or "tenants" or "families" or "friends" of the defendant company within the meaning of the deed, and were not entitled to the use of the garden, and that the defendant company were not entitled to authorise them to use it. The circumstances of this case obviously have strong resemblance to those of the present case.

I have been referred also to a Canadian case, *Carpenter v. Smith* (14). It appears that a number of purchasers of lots near Lake Huron in Ontario had acquired their properties from a common vendor by reference to a plan on which there was shown an adjoining strip of land, sixty-six feet wide, marked "shore reserve", and beyond this a further area about two hundred feet wide, marked "sandy beach" and bounded by a wavy line called "water line". Owing to the recession of the water of the lake this area had increased to a width of 518 feet. The defendant was a purchaser of these areas from the vendor, and only one of the plaintiffs was an original grantee from the vendor. The learned judge held that the owners of the plots were entitled by virtue of an implied grant, that is, it appears, by virtue of the principle preventing a grantor of land from derogating from his grant, to a right to use the area between the "shore reserve" and the water for all purposes for which a beach was ordinarily used at a summer colony. So far as I can see, the contest in the case turned on the question whether the plaintiffs were able to make a title through an implied grant and in spite of the accretion, and it does not seem to have been considered whether the right claimed over the beach area was a right of a kind known to the law. I do not find this case, therefore, of definite assistance on the question which I am considering, though obviously rights, as wide as those at issue in the present case, were recognised as legal rights.

I was referred to *A.-G. of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.* (15) (in which the Privy Council accepted as an easement a right to place

A trade goods on land), and *Wright v. Macadam* (16) (in which the Court of Appeal held that the use by the tenant of a top floor flat of a shed in the garden for the storage of coal was a right known to the law), but these cases do not assist me much. They are, of course, examples of the principle now accepted that "it is not the law that every easement must be one hitherto recognised by law, such as light, air, or a watercourse", per GODDARD, L.J., in *Paine & Co., Ltd. v. St. Neots Gas & Coke Co.* (17) ([1938] 4 All E.R. at p. 597). The enjoyment of amenities which I am now considering is no modern novelty, as I have already pointed out. *Simpson v. Godmanchester Corpn.* (18) is nearer to the point, for in that case the rights claimed related to a grant of 1689, and upwards of two hundred years' uninterrupted enjoyment. I am bound to say that if a right to open locks on the River Ouse on the land of another is accepted by the court as a right known to the law and an easement, I find it difficult to see what are the objections to a right to use neighbouring land for the purpose of enjoying air and exercise and similar amenities. Further, it is evident that the attachment of such amenities to the ownership of a particular house may add considerably to the value and the enjoyment of the house. As regards fettering the land which is the subject of the rights, the covenants entered into by the vendors in the present case prevent them or their successors in title building on the site of the pleasure ground, and its existence as a pleasure ground in accordance with the intentions of the grantors is patent to anyone who visits the locality. I must confess that I have a leaning towards the intentions of the parties to transactions being carried out, if this is legally possible, and a dislike of seeing them defeated by the technicalities of suggested rules of law. Unless, therefore, I am compelled by the state of the authorities, I am not anxious to deprive the owners of the plots on the former White Cross Estate of the rights which the vendors' conveyances from 1855 to 1864, or thereabouts, attempted to give them.

In my view, there are authorities binding on me which lead me to the conclusion that the right to use a pleasure ground is a right known to the law and an easement. These are *Duncan v. Louch* (12) and *Keith v. Twentieth Century Club, Ltd.* (13). These cases could not have been decided as they were unless the right to use a pleasure ground had been accepted as a valid easement effective against the land in question against later owners and enforceable by successors in title to the grantees of the properties to which the enjoyment of the right was attached. Neither the obiter dicta of so eminent a Chancery judge as FARWELL, J., nor the statement by the Roman jurist PAUL, in my view, can compel me to come to a conclusion inconsistent with these cases.

Accordingly, the conveyances of parts of the White Cross Estate conferred on the purchasers and their successors in title legal and effective easements to use the pleasure ground known as Ellenborough Park in the manner in which it was intended by the conveyances to be used, subject to the obligation to pay a fair and just proportion of the costs, charges and expenses of keeping it in good order and condition. The first question raised by the summons must be answered in the affirmative, but, for the expression "the ratepayers", I will substitute "the property owners contributing to the maintenance of the pleasure ground".

[HIS LORDSHIP heard argument on the questions numbered (i) and (ii) on p. 48, ante.]

DANCKWERTS, J.: The point which I have to decide now as a result of the judgment which I have given is very difficult. The effect of my judgment is that there are on the one hand the trustees of the will of William Henry Davies, who are the owners of the site of Ellenborough Park: on the other hand there are the persons who were entitled to easements over the land in question. Those latter include the successors in title of the various purchasers of the White Cross Estate, who were the owners of the adjoining houses, or dominant tenements, during the period between 1941 and May, 1946, when the land was in the



occupation of the military authorities. They were deprived during that period of any chance to enjoy their right over the land. A

The payments which have been received in respect of the land by the trustees fall under three heads. There is, first of all, money which they received for the sale of the timber. It is conceded that the proceeds of the sale of timber belong to the trustees, and, therefore, no question arises with regard to them. Secondly, rental compensation was paid by the military authorities of £150 per annum from 1941 to 1946. The total sum received was £839 8s. 11d. There are, however, certain payments which had to be made for the purpose of receiving these rental payments and which ought to be deducted from the sum amounting to £249 15s. 1d. These reduce the sum received for rental compensation to the net sum of £589 13s. 10d. The third payment was that of £1,770 4s. 7d. for dilapidations, i.e., injury and damage to the property in question. The payments must have been made under the Compensation (Defence) Act, 1939. The rental compensation falls within s. 2 (1) which provides: B C

“The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say,—(a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the land in a state to command that rent . . . ” D E

Under s. 2 (2), the rent

“ . . . shall be considered as accruing due from day to day during the period for which the possession of the land is taken in the exercise of emergency powers, and be apportionable in respect of time accordingly, and shall be paid to the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained in the exercise of such powers . . . ” F

It seems to me the persons who were entitled to occupy the land during the period in question were the trustees. It is perfectly true that the owners of the dominant tenements, the houses round the land, had important rights over the land in question, but they were only incorporeal rights. Therefore those rights cannot, as it seems to me, amount to occupation of land. The position of occupiers must be that of the trustees. They keep the land, and, therefore, are *prima facie* entitled to payment of the rental compensation. G

I do not think, however, that that is the end of the matter because the fact that the rental compensation is paid to the occupier does not necessarily decide, as it seems to me, the ultimate position as regards persons who were interested in the land. At any rate, it appears that in relation to compensation on compulsory purchase the rights of owners of easements are recognised and such persons are entitled to compensation if their rights are taken away. I think that the position is similar for the rental compensation paid under this particular requisition. Accordingly it would appear that of the net sum of £589 13s. 10d., which represents the rental compensation, the owners of easements over the land are entitled to some portion of the sum so received. It is not for me to say how much that would be; it would be a matter for assessment by an expert, such as a surveyor. It seems to me that I shall have to direct an inquiry as to the proper amount of the net sum received which is referable to the deprivation of the owners of the dominant tenement of their enjoyment of their rights over the land, and also an inquiry who those persons during the period in question were and what are the respective amounts payable out of the compensation to such respective persons. H I

A I come, then, to the sum which has been paid in respect of damage to the land. This question depends on the construction of the terms of the deed of 1864 and on the obligation. The person entitled was to

B “pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs the pleasure ground hereinbefore referred to.”

C By implication, the owners were in effect at all times to keep this place as an ornamental pleasure ground and were under an obligation to apply the moneys which they received for the purpose of keeping up the property as a reasonable pleasure ground. It would be quite wrong for the trustees as owners of the site to apply for the purposes of the beneficiaries for whom they are trustees the moneys which have been received in respect of damage. Those moneys are properly applicable for the purpose of reinstating the property as a pleasure ground. The trustees will not be entitled to demand further contributions from the owners of the dominant tenements until the money has been exhausted in that manner.

Order accordingly.

D Solicitors: *Waterhouse & Co.*, agents for *John Hodge & Co.*, Weston-super-Mare (for the plaintiffs); *Robins, Hay & Waters*, agents for *Burges, Salmon & Co.*, Bristol (for the first defendant); *Robbins, Olivey & Lake*, agents for *Griggs & Collett*, Weston-super-Mare (for the second defendant).

E [*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

DENNIS *v.* DENNIS (SPILLETT AND OTHERS cited).

F [COURT OF APPEAL (Singleton, Hodson and Morris, L.JJ.), March 16, 17, 1955.]

Divorce—Adultery—Definition—Penetration essential—Attempt to commit adultery distinguished.

G To constitute adultery as a ground of divorce some penetration of the woman by the man must be found to have taken place; and, although the act of sexual intercourse need not have been complete, yet an attempt to commit adultery, penetration not having taken place, must be distinguished from adultery and is not of itself sufficient ground for divorce.

✓ Observations of VISCOUNT BIRKENHEAD in *Rutherford v. Richardson*. ([1923] A.C. at p. 11), and of KARMINSKI, J., in *Sapsford v. Sapsford & Furtado* ([1954] 2 All E.R. at p. 374) considered.

H Per SINGLETON, L.J.: there is no distinction to be drawn between the words “sexual intercourse” in the definition of adultery [in *RAYDEN ON DIVORCE* (6th Edn.) at p. 611] and “carnal knowledge” in the criminal law (see p. 55, letter C, post).

Appeal dismissed.

I [Editorial Note. Evidence of penetration is essential for the proof of carnal knowledge for the purposes of the criminal law; see 9 HALSBURY'S LAWS (2nd Edn.) 476, para. 816, and for cases on the subject, see 9 DIGEST 843, 9264 (cases of rape). The statutory definition of carnal knowledge, by which proof of penetration is essential, is in s. 63 of the Offences against the Person Act, 1861; 5 HALSBURY'S STATUTES (2nd Edn.) 813.

As to adultery by partial sexual intercourse, see 10 HALSBURY'S LAWS (2nd Edn.) 660, para. 972, note (x); and for cases on the subject, see 27 DIGEST (Repl.) 314, 2626, 2627.]

Cases referred to:

- (1) *Rutherford v. Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 27 Digest (Repl.) 592, 5536.
- (2) *Sapsford v. Sapsford & Furtado*, [1954] 2 All E.R. 373; [1954] P. 394.
- (3) *Thompson (otherwise Hulton) v. Thompson*, [1938] 2 All E.R. 727; [1938] P. 162; *affd.* C.A., [1938] 4 All E.R. 1; [1939] P. 1; 107 L.J.P. 150; 159 L.T. 467; 27 Digest (Repl.) 464, 4001.
- (4) *Jolly v. Jolly & Fryer*, (1919), 63 Sol. Jo. 777; 27 Digest (Repl.) 314, 2626.

Appeal.

The wife petitioned for divorce on the ground of the husband's cruelty and prayed for the exercise of the court's discretion in her favour. By his answer the husband denied the allegations of cruelty and cross-prayed for a decree on the ground that the wife had committed acts of adultery with the three parties cited and that the adultery had been revived by the wife's desertion. On Oct. 20, 1954, Mr. Commissioner EDGEDALE, Q.C., granted a decree in the wife's favour and rejected the cross-prayer on the ground that the wife had just cause for leaving the matrimonial home and that no adultery had been proved. The husband appealed on the ground, among other grounds, that the facts as found in relation to the alleged adultery with the first party cited did in fact constitute adultery, and this report deals only with this question.

J. Lloyd-Eley and William Denny for the husband.

S. Seuffert and M. A. Gregory for the wife.

B. L. A. O'Malley for the first party cited.

SINGLETON, L.J.: In para. 6 of his answer the husband pleaded that in or about the autumn of 1941, the wife frequently committed adultery with one C. E. Spillett, the first party cited, and cross-prayed that the marriage be dissolved on the ground of that adultery as well as on other grounds.

It is not necessary for this purpose that I should go into the history of the marriage except to say that the wife and the husband were married on Feb. 19, 1938. The evidence in support of the husband's charge of adultery against the wife was summarised by Mr. Commissioner EDGEDALE, Q.C., in his judgment. He said that the husband told him that early in the year 1941 he had become a little troubled about the wife; she was restless at night; she did not speak about it, but she was strange, and she said to him on one occasion about that time: "I know Mr. Spillett", and she spoke about her relations with him early in the year 1941, and she acted in a strange manner. The judgment continues:

"He asked her what was the matter and there was no definite answer, but she burst into tears and this led to a confession. She said 'I am very fond of Mr. Spillett', or 'I love him very much.' She said she had been going with him to shelters, and for walks during the lunch times. She said vaguely what he did when he came to this flat, and said nothing about love beyond the statement about being very much in love with him. It is not certain that he offered her his hand, but he talked about transferring his insurance policies. She said 'You have been awfully decent and I do not wish to hurt you but I do love this man.' She said she felt rotten about transferring her affection to another man. 'I asked her if he was married; she said he was and he had a family. I asked where he lived and she told me she was not quite sure where it was.' He said he did not ask her outright how far matters had matured, but he did ask her if she had made love to him and there was no emphatic Yes or No except that she liked the man."

The husband in his evidence said that at that time she would not have sexual intercourse with him, the husband. Thus the case of the husband, in so far as adultery is concerned, rested on the confession made to him by his wife, and the

A commissioner said that the husband told him that infidelity was implied in the statement she made. She did not say: "I have committed adultery", or, "I have committed misconduct with Mr. Spillett," but she said that she loved him, and from that, according to the husband, an implication that adultery had been committed arose. The wife in her evidence had said she had made a confession to her husband, but she said she had not said that she had committed adultery.

B The husband and the wife lived together until February, 1953, and though the adultery alleged, if it took place, had been condoned, it is said it had been revived by other matrimonial offences, which it is unnecessary to investigate. The question is: Was adultery on the part of the wife proved? No doubt the wife thought at one time that what had taken place between her and Mr. Spillett amounted to adultery, for she asked for the discretion of the court and put in a

C discretion statement in which she described how she met Mr. Spillett; they became friendly, and on one occasion committed adultery together at her flat. She said in the discretion statement that she was very ashamed of what she had done; she had confessed to the husband, who promised to forgive her on condition that she never saw the man again. The husband's evidence shows that after the confession she made to him they were reconciled and they lived happily

D together for some years. The wife appears to have been of the opinion that she had committed adultery. A different position arose when her evidence was given. She said she was attracted by Mr. Spillett and that she was ready and willing to commit adultery with him; that on the only occasion they attempted it he was unable to do that which was his intention. She described her fondness for Mr. Spillett, and she said that he had visited her flat several times, and on

E the important day she went to the bedroom, took off most of her clothing, and Mr. Spillett after a little time followed her to the bedroom, and he took off part of his clothing, and having put on his person a sheath he got on to the bed on which she was lying. He tried to have sexual intercourse with her, but he was unable to effect his purpose. That was her evidence.

Mr. Spillett stated: "I am a nervous, rather self-conscious sort of person.

F Before I had finished removing my clothes I was highly excited and agitated, and found myself entirely incapable of any sexual act." [His LORDSHIP read a further extract from the evidence of Mr. Spillett and continued:] The commissioner, speaking of Mr. Spillett and of his evidence, said:

"On the other hand, I have to confess that when Spillett was in the witness-box he gave me a complete conviction that he was telling the truth."

G The commissioner preferred the evidence of the wife to the evidence of the husband. He believed the wife and not the husband on other matters. The commissioner then said:

"Having regard to what I have already said, it is clear, and I find as a fact, that there was no penetration . . . I find that there was no adultery between

H Spillett and the wife."

Though the wife had asked for the discretion of the court and had put in a discretion statement, on the whole of the evidence the commissioner was satisfied that there had not been the act of sexual intercourse between her and Mr. Spillett, as that expression is normally understood. The husband appeals to this court on this question as well as on other matters which must be dealt with separately, and counsel on his behalf asks us to say that on the evidence of the wife and of Mr. Spillett, and on the findings of the commissioner, adultery was committed, and that the husband ought to be granted a decree on that ground. His submission was that if two people, man and woman, behave as the wife and Mr. Spillett behaved together in her flat on the day I have mentioned, adultery is committed.

I It appears to me that there is a danger of confusing adultery with an attempt to commit adultery. It has never been said that an attempt to commit adultery

gives the right to one party to a marriage to a decree of dissolution. Counsel placed reliance on a passage in the speech of VISCOUNT BIRKENHEAD in *Rutherford v. Richardson* (1). That was a case in which the husband was at the time of the petition in a criminal lunatic asylum. The wife alleged adultery with her companion, Miss Richardson. According to the report ([1923] A.C. 2):

"It was admitted that [the respondent husband] entered Miss Richardson's bedroom between 10 and 11 o'clock on the night in question after Miss Richardson was in bed with the intention of committing adultery with her, and that they had a conversation, but Miss Richardson stated in evidence that she indignantly repelled his overtures and gave him a cousinly scolding; that she told him to go away, which he did; and that he was in her room for a few minutes only."

Miss Richardson was in fact *virgo intacta*. A decree on the ground of adultery had been granted by BRANSON, J. The Court of Appeal set aside that decree, and the House of Lords agreed with the judgment of the Court of Appeal. I have stated some part of the facts for the purpose of showing how far removed they are from the present case. In the passage on which reliance is placed VISCOUNT BIRKENHEAD said ([1923] A.C. at p. 11):

"There remains the medical evidence. In the course of the trial, Miss Richardson, although she had refused to be examined beforehand, submitted herself for examination to a medical man employed by her. The Court of Appeal rested mainly upon that evidence to reach the conclusion that the decree should be set aside. I assign less importance to it, and regard it only as affording further corroboration of the other considerations in favour of the intervener. The evidence of the doctor was cautious and guarded. It seems, however, to establish that there had been no penetration and, in the doctor's opinion, that the appearance of the organs was such as he did not think was consistent with an effective attempt at penetration. Some suggestion was made in argument in this House that this condition, even though inconsistent with penetration, was not inconsistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the ecclesiastical courts, a decree based upon adultery might issue. But it is not open now to the petitioner to rely on some lesser sexual act. No evidence was adduced in support of such a suggestion. It was not made to the intervener or to the doctor, and I do not think that counsel at the bar of this House put it forward very seriously."

The submission which is made is that, in the words of VISCOUNT BIRKENHEAD which I have read, a decree of dissolution may be granted for some lesser act of sexual gratification than the act of adultery or sexual intercourse, as those expressions are normally understood. That is why I said there is a danger of confusing an attempt with the act itself. I recognise that the reference to "some lesser act of sexual gratification" gives rise to a certain amount of difficulty. I believe that the proper view of those words is to be found in a passage in the judgment of KARMINSKI, J., in *Sapsford v. Sapsford & Furtado* (2). The judge having set out the passage ([1923] A.C. at p. 11) from the speech of LORD BIRKENHEAD which I have just read, said ([1954] 2 All E.R. at p. 374):

"If I understand those words, LORD BIRKENHEAD had in mind what had occurred in that particular case where there had been, at any rate, an attempt at sexual intercourse—that is, by the introduction of the male organ into the female—but for one reason or another the attempt had not fully succeeded."

KARMINSKI, J., then proceeded to consider the judgment of LANGTON, J., in *Thompson (otherwise Hulton) v. Thompson* (3).

A Adultery cannot be proved unless there be some penetration. It is not necessary that the complete act of sexual intercourse should take place. If there is penetration by the man of the woman, adultery may be found, but if there is no more than an attempt, I do not think that a finding of adultery would be right. In some of the recent editions of *RAYDEN ON DIVORCE* there has been a definition of adultery. In the current edition there appears this

B passage (6th Edn. at p. 111):

“For purposes of relief in the Divorce Division, adultery may be defined as consensual sexual intercourse between a married person and a person of the opposite sex during the subsistence of the marriage.”

C In an earlier edition the passage (5th Edn. at p. 89) was in the same form except that the word “voluntary” has been replaced in the current edition by “consensual”. The evidence in the present case shows that both parties were ready and willing to have sexual intercourse the one with the other. On the commissioner’s findings of fact there was no such sexual intercourse; there was no penetration. In my view there is no distinction to be drawn between the words “sexual intercourse” in the definition of “adultery” which I have read, and

D “carnal knowledge” in the criminal law. In regard to offences charged under the Criminal Law Amendment Act, 1885, s. 3 and s. 5*, or on a charge of rape,† it must be shown that there is some penetration.‡ In matrimonial suits it is not often possible to give direct evidence of sexual intercourse. The practice is stated by the late MR. WILLIAM RAYDEN in the first edition of his book (at p. 63) published in 1910:

E “It will not be out of place here to consider the nature of the proofs which will satisfy the court that adultery has been committed: to succeed on such an issue it is not necessary to prove the direct fact, or even a fact of adultery in time and place; for if it were, in very few cases would that proof be attainable; it is rarely indeed that parties are surprised in the direct act of

F adultery; and such evidence is apt to be disbelieved: in nearly every case the fact is inferred from circumstances, which lead to it, by a fair inference, as a necessary conclusion; and, unless this were so held, no protection whatever could be given to marital rights.”

G If a man and a woman who are attached to each other, as Mr. Spillett and the wife were, go to her bedroom and take off the greater part of their clothing and lie on the bed together, there will arise in most cases a presumption of adultery, which may be extraordinarily difficult to rebut. If people do that sort of thing others may think that the purpose with which they do it is because they wish to commit adultery together, as indeed the persons in this case did. The inference of adultery is capable of being rebutted, and on the findings of the commissioner

H in the present case it was rebutted, for he has found that at the time at which the two were together on the bed the man was impotent in regard to that woman at least. He was unable to get an erection, and he was, consequently, unable to penetrate the woman to any degree. That was the finding of the commissioner, and I am satisfied that, on that finding of fact, he took the only course which he was entitled to take. He declined to find that adultery was proved.

I For these reasons it appears to me that the appeal on this part of the case must be dismissed. I wish to add this, that I have sought to confine what I have said to the facts of the present case. This appeal should be dismissed.

* See 5 HALSBURY’S STATUTES (2nd Edn.) 907, 908.

† See Offences against the Person Act, 1861, s. 48; 5 HALSBURY’S STATUTES (2nd Edn.) 806.

‡ See s. 63 of the Act of 1861, and *R. v. Nicholls* (1847) (2 Cox C.C. 182); 14 DIGEST 107, 780; and see *R. v. Marsden* ([1891] 2 Q.B. 149); 15 DIGEST 847, 9315.

HODSON, L.J.: I agree. On the facts in the present case the learned commissioner found that the wife and Mr. Spillett had the intention of committing adultery, and that their behaviour together was grossly indecent, but that no adultery took place for the reason that the man was incapable of the act. He formed the conclusion that there was no penetration of the woman by the man, and in those circumstances that there was no adultery. I agree with that conclusion and the basis on which it stands. A

It is obvious that adultery, being a secret matter, as a rule has to be inferred from evidence of inclination and opportunity, and if evidence is given of a guilty intention and of acts of gross indecency, adultery itself may readily be inferred. It does not follow from that, however, that the acts of gross indecency themselves are acts of adultery. I think that really is where the argument for the husband leads. Counsel for the husband has put forward an argument based on a dictum of **VISCOUNT BIRKENHEAD** in *Rutherford v. Richardson* (1). That was a case where the woman against whom the charge of adultery was made was apparently a virgin, and **LORD BIRKENHEAD** said ([1923] A.C. at p. 11): B C

"The evidence of the doctor was cautious and guarded. It seems, however, to establish that there had been no penetration and, in the doctor's opinion, that the appearance of the organs was such as he did not think was consistent with an effective attempt at penetration. Some suggestion was made in argument in this House that this condition, even though inconsistent with penetration, was not inconsistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the ecclesiastical courts, a decree based upon adultery might issue." D E

VISCOUNT BIRKENHEAD went on to say that no evidence had been adduced in support of any suggestion of a lesser sexual act in that case. It is clear that the question of anything short of some penetration was never the subject-matter of any evidence in that case, but I think it is fair to counsel to say that the language of **LORD BIRKENHEAD** is, on the face of it, wide enough to cover the present case, and although it may be limited in the way in which **KARMINSKI, J.**, limited it in *Sapsford v. Sapsford & Furtado* (2), that is to say, limited to the consideration of a partial penetration, I think it must be conceded that the actual words of **LORD BIRKENHEAD** are capable of a wider interpretation and go beyond cases of partial penetration. F

I think it might be well to add that it has been long accepted, as **LANGTON, J.**, said in *Thompson (otherwise Hulton) v. Thompson* (3) ([1938] 2 All E.R. at p. 731) that: G

"... no one nowadays contends that the fact that a woman accused of adultery is found to be *virgo intacta* is inconsistent with partial intercourse sufficient to sustain the charge of adultery. The finding of **HILL, J.**, in *Jolly v. Jolly & Fryer* (4) is an instance in point, and shows that this most careful and discriminating judge was ready to find what he has so properly described a 'very heavy burden' discharged where the circumstances disclosed by the evidence warranted such a conclusion." H

The fact that in cases where the woman is apparently a virgin the argument is put in that way, seems to me to support the view that there must at least be partial penetration for the act of adultery to be proved, for one is considering in these courts of necessity physical matters which must be capable of some sort of precise understanding. A man may commit adultery in his heart, but the courts are dealing with the physical act which has to be proved in order that a divorce may be obtained, and I think that all the authorities, including the writers on canon law and ecclesiastical law, when they speak of adultery are speaking of the physical act, understood as carrying with it a conception of natural I

A copulation between the sexes. I think the word has not been extended to include such a form of what may be described as lesser sexual gratification, as counsel for the husband contends in the present case. The words used by LORD BIRKENHEAD ([1923] A.C. at p. 11) are not precise. Counsel for the husband faced the difficulty by seeking to put forward as a test of what is and what is not adultery the possibility of insemination and consequently of spurious issue. He said there must be the possibility of insemination of the female by the male, coupled with some physical contact between the two persons concerned, and that test, he said, is satisfied in the present case. Putting it in another way, he said any attempt at penetration involving the woman's voluntary surrender of her organs of generation to the man would suffice.

C I am unable to accept that contention. It seems to me to go beyond the limits of what can be regarded as adultery, and for my part I can find no other sure ground on which to base my decision in the present case than that which was adopted by the commissioner and by SINGLETON, L.J., namely, the test of penetration—penetration not necessarily complete, but some penetration in order that the physical fact of adultery may be proved either directly or by inference. I agree, therefore, that the appeal on this part of the case fails.

D MORRIS, L.J.: I also agree. The evidence which may be called in proof of an allegation of adultery may be such that the reasonable and natural inference to be drawn from certain proved circumstances is that penetration took place. On the very special and most unusual facts of the present case, the conclusion was reached that there was no penetration at all. There was, therefore, no sexual intercourse, and, therefore, no adultery. The two persons concerned had the desire to commit adultery and went very far indeed in their attempt to effect their purpose, but in fact they did not effect it. I read the words of VISCOUNT BIRKENHEAD in *Rutherford v. Richardson* (1) ([1923] A.C. at p. 11) as they were understood by KARMINSKI, J., in *Sapsford v. Sapsford & Furtado* (2) ([1954] 2 All E.R. at p. 374).

F Appeal dismissed.

Solicitors: *Hy. S. L. Polak & Co.* (for the husband); *Walmsley & Stansbury* (for the wife); *George R. Reid* (for the first party cited).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re DEFIANT CYCLE CO., LTD.

[CHANCERY DIVISION (Vaisey, J.), March 8, 9, 28, 1955.]

Costs—Taxation—Company—Compulsory winding-up—Costs incurred by company's solicitor before winding-up—Taxation by Companies Winding-up Department or by Supreme Court Taxing Office.

On an application by the liquidator in the compulsory winding-up of a company, the court made an order directing a solicitor, who had acted for the company in certain court proceedings before the company went into liquidation, to deliver a bill of costs and a cash account, and for the costs to be taxed. On the question whether the taxation should take place in the Companies Winding-up Department or as an ordinary taxation in the Central Office of the Supreme Court,

Held: as the registrars attached to the companies court were "taxing officers" within the meaning of R.S.C., Ord. 71, r. 1, the court had jurisdiction to direct the taxation to be carried out either in the Companies Winding-up Department or by a taxing master of the Supreme Court, the matter being in the discretion of the court; in the present case, and in normal circumstances, the taxation should be referred to the Supreme Court Taxing Office.

[As to the Jurisdiction of the Court to Order Taxation of Costs, see 31 HALSBURY'S LAWS (2nd Edn.) 182-189, paras. 214-216; and for cases on the subject, see 42 DIGEST 159-163, 1596-1646.]

Cases referred to:

- (1) *Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822; [1953] 1 Q.B. 543; 3rd Digest Supp.
- (2) *Storer & Co. v. Johnson*, (1890), 15 App. Cas. 203; 60 L.J.Ch. 31; 62 L.T. 710; 42 Digest 160, 1609.
- (3) *Re Park*, (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; 42 Digest 159, 1596.
- (4) *Re Palace Restaurants, Ltd.*, [1914] 1 Ch. 492; 83 L.J.Ch. 427; 110 L.T. 534; 10 Digest 815, 5309.

Summons in company winding-up.

The Official Receiver, as liquidator in the winding-up of the company, applied for an order that the respondent deliver a bill of costs relating to certain court proceedings, in which the respondent acted on behalf of the company, and a cash account of all moneys received from the company, and that the bill of costs be taxed.

The summons was argued in chambers, but the judgment was delivered in open court.

K. W. Mackinnon for the applicant, the liquidator.

A. F. M. Berkeley for the respondent.

Cur. adv. vult.

Mar. 28. VAISEY, J., read the following judgment: This company was ordered to be wound up by the court on July 27, 1953, on the petition of a creditor. The value of the assets is said to be not more than £169, while the gross liabilities are said to amount to some £13,554, which sum includes £805 due to a preferential creditor. The Official Receiver, as liquidator of the company, has learnt that a short time before the winding-up the company had successfully appealed against a conviction by the Tottenham justices in certain proceedings instituted against the company by the Ministry of Supply, and he was informed by a letter dated July 31, 1953, that Mr. Lucien Fior, trading as Messrs. Fior, had acted as solicitor for the company in those proceedings and that the question of the party and party costs of the successful appeal remained outstanding. The liquidator wrote to Mr. Fior on Aug. 10, 1953, asking him to refund any

A balance in his hands after taxation of his costs. The present summons was issued in the companies court on Nov. 11, 1954; it is entitled "In the matter of [the company], In the matter of the Companies Act, 1948, and In the matter of the Solicitors Act, 1932." It asks that Mr. Fior be ordered to deliver a bill of costs, and a cash account, and it asks that such costs be taxed.

B It would appear from the records of the company that moneys to the total of £600 had been paid to Mr. Fior either on account of costs or otherwise, and it would further appear that those moneys were paid solely on account of the conviction and appeal above mentioned. I will refer to these proceedings as the "police court proceedings". Mr. Fior has never rendered any bill of costs to the company or the liquidator in connection with the police court proceedings, and by a letter dated June 2, 1954, Mr. Fior stated that the sum of £103 14s. 6d. C had been recovered in respect of the party and party costs allowed in connection with the appeal. Mr. Fior has never accounted for any of these moneys. In his letter dated Jan. 4, 1954, Mr. Fior had claimed to be entitled to set off against the company's moneys held by him or his firm certain costs in connection with an action entitled *Nicolene, Ltd. v. Simmonds* (1). Mr. Simmonds, the defendant D to that action, was one of the directors of the company, but the company was not a party to the action. The case concerned a contract for the sale and purchase of three thousand tons of steel reinforcing bars. It seems unlikely that this company, with a paid-up capital of only £100, and whose principal or only activity appears to have been the manufacture of children's toys, should have had anything to do with the *Nicolene* case (1). However, it seems to be suggested E either that it was concerned in that action, or that the £600 received from its coffers by Mr. Fior (£450 by cheques and £150 in cash) was applied for its benefit in some manner (quite unexplained) in connection with the *Nicolene* case (1). The evidence on the matter is practically non-existent. There is no record of the company, such as a minute, authorising the use of the company's money to finance either party in the said action. I do not know when or how Mr. Fior was retained to act for the company, or in respect of what matters he was so retained. F The liquidator asks that Mr. Fior should be ordered to render a proper bill and provide a proper cash account relating to the matters referred to above or any other matters, and that the bill should be taxed, and that Mr. Fior should repay to the company any balance of the moneys remaining in his hands.

Mr. Fior has deposed that he first commenced to act for the company in 1951, and that he acted on behalf of Mr. Simmonds, the defendant in the *Nicolene* G case (1), in connection with the proceedings brought against him by *Nicolene, Ltd.* He says that he did this on the company's instructions, but there seems to be no record as to why and how and when and by whom those instructions were given. The action was brought for damages for breach of a contract in respect of which the defendant was deemed to be personally liable, but whether and, if so, to what extent, he was acting on behalf of the company and has any right to H indemnity from the company seems to be wholly unknown.

As regards the police court proceedings, Mr. Fior deposes that at the end of May, 1952, he was instructed to act on behalf of the company and its two directors, namely, Mr. Simmonds and Mr. MacNay, in respect of forty-three summonses issued at Tottenham Police Court on the instructions of the Ministry of Supply. There were also three other summonses issued against the company and Mr. I MacNay in respect of other matters connected therewith. In October, 1952, the police court proceedings were disposed of. Some of them were dismissed. The matter is somewhat confused but it seems to me indisputable that Mr. Fior has had £600 of the company's money for which he is bound to account to the liquidator, subject only to his right to retain what is owed to him for costs in respect of the police court proceedings. As regards the *Nicolene* case (1), it seems to me that this was an action against Mr. Simmonds alone, and that the company is not concerned with it at all. Of the £600 above referred to, £450 was

paid to Mr. Fior by cheques drawn on the company's banking account. In the absence of evidence which, so far as I can see, is non-existent, I should assume that these moneys were moneys of the company placed in the hands of Mr. Fior, and held by him to the company's order. The remaining £150 was paid in cash drawn from the company's banking account either by Mr. Simmonds or Mr. MacNay, and I cannot tell what the actual source of that money was, nor for what purpose it was paid, except that Mr. Fior alleges (as I understand) that it was paid on account of the costs, not only of the police court proceedings, but of the *Nicolene* case (1).

The summons is, as I have said, entitled "In the matter of the Solicitors Act, 1932", and I think that I have full jurisdiction sitting in the companies court to make the order asked for in the terms in which I propose to make it: see *Storer & Co. v. Johnson* (2), and *Re Park* (3). This court is, unquestionably, a branch, department, or division of the High Court, and the only uncertain question is the purely procedural one whether the taxation should take place in the Companies Winding-up Department or in the Central Office of the Supreme Court, that is, as an ordinary taxation. On this point the authorities (*Storer & Co. v. Johnson* (2), *Re Park* (3), and *Re Palace Restaurants, Ltd.* (4)), afford no clear guidance, and the text-books such as PALMER'S COMPANY PRECEDENTS (16th Edn.), Part II, p. 311, STIEBEL'S COMPANY LAW (3rd Edn.), vol. 2, p. 1097, the ANNUAL PRACTICE, 1955, p. 1109, BUCKLEY ON THE COMPANIES ACTS (12th Edn.), pp. 515, 539, GORE-BROWNE ON JOINT STOCK COMPANIES (41st Edn.), pp. 679, 743, and CORDERY ON SOLICITORS (4th Edn.), p. 391, are not, and could not be expected to be, any more helpful than the authorities. The registrars attached to the companies court are well used to taxing bills of costs and are "taxing officers" within the meaning of R.S.C., Ord. 71, r. 1. My own view is that I have jurisdiction to direct the taxation in such a case as the present to be carried out either in the Companies Winding-up Department or by a taxing master of the Supreme Court, at my discretion. I can imagine cases in which the choice should fall on the first alternative. Here, I think that the reference should be to the Supreme Court Taxing Office, and this is probably the course which ought generally and in normal circumstances to be followed. I, therefore, order as follows: (i) that Mr. Lucien Fior practising as Messrs. Fior do as solicitor to the company within twenty-one days from the date of this order deliver to the Official Receiver as liquidator of the company or to his solicitors his bill of costs as such solicitor in connection with certain proceedings instituted against the company by the Ministry of Supply; (ii) that Mr. Lucien Fior do also within the said period deliver to the said Official Receiver as such liquidator a cash account of all moneys received from the company whether on account of the said proceedings or on any other account; (iii) that it be referred to a taxing master of the Supreme Court to tax the said costs. The liquidator will have to consider very carefully the question how far the costs included in the bill are properly the costs of the company or costs for which the company is responsible and not merely costs of Mr. Simmonds or Mr. MacNay. On the evidence as it stands, it seems to me to be just as likely that Mr. Simmonds and Mr. MacNay were liable to indemnify the company in respect of costs as that the company was liable to indemnify them: and the order which I am now making should be a first step to illuminating an obscure situation. I will order Mr. Fior to pay the Official Receiver's costs of the present summons.

Order accordingly.

Solicitors: *Stafford Clark & Co.* (for the applicant); *Lucien Fior* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

CARR v. CARR. SAME v. SAME.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), February 21, 22, 23, 1955.]

Divorce—Foreign decree—Decree granted to wife in Northern Ireland on ground of husband's desertion—Acquisition by husband of another domicile after date of desertion—Recognition of decree by English court—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 Geo. 6 c. 13) (N.I.), s. 26—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 18 (1), (6).

The parties were born and had domicils of origin in Northern Ireland. They were married in June, 1939. The husband deserted the wife in March, 1943. In 1945 the husband met another woman and had since lived with her as man and wife in England. In December, 1948, the wife presented a petition in Northern Ireland for divorce on the ground of the husband's desertion. On Jan. 15, 1949, the husband signed an acknowledgment of service. On Sept. 7, 1953, the husband presented in England a petition for divorce on the ground of the wife's desertion. On Feb. 18, 1954, the court in Northern Ireland granted a decree in the wife's favour, the court holding that it had jurisdiction by reason of the fact that the husband was domiciled in Northern Ireland immediately prior to the husband's desertion of her. By her answer to the husband's petition in England, the wife pleaded the decree in Northern Ireland, and alternatively cross-prayed for a decree on the ground of the husband's desertion. On Nov. 5, 1954, the wife's decree in Northern Ireland was made absolute. In January, 1955, the wife presented a petition in England for a declaration that the marriage had been validly dissolved. The suits were consolidated.

Held: as the Matrimonial Causes Act (Northern Ireland), 1939, s. 26, was in similar terms to the English Matrimonial Causes Act, 1937, s. 13, which had been re-enacted in the Matrimonial Causes Act, 1950, s. 18 (1) (b), the court in Northern Ireland had exercised a jurisdiction which in corresponding circumstances the English courts claimed to exercise; and since the husband had not lost his domicile of origin in Northern Ireland at the date when he deserted the wife, the decree obtained by her in Northern Ireland would be recognised as valid in England; accordingly, the husband's petition would be dismissed, and the wife would be entitled to the declaration which she sought.

Travers v. Holley & Holley ([1953] 2 All E.R. 794) applied.

[Editorial Note. In the present case a principle of the decision in *Travers v. Holley & Holley* ([1953] 2 All E.R. 794, see at p. 797 per SOMERVELL, L.J.) that the English courts should recognise foreign decrees made in exercise of a jurisdiction which the courts of this country themselves claim, is applied for the first time on a petition for a declaration that a foreign decree was valid.

As to the Recognition of Foreign Decrees where Reciprocity exists between England and the foreign country, see 7 HALSBURY'S LAWS (3rd Edn.) 113, note (u); and for cases on the subject, see 3rd DIGEST Supp.

For the Matrimonial Causes Act, 1950, s. 18 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 405.

For the Matrimonial Causes Act, 1937, s. 13, see 11 HALSBURY'S STATUTES (2nd Edn.) 843.]

Cases referred to:

- (1) *Har-Shefi v. Har-Shefi*, [1953] 1 All E.R. 783; [1953] P. 161; 3rd Digest Supp.
- (2) *Travers v. Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.

- (3) *Bell v. Kennedy*, (1868), L.R. 1 Sc. & Div. 307; 11 Digest (Repl.) 329, 39. A
 (4) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest (Repl.) 329, 41.

Petition for divorce.

The parties were born in Northern Ireland, where their parents had at all times continued to live. In March, 1936, the husband joined the Royal Navy. In about March, 1939, the husband left the Navy and became a naval tailor in Portsmouth dockyard. The husband wrote and made a proposal of marriage to the wife. She accepted. The husband thereupon rented a house which he furnished at Gosport. In June, 1939, they were married at Gosport. In April, 1940, the husband re-joined the Navy and the wife who was then pregnant returned to her parents in Northern Ireland. In October, 1940, the husband went into hospital, and at about this time their home at Gosport was bombed. In September, 1940, the first child was born. In February, 1941, the husband was discharged from hospital, and also from the Navy on medical grounds. The husband returned to Northern Ireland and stayed with his wife at her parents' home. After a time the husband rented a house in Northern Ireland which he proceeded to furnish and where the parties then lived. In September, 1941, the husband was sent to work in a munitions factory at Preston, England. The wife stayed in Northern Ireland and in November, 1941, she went back to live with her mother. In December, 1941, the second child was born. According to the husband's evidence, he stayed in Preston until October, 1942 and never returned to Northern Ireland; but according to the wife's evidence, he returned for a fortnight's holiday in March, 1942; and in May, 1942, when his employment at the factory ceased, he returned to live with her in Northern Ireland. In October, 1942, he went to Portsmouth, and thence to Devonport on a government training scheme for six months. In March, 1943, the husband consulted solicitors who wrote to the wife with a view to a separation between the parties. In 1945 the husband met the woman named in his discretion statement, and they had since lived together as man and wife. On Sept. 14, 1945, the husband was transferred to Portsmouth dockyard. In December, 1948, the wife presented in the High Court of Justice in Northern Ireland a petition, dated Dec. 15, 1948, for divorce on the ground of the husband's desertion, alleging that the parties were domiciled in Northern Ireland. On Jan. 15, 1949, the husband signed an acknowledgment of service. On Sept. 7, 1953, the husband presented in England a petition for divorce on the ground of the wife's desertion, alleging that the parties were domiciled in England, and praying for the exercise of the court's discretion in his favour. On Nov. 26, 1953, the husband was served with notice of the wife's intention to proceed with her petition in Northern Ireland. On Jan. 26, 1954, the husband's solicitors wrote to the registrar in Northern Ireland, saying: "We are informed by our client that he has since 1941 a settled intention of residing permanently in England". On Jan. 29, 1954, the wife's suit in Northern Ireland was heard undefended, and on Feb. 18, 1954, she was granted a decree nisi, the court holding that immediately before the desertion the parties were domiciled in Northern Ireland and that, accordingly, the court had jurisdiction under the Matrimonial Causes Act (Northern Ireland), 1939, s. 26. By her answer to the husband's petition in England the wife denied that the parties were domiciled in England, and pleaded that by reason of the decree nisi in Northern Ireland the allegation of desertion was *res judicata* and that the husband was estopped from making the allegations in the petition; alternatively, she cross-prayed for a decree of divorce on the ground of the husband's desertion. On Nov. 5, 1954, the wife's decree in Northern Ireland was made absolute. On Jan. 15, 1955, the wife presented a petition for a declaration that the marriage had been validly dissolved on Nov. 5, 1954, and that she was no longer married to the husband. By his answer the husband denied the allegations in the petition, and contended that he had acquired a domicile of choice in England

A when he joined the Royal Navy in 1936, and that the marriage had not been validly dissolved. On Feb. 10, 1955, the two suits were consolidated.

J. Stirling for the husband.

J. C. Mortimer and *Miss Elaine Jones* for the wife.

B **BARNARD, J. :** In the present case the husband is seeking a divorce from the wife on the ground of her alleged desertion, and asks the court to exercise its discretion in his favour. The wife has put in an answer in which she denies the English domicile alleged by her husband and denies the desertion. Further she relies on a decree nisi of divorce which she obtained on Feb. 18, 1954, from the High Court of Justice in Northern Ireland and which was made absolute on Nov. 5, 1954. In the alternative, if the decree of the court of
C Northern Ireland is not considered valid, then she cross-charges the husband with desertion and asks for a decree of divorce in this country. She has also filed, as she is entitled to do according to the recent decision of the Court of Appeal in *Har-Shefi v. Har-Shefi* (1), a petition seeking a declaration that her decree in Northern Ireland is valid.

D It is clear from the pleadings that various issues are raised between the parties but that of domicile, which lies at the threshold of the dispute, must be considered first. The Matrimonial Causes Act (Northern Ireland), 1939, s. 26, reads as follows:

E “Where a wife has been deserted by her husband . . . and the husband was immediately before the desertion . . . domiciled in Northern Ireland, the court shall have jurisdiction for the purpose of any proceedings taken by the wife in a matrimonial cause or matter, notwithstanding that the husband has changed his domicile since the desertion . . .”

F There was a similar provision in s. 13 of our Matrimonial Causes Act, 1937, which has been re-embodied in the Matrimonial Causes Act, 1950, s. 18 (1) (b), and although it was always considered by the courts of this country that we would only respect a decree which was granted in a foreign court where the parties were domiciled in the country of that court at the institution of the proceedings, it is now quite clear, and only seems to me to be common sense, that, by the decision of the Court of Appeal in the case of *Travers v. Holley & Holley* (2), this country will respect a foreign decree based on provisions similar to the section which I have just read by reason of the fact that we ourselves will grant a decree in those circumstances.

G There is no dispute in the present case that the husband's domicile of origin was in Northern Ireland. It is equally clear that the husband is alleging a change of domicile and, therefore, the burden of proof in satisfying this court that he has changed his domicile is on him. I do not think I can do better than refer to a few very short passages from the judgment of JENKINS, L.J., in the Court of Appeal in *Travers v. Holley & Holley* (2). JENKINS, L.J., says this ([1953] 2 All E.R. at p. 797):

H “ . . . it was, further, not in dispute that the onus of proving the abandonment of a domicile of origin in favour of a domicile of choice was on the person alleging the change of domicile, and that to discharge that onus it must be clearly shown that the individual whose domicile was in question removed from the country in which he had his domicile of origin to the country alleged to have become his chosen place of domicile with a definite and fixed intention (what LORD WESTBURY called ‘a fixed and settled purpose’ in *Bell v. Kennedy* (3) (L.R. 1 Sc. & Div. at p. 321), and the EARL OF HALSBURY, L.C., ‘a fixed and determined purpose’ in *Winans v. A.-G.* (4) ([1904] A.C. at p. 288)), then or subsequently formed of making the latter his permanent home in substitution for and to the exclusion of the former . . . Change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct from a change
I

from one domicile of choice to another), has always been regarded as a serious step which is only to be imputed to a person on clear and unequivocal evidence.”

As authority for that exposition of the law JENKINS, L.J., quotes again *Winans v. A.-G.* (4) and *Bell v. Kennedy* (3). It is true that JENKINS, L.J., in the Court of Appeal was delivering a dissenting judgment, but nobody can possibly quarrel with that very clear exposition of the law, and JENKINS, L.J., only dissented from the other two lords justices because he did not consider the evidence sufficient to warrant an abandonment of the domicile of origin and the acquisition of a domicile of choice.

[HIS LORDSHIP stated the facts and continued:] I have little doubt in my own mind on those facts that the wife's evidence is more reliable than that of the husband and that the husband deserted her either in October, 1942 or in March, 1943. It may be that when he left Ireland in October, 1942, he had made up his mind never to live with his wife again, but I think the more reliable date of the two would be March, 1943, when the wife says, and I think that the wife's account is the true one, that she got some letters from his solicitors seeking a separation. I do not think that the husband had changed his domicile by then. After all, as JENKINS, L.J., said ([1953] 2 All E.R. at p. 797, letter G), change of domicile is a serious step, which is only to be imputed to a person on clear evidence. It cannot be discarded like an overcoat on a hot day and I think that it is more likely that it was when he became attached to, and set up home with, another woman at Devonport, which would be, if his discretion statement is accurate, in 1945, that he really abandoned his domicile of origin and acquired a domicile of choice in England. The length of time that he has since been in England confirms that he has acquired a domicile of choice in England. He left Portsmouth dockyard and now works in the General Post Office, and I have little doubt that he now does regard England as his home. If that is so, as I have concluded, there can be no doubt that the decree pronounced in the court of Northern Ireland was a decree of a court of competent jurisdiction and, therefore, a decree which will be regarded as a good decree in this country. That being so, and that decree having been made absolute on Nov. 5, 1954, the marriage was already dissolved before the present case came before me and there is not any marriage left for me to dissolve. Accordingly, I dismiss the husband's petition, and declare that the decree pronounced in Northern Ireland on Feb. 18, 1954, was valid.

Order accordingly.

Solicitors: *G. E. C. Dougherty* (for the husband); *Ward, Bowie & Co.* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A Re A DEBTOR (No. 757 OF 1954), *Ex parte* THE DEBTOR v.
F. A. DUMONT, LTD. (Petitioning Creditor).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.),
February 24, 25, 28, March 17, 1955.]

B *Bankruptcy—Extortion—Judgment debt—Payment of solicitor and client costs
as term of accepting payment of debt by instalments—Voluntary offer—
Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 5 (3).*

C On Aug. 20, 1954, the petitioning creditor served on the debtor a specially
indorsed writ claiming the sum of £800 for money lent, and costs. On Aug.
31 the debtor called on the creditor's solicitors, admitted that, in fact, he
owed the sum of £840 to the creditor, and said that he wished to pay the
D whole debt by instalments. On being informed that the creditor might
require, as a term of accepting the debtor's proposal to pay the debt by
instalments, an indemnity in respect of all the costs which the creditor had
incurred, the debtor said that he would be willing to pay these costs. There
was no mention of bankruptcy proceedings at the interview, but, at the end
of the interview, the debtor was told that the creditor intended to proceed to
judgment in any event. During the subsequent negotiations as to the terms
in regard to the payment of the debt by instalments, no objection was raised
by the debtor or his solicitors as to the payment of the creditor's solicitor
and own client costs. On Sept. 9 the creditor obtained judgment for
£800 and £12 5s. as party and party costs, the debtor not having defended
the proceedings. The parties having failed to reach an agreement in regard
E to the amounts of the instalments and the times of payment, on Oct. 21 the
creditor presented a bankruptcy petition against the debtor founded on the
judgment debt of £812 5s. The debtor claimed that the creditor was dis-
qualified from obtaining a receiving order founded on the judgment debt
because the creditor had been guilty of extortion in attempting to obtain
from the debtor the full amount of costs which the creditor had incurred in
obtaining the judgment.

F **Held:** the debtor's promise to pay the petitioning creditor's solicitor
and own client costs not being the result of any threat, whether of bank-
ruptcy proceedings or of any other nature, there was no extortion by the
creditor, and the creditor was entitled to a receiving order.

G *Re Bebro* ([1900] 2 Q.B. 316) considered and followed; *Re Debtor* (No.
883 of 1927) ([1928] Ch. 199) distinguished; *Re A Judgment Summons* (No.
25 of 1952), *Ex p. Henlys, Ltd.* ([1953] 1 All E.R. 424) considered, and
dictum of HARMAN, J., *ibid.* ([1952] 2 All E.R. at p. 774) in part approved
and in part disapproved.

H Per CURIAM: (a) there is no hard and fast rule that any arrangement
or agreement made by a petitioning creditor with his debtor, after the
institution or under the shadow of bankruptcy proceedings, whereby the
creditor is able to get more than that "to which he was legally entitled"
(that is, more than he could have recovered at law at the time of the
bankruptcy proceedings being started or threatened) amounts to extortion
in bankruptcy law, notwithstanding the absence of any mala fides or anything
amounting to oppression in fact.

I (b) there is equally no rule that extortion has, in bankruptcy law, a special
and artificial significance divorced altogether from the ordinary implication
of the word.

(c) the so-called "rule" in bankruptcy is no more than an application of
a more general rule that court proceedings may not be used or threatened
for the purpose of obtaining for the person so using or threatening them
some collateral advantage to himself, and not for the purpose for which such
proceedings are properly designed and exist; and a party so using or
threatening proceedings will be liable to be held guilty of abusing the

process of the court and, therefore, disqualified from invoking the powers of the court by proceedings which he had abused.

(d) on the other hand the court will always look strictly at the conduct of a creditor using or threatening bankruptcy proceedings; and, if the court concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat), the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused.

(e) in every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion. (See p. 78, letters B to G, post).

Appeal dismissed.

[As to Attempted Extortion by a Petitioning Creditor, see 2 HALSBURY'S LAWS (3rd Edn.) 299, para. 569; and for cases on the subject, see 4 DIGEST 158, 159, 1485, 1488-1493.

For the Bankruptcy Act, 1914, s. 5 (3), see 2 HALSBURY'S STATUTES (2nd Edn.) 334.]

Cases referred to:

- (1) *Re Shaw, Ex p. Gill*, (1901), 83 L.T. 754; 4 Digest 159, 1492.
- (2) *Re Bebro*, [1900] 2 Q.B. 316; 69 L.J.Q.B. 618; 82 L.T. 773; 4 Digest 159, 1491.
- (3) *Re Debtor (No. 883 of 1927)*, [1928] Ch. 199; 97 L.J.Ch. 120; 138 L.T. 440; Digest Supp.
- (4) *Re A Judgment Summons (No. 25 of 1952)*, *Ex p. Henlys, Ltd.*, [1953] 1 All E.R. 424; [1953] Ch. 195; *reversg.*, [1952] 2 All E.R. 772; [1953] Ch. 1; 3rd Digest Supp.
- (5) *Re G., Ex p. B.*, (1900), 44 Sol. Jo. 345; 4 Digest 159, 1490.
- (6) *Re Atkinson, Ex p. Atkinson*, (1892), 9 Morr. 193; 4 Digest 158, 1488.
- (7) *King v. Henderson*, [1898] A.C. 720; 67 L.J.P.C. 134; 79 L.T. 37; 4 Digest 183, *w.*

Appeal.

The debtor appealed from a receiving order made by Mr. Registrar BOWYER, and dated Dec. 6, 1954. It was contended on behalf of the debtor that the receiving order should not have been made because the petitioning creditor had been guilty of attempted extortion. The facts appear in the judgment.

C. H. Duveen, Q.C., and *Muir Hunter* for the debtor.

R. O. C. Stable for the petitioning creditor, *F. A. Dumont, Ltd.*

Cur. adv. vult.

Mar. 17. SIR RAYMOND EVERSLED, M.R., read the following judgment of the court: On this appeal by the debtor against a receiving order made against him by Mr. Registrar BOWYER on Dec. 6, 1954, the only point raised on the debtor's behalf in this court (as it was before the learned registrar) was that the petitioning creditor, having been guilty of "extortion" or attempted "extortion" in regard to the judgment debt which it obtained against the debtor, is now disqualified from obtaining a receiving order founded on that judgment debt. The judgment was obtained on Sept. 9, 1954, and was for a sum of £800 for money lent plus £12 5s. for costs. There was a question raised in the court below as to a further sum of £40, payment of which, it was suggested, the petitioning creditor had attempted improperly to extort from the debtor. It was, however, admitted before us that the debtor had at all material times in fact owed this further sum to the petitioning creditor. It was not, therefore, argued in this court that there had been any extortion in regard to the £40 and we can henceforth disregard it. The extortion contended for by counsel for the debtor was exclusively related to the debtor's promise to pay, or the

A petitioning creditor's attempt to obtain, in the circumstances later specified, a further sum of £8 15s. for costs, representing the difference between the full amount of legal costs which the petitioning creditor had incurred in obtaining judgment and the amount of £12 5s., the party and party costs awarded by the judgment.

B Since, on the view which we take, this case, as every other like case, must depend on its own particular facts, it is necessary to relate those facts fully and precisely.

C The proceedings in which the judgment was obtained had been initiated by specially indorsed writ, issued on Aug. 9, 1954, in the Queen's Bench Division of the High Court, claiming, as we have said, the sum of £800 for money lent and costs. The writ was served on the debtor on Aug. 20. The next event was that on Aug. 31, the debtor, of his own motion, called on the petitioning creditor's solicitors and saw a Mr. Farrell, a managing clerk in their employ. What occurred at that interview is narrated in para. 3 of Mr. Farrell's affidavit made in the present proceedings, and there has been no challenge of the accuracy of Mr. Farrell's evidence. We attach, as will later appear, great importance to this evidence, and, therefore, read para. 3 of the affidavit substantially in full. It ran as follows:

D " On Aug. 31, 1954, the debtor called at 14, Norfolk Street and was seen by me. He informed me that he wished to discuss the question of his indebtedness to the petitioning creditor. He admitted to me that although only £800 was claimed in the writ of summons . . . with which he had been served on Aug. 20, 1954, he owed a total of £840 to the petitioning creditor. He informed me that he wished to pay not only the £800 claimed on the writ, but the debt of £40 in addition thereto. He told me that he was not able to pay £840 down, but wished to pay the debt by instalments. He said that a company, Hingeless Products, Ltd., of which he was a director and whose shares were all held by either himself or his wife was entitled to receive from another company, Thurloe Holdings, Ltd., commission which was payable to Hingeless Products monthly, in respect of sales of hingeless spectacle frames. He told me he did not know precisely the amount that would be paid in the coming months because the amount varied according to the sale of the frames. He proposed that he should arrange for Thurloe Holdings to pay to the petitioning creditor the money that would otherwise be paid to Hingeless Products as commission and assured me that Hingeless Products would be willing to agree to this arrangement. I told the debtor that before my firm could advise their clients regarding his proposal, inquiries into the standing of the companies concerned would have to be made and into the agreement subsisting between Hingeless Products and Thurloe Holdings and that, if my firm's clients were to allow him to discharge his indebtedness by instalments, they might require that he discharge in addition to his debt of £840 all the costs that the petitioning creditor had had to incur over the matter. The debtor said that he would be willing to pay these costs if the petitioning creditor required it. I then asked him to put his proposal in writing and send it to my firm. He agreed to do this and said that he would produce: (a) the agreement under which Thurloe Holdings paid commission to Hingeless Products; (b) a letter from Hingeless Products authorising Thurloe Holdings to supply information to the petitioning creditor, and (c) a letter signed by all the directors of Hingeless Products intimating that they would agree to assign to the petitioning creditor the full benefit of the agreement between Hingeless Products and Thurloe Holdings until such time as the indebtedness of the debtor together with the costs had been satisfied. I said that my firm would take instructions from their clients as soon as they were in a position to advise them on the matter, but that my firm's instruction did not permit them to delay issuing a summons for judgment under R.S.C., Ord. 14."

It will be observed that the debtor's proposal was that the amount owing by him should be paid by instalments and that the petitioning creditor should accept certain sums to which Hingeless Products, Ltd. was said to be from time to time entitled in or towards satisfaction of the instalments. It will be observed further that the debtor, on being informed that the petitioning creditor "might" require an indemnity as to the costs to which it had been put as a term of its agreeing to accept payment in the way proposed (without any interest), at once expressed himself as willing to pay such costs. It will be observed finally that no mention of bankruptcy proceedings was made from first to last. A summons for judgment had not then been issued, but Mr. Farrell informed the debtor, at the end of the interview, that his instructions required him to proceed to judgment in any event.

On the following day [Sept. 1] the debtor wrote to the petitioning creditor's solicitors as follows:

"With reference to our interview of yesterday regarding the settlement of your client's claim I confirm that I have made the following proposal. I shall make all arrangements you require with Messrs. Thurloe Holdings, Ltd., of 15, Whitehall, S.W.1 that all future payment due in respect of commission regarding the hingeless spectacle frames shall be made to you direct until the full amount of your client's claim and costs are fully met. In consideration of the above you will be good enough to let me have your undertaking to discontinue further proceedings. I trust that my proposal will receive your favourable consideration and on your acceptance I shall be pleased to supply further details and produce all necessary documents."

It will be noticed that the debtor did not then produce the documents which he had been asked to produce but that he expressed in his letter his conditional readiness to "produce all necessary documents".

On Sept. 2 the summons for judgment was issued, and on the same day the petitioning creditor's solicitors wrote to the debtor. Having regard to its importance, this letter must also be read at length. It will be noticed that bankruptcy proceedings are twice referred to:

"We have considered your letter of Sept. 1 and the proposals contained therein whereby it is your intention to discharge your indebtedness to our client company. We must make it quite clear at this stage that there is no possibility of discontinuing the proceedings and that our instructions are to obtain judgment against you without further delay, and that is the course which we are pursuing. If, when judgment has been obtained, we are in a position to submit a reasonable proposal to our clients whereby the judgment may be satisfied without recourse to bankruptcy proceedings we are, of course, prepared to take instructions thereon. Our instructions at this stage are absolutely specific and unless we have a really satisfactory alternative to submit, we see no reason why we should trouble our clients for any variation. Nevertheless, we are prepared to explore such proposals as you may care to make on the distinct understanding that our so doing will not prejudice our clients' eventual decision in any way whatsoever. The statements in your letter under reference are not sufficiently definite for us to advise our client on the position and, in order that we may do so, will you please let us have the following at your earliest convenience. 1. The original or a certified copy of the existing agreement between Hingeless Products, Ltd. and Thurloe Holdings, Ltd. In the event of your sending us the original, we undertake its safe custody and return to you in due course. 2. A letter of authority from Hingeless Products, Ltd. addressed to Thurloe Holdings, Ltd. requesting and authorising them to supply us with such information relating to the agreement as we may reasonably require. 3. A letter signed by all the present directors of Hingeless Products, Ltd. intimating that they are prepared to assign to us or to our clients the full benefit of the

A agreement between themselves and Thurloe Holdings, Ltd. until such time as your indebtedness to Messrs. F. A. Dumont, Ltd. (together with all costs on a solicitor and own client basis) have been satisfied. On receipt of the above documents we will consider the matter further, but we must warn you that our instructions are to issue a bankruptcy notice as soon as judgment has been obtained and there is consequently very little time available."

B The debtor thereupon for the first time consulted solicitors—a firm, in fact, highly experienced in this class of work. By letter dated Sept. 6, these solicitors informed the petitioning creditor's solicitors that the debtor did not propose to defend the pending proceedings and, in substance, repeated the proposal made by the debtor to Mr. Farrell, including the fact that he was "also prepared to pay your reasonable costs in the matter". The letter included the sentence, somewhat ominous in retrospect, "Our client is very anxious not to be made a bankrupt". Counsel for the debtor conceded (clearly rightly, in our judgment) that by "reasonable costs" in the letter last cited was meant the same thing as proper solicitor and own client costs.

D Some further correspondence, which we need not read, passed between the solicitors on the details of the proposed payments. On Sept. 9 judgment was obtained. On Sept. 13 Mr. Farrell telephoned to the debtor's solicitors and spoke to a partner in the firm. The latter took the precaution of having the entire conversation recorded, and a note of it appears in the exhibited bundle of correspondence. As appears from the note, the petitioning creditor was unwilling to accept the instalments proposed by the debtor. The petitioning creditor asked instead for £440 down (that figure including the admitted £40 above mentioned) "plus our costs" and two instalments on stated future dates, but without any interest. The dialogue concluded as follows: "What are your costs?" "Well, we can agree those, can't we?" "You had better tell me what you want so that I can inform the client." "Well, twenty guineas." "Well, you had better put it in writing." "All right, we will write to you without prejudice." "Do you still want security?" "No. We don't want any security. Our client wants the money." Again, no point was taken on the debtor's part as to the propriety of the sum of twenty guineas as a figure for solicitor and own client costs.

F On the same day [Sept. 13] the debtor's solicitors wrote to the solicitors for the petitioning creditor stating that the debtor was unable to improve on his former offer. They said:

G "He [the debtor] thinks . . . that your clients are very unreasonable as in your letter to him of Sept. 2 you make certain demands. These demands our client, in view of the fact that he must either comply with these or submit to the indignity of bankruptcy proceedings, has done his very best to comply with and not only that, in our letter to you of Sept. 6, he promised an immediate payment of £240 . . . He, on our advice, submitted to judgment and now your clients want £440 down and £21 for costs, £200 on Oct. 15, and £200 on Nov. 30, and, not only that, they want £440 and the £21 costs within forty-eight hours, although we suggested seventy-two hours. You will bear in mind that the order for judgment is for £800 only and for £12 5s. costs although our client offered to pay a further £40 for which he is morally, but not legally, liable. The position now is that our client can do no more than he has offered to secure your clients in the best possible way. In these circumstances if you insist on proceeding in bankruptcy our client will attend here to be served with such documents as you deem proper to serve upon him. It does, however, occur to us to ask you to reconsider the matter."

I The petitioning creditor's solicitors also wrote on Sept. 13 to the debtor's solicitors confirming the telephone conversation. Save for the reference to them in the telephone conversation, the letter made no mention of costs, but was

devoted to justifying the added claim, now conceded, for £40. The only reference to bankruptcy proceedings was: "We advised our clients that they would be in a position, in the event of bankruptcy proceedings ensuing, to prove for the balance of £40."

The next event was that on Sept. 15 a bankruptcy notice was issued, founded on the judgment debt, including costs, of £812 5s. On Sept. 20 the petitioning creditor's solicitors telephoned to the debtor's solicitors stating that their client was prepared to accept modified terms, which were to the debtor's advantage, as regards the instalments, and these modified terms were, later on the same morning, repeated when a representative of the petitioning creditor's solicitors called on the debtor's solicitors. As the terms were not acceptable to the debtor, the bankruptcy notice was thereupon served. These last-mentioned terms did not contain any alteration of the proposals previously made as to costs. No further matters of fact are relied on by the debtor in support of his allegation of extortion. The bankruptcy notice expired on Sept. 28 and the petition was presented on Oct. 21, 1954.

It was the contention of counsel for the debtor that on these facts the petitioning creditor must be treated as guilty of "extortion" as that word is understood in bankruptcy law and, therefore, disqualified from obtaining a receiving order on its petition, and not only that, but also disqualified for all time from founding a bankruptcy petition on its judgment debt against the debtor. It was conceded by counsel for the petitioning creditor, that if, in truth, the petitioning creditor had been guilty of "extortion" in the bankruptcy sense it was so disqualified. The penalty, then, is severe. The judgment obtained by the petitioning creditor on Sept. 9, 1954, is, if "extortion" be established, for ever tainted in the creditor's hands, however justly obtained and whatever be the circumstances relating to it, so far as bankruptcy proceedings are concerned. No subsequent conduct on the part of the petitioning creditor or of the debtor can remove the taint. So far as this judgment debt is concerned the debtor, through no act or virtue of his own, is for ever immune from bankruptcy proceedings (properly so called) at the suit of the petitioning creditor, to whom the doors of the court in the exercise of its bankruptcy jurisdiction as regards this judgment debt are for all time closed. So far-reaching a result would appear at least surprising if (as is in the present case conceded) no degree of moral turpitude, no kind of bad faith, no oppression, as that word is ordinarily understood, attached to the conduct of the petitioning creditor. Yet the argument of counsel for the debtor so demands and requires.

In the circumstances it is, in our judgment, necessary to examine closely the basis of the argument and to discover what are, in truth, the characteristics of "extortion" as understood in bankruptcy law and what is the justification for the intervention of the court where "extortion" is found to have taken place. It appeared at one stage during the argument that the basis and justification of the decisions as to extortion might be that, once a creditor had invoked or threatened to invoke the bankruptcy jurisdiction, he was irrevocably committed to an equal distribution of the debtor's assets among the debtor's creditors, so that any step or action thereafter on the part of the creditor which was calculated to result, or might result, in his obtaining rateably more in respect of his debt than other creditors amounted to extortion. No doubt, anything done or proposed by the debtor designed to secure for him, in the bankruptcy, more than his proper share of the assets would be vicious and tainted. *Re Shaw, Ex p. Gill* (1) was such a case; for there the creditor had proposed, as a term of his consenting to the composition of 10s. in the £ which the other creditors had approved, a scheme whereby he would, in fact, have received more than 10s. in the £ in respect of his debt. The scheme involved, in other words, a plain fraud on the other creditors. Nothing of that kind enters into the present case. Attempted frauds on the other creditors require no further consideration. The

A court will clearly not in the exercise of its discretion under s. 5 (3) of the Bankruptcy Act, 1914, make a receiving order at the suit of one who has attempted such a fraud.

Counsel for the debtor conceded in his reply that the rule as to extortion which he sought to invoke did not rest on any such general proposition as above suggested, namely, that a creditor invoking or threatening to invoke the bankruptcy jurisdiction was irrevocably committed to equal distribution in all circumstances; and, in our judgment, he plainly was right so to concede. On any other view a creditor, who had served a bankruptcy notice in respect of a judgment debt and who had reason to suppose that the debtor's assets were insufficient to pay all his creditors in full, could not safely accept payment in full of his debt according to the terms of the bankruptcy notice itself. Moreover, such a proposition would be inconsistent with *Re Bebro* (2), a decision of this court hereafter considered. For the effect of that case was that, as a result of the terms made between the creditor and the debtor for the withdrawal of the former's first petition, the amount of the debt on which the first petition had been based was increased; and, on this view, it could not matter that the increase in the amount of the petitioning creditor's debt had arisen from a wholly voluntary offer on the debtor's part. At most, the general nature and purpose of the bankruptcy jurisdiction, including its effect on the status of the debtor, forms the background against which an allegation of "extortion" must be judged. In our view the observation of LORD HANWORTH, M.R. ([1928] Ch. at p. 208) in *Re Debtor* (No. 883 of 1927) (3) must be so judged. LORD HANWORTH, M.R., said (*ibid.*):

E "The whole principle of bankruptcy is that when an act of bankruptcy has been committed there shall be a fair distribution between all the creditors . . ."

The case submitted by counsel for the debtor, however, was that anything done, or any agreement or arrangement made, by a creditor under the shadow or threat of bankruptcy proceedings whereby the creditor might obtain from the debtor a penny piece more than the sum "to which he was legally entitled" amounted to extortion within the meaning of bankruptcy law, even though there was no true element present of impropriety or oppression, as those words are commonly understood. In our judgment, such a proposition is too widely stated and cannot be justified by the decided cases, for it appears to us to involve the assertion that any sum which a debtor may agree to pay over and above the actual amount of the judgment debt is a sum "to which the creditor is not legally entitled", and which he is presumed in law to have exacted from the debtor by bankruptcy proceedings or the threat thereof, whatever be the circumstances in which the debtor may have agreed to pay such additional sum. No doubt, where a creditor has, for example, agreed to accept payment of his debt in instalments, a sudden demand on his part for his solicitor and client costs, without any consideration, as a term of not proceeding on a bankruptcy petition would properly be regarded as extortion. *Re A Judgment Summons* (No. 25 of 1952), *Ex p. Henlys, Ltd.* (4), was such a case though this court, in fact, deliberately expressed no view on that particular matter. And any demand by a creditor to be paid a full indemnity as to costs over and above his ordinary party and party costs is very likely to be regarded with great suspicion where the threat of bankruptcy is present; but a creditor may perfectly well and properly, we conceive, after judgment and before bankruptcy proceedings have been initiated or threatened, make terms with his debtor to accept payment of his debt by instalments or otherwise on terms advantageous to the debtor, and may, as consideration for the concession which he makes, say to the debtor: "If I am to wait for payment or if I am to accept some form of substituted security, at least you must indemnify me against the legal expenses to which you have put

me". Such a bargain, at least if made before any threat of bankruptcy proceedings, would prima facie be both proper and enforceable, and any reasonable additional sum which the debtor thereby engaged himself to pay for costs could not, in our judgment, be described as a sum to which the creditor "was not legally entitled". Were it otherwise, indeed, as counsel for the petitioning creditor pointed out, the result would be highly disadvantageous to honest debtors. Moreover, counsel for the debtor conceded that any consideration flowing from the debtor other than the promise of a money payment (for example, a reasonable covenant in restraint of trade) would not be liable to challenge. We find it, for our part, difficult to see why a promise of the one kind should be innocuous but of the other should be automatically characterised as a subject of extortion.

If a comparable arrangement or promise is made or given after bankruptcy proceedings have been begun or threatened, must it merely on that account be held automatically and in all circumstances to constitute extortion on the part of the creditor? We cannot accept that view. No doubt, the initiation or threat of bankruptcy proceedings, with all their quasi-penal consequences, can be a most potent instrument in the hands of a creditor, and provides, readily enough, scope for oppression; and, no doubt, the court will view with a jealous eye any bargain proposed or demand made by a creditor wielding such a weapon.

The question to be considered, however, albeit with due regard to the unequal position of the parties, is, whether there has been oppression, whether there has been extortion, in fact. In our judgment, a sum which a debtor may for good consideration promise to pay to the creditor does not automatically and in all circumstances become a payment to which the latter is not legally entitled, and which he has exacted or attempted to exact by bankruptcy proceedings or the threat thereof, merely because such proceedings have been initiated or threatened, and nothing in the decided cases compels us so to hold. Nor, in our judgment, do the decided cases warrant the conclusion that "extortion" in bankruptcy has a special significance altogether divorced from the proper and ordinary meaning of the word.

In *Re G.*, *Ex p. B.* (5), the creditor had made terms for the withdrawal of his first petition, which terms included a sum of £20 being added as a "bonus" to the debt. He later obtained judgment in respect of the balance of the original debt so increased and sought to invoke bankruptcy proceedings on that judgment. It was held that he could not be allowed so to do. SIR NATHANIEL LINDLEY, M.R., is reported to have said (44 Sol. Jo. at p. 346):

"... when we look behind the judgment in this case, we find that the second promissory note was substantially, to some extent, obtained by extortion based on an abuse of the bankruptcy process."

The case is very shortly reported, but in *Re Bebro* (2), which was decided later in the same year, RIGBY, L.J., who was a member of the court in *Re G.*, *Ex p. B.* (5), said of it ([1900] 2 Q.B. at p. 322):

"There the registrar had in fact come to the conclusion that there was extortion; and, speaking for myself, I may say—and I think I am not wrong in saying that my opinion in that case was shared by the other members of the court—that we thought we could not possibly take a different view from that which the registrar had taken; and we proceeded on that ground only, namely, that there had been de facto extortion."

In *Re Bebro* (2) the decision went the other way. Counsel for the debtor in the present case claimed that that case was one of very special facts in that the terms on which the first bankruptcy petition presented by the creditor had been withdrawn had included a promise by the debtor to pay a sum for costs over and above the amount in respect of which the original petition had been presented, such promise having, according to the report, been entirely voluntary on the debtor's part without any pressure from the creditor, who had expressed himself

A as willing to take no more than the amount of the original judgment debt. No doubt, if the facts were as we have stated them, the case was unusual; but we refer to certain passages in the judgments for the principle which they contain. Thus, SIR RICHARD WEBSTER, M.R., said ([1900] 2 Q.B. at p. 320):

B “But the matter has been put by Mr. Reed [the learned counsel for the debtor] on the higher ground that, although on the evidence the transaction might not be one of extortion but based merely upon the earnest solicitation of the debtor, yet if the result was that the creditor obtained a larger amount than he would have got under the bankruptcy proceedings, that would in law be extortion. Agreeing with the learned registrar, as I do, upon the facts, that there was no extortion exercised by the petitioning creditor, and that the request came from the debtor himself, and believing, as the C registrar believed, that the petitioner was willing to take his money without interest—or that at any rate he brought no pressure upon the debtor in order to get a larger amount—I think Mr. Reed’s argument must go this length, that if the result of the proceedings is that the petitioner got a larger amount than he would have got under the bankruptcy proceedings, they cannot stand. I think the true view is that taken by FRX, L.J., in *Re Atkinson* (6), D where he says (9 Morr. at p. 196): ‘In my opinion, the moment the court sees the petition is made a means of extorting money, a petitioner should not be able to get a receiving order.’ I quite agree that it by no means follows that because the solicitation came in the first instance from the debtor there can be no extortion: because, as my brother RIGBY, L.J., has already pointed out, it might well be that, in his answer to the request of the debtor, E the petitioner did in fact put very considerable pressure upon the debtor; but the court must be satisfied that the bankruptcy proceedings have been used to extort or get from the debtor a larger amount than the creditor could have lawfully received by means of the proceedings. I quite agree with Mr. Reed’s argument that if extortion is once proved the machinery by F which it has been effected, whether by getting an adjournment or a dismissal of the petition, makes no difference. If the process of the court has been used improperly, that is enough to vitiate the arrangement.”

After referring to *Re G., Ex p. B.* (5), the learned Master of the Rolls said (*ibid.*, at p. 321):

G “I see nothing to justify the argument in the present case that any bona fide proceedings to get payment from the debtor without undue pressure should be treated as extortion merely because the debt which forms the foundation of a subsequent bankruptcy proceeding is for a larger amount than the petitioning creditor would have obtained under the petition originally presented.”

H We have already referred to one part of the judgment of RIGBY, L.J. He concluded his judgment as follows (*ibid.*, at p. 323): “Each case must be carefully examined into, and the court must decide upon the facts arising out of such examination.” Finally, COLLINS, L.J., said (*ibid.*, at p. 324):

I “Here it is shown that there has been no extortion. The registrar has found that the pressure, if there was any, came from the debtor and not from the creditor, and so there has been no extortion at common law. The cases cited by Mr. Reed went on a larger principle, which I do not think has as yet been applied to cases like that now before us.”

We have already mentioned *Re Shaw, Ex p. Gill* (1). The case was entirely different from the present, being one where the creditor had attempted to perpetrate a plain fraud on the other creditors. But we find the language of RIGBY, L.J., once more of considerable assistance. He said (83 L.T. at p. 755):

“Now, it was admitted, and could not be denied, that if a creditor goes to his debtor and says: ‘You owe me so much, I can proceed in bankruptcy

against you; you will not like that; pay me something extortionate, something altogether beyond what you owe me at law, or I will file a petition,' that petition cannot be made the basis of a receiving order; and very properly, for though the petition itself will only be that which is within the right, so far as there is a right, of a creditor, and will only have the effect of distributing the property according to the rules of bankruptcy, yet the previous conduct of the creditor would make it plain that he was using, or attempting to use, the bankruptcy proceedings as the means of unduly extorting what was not due to him."

Counsel for the debtor in the present case, however, relied most strongly (and very naturally) on *Re Debtor (No. 883 of 1927)* (3). Although the members of the court were careful to say that they were not moved by sympathy for the debtor, yet it is quite plain that they thought that the conduct of the creditor had been, to say the least, of a most harsh character. The debtor, who was an articulated clerk to a firm of solicitors and without means, had been persuaded to provide the creditor with a cheque for £500 in respect of an underwriting transaction in the belief that funds would be provided from another source to satisfy any obligation which might fall on him. The debtor having failed to meet the cheque, judgment was obtained on it by the creditor, who then proceeded to initiate bankruptcy proceedings. The letter from the creditor's solicitors (of which LORD HANWORTH, M.R., said ([1928] Ch. at p. 205) that he could well understand the indignation which it would create in the minds of those who received it) is set out (*ibid.*, at pp. 200, 201), and the substance of it was that the creditor said that he would agree to adjournment or withdrawal of the petition only on terms including that the debtor should pay, in addition to the amount of the judgment debt and interest, the difference between the creditor's solicitor and own client costs and the party and party costs obtained on the judgment, and also the solicitor and client costs incurred by the creditor in an action against a third party, these costs amounting in all to some £160. The debtor did not accept the proposed obligation as to costs, but he, in fact, made an instalment payment which was treated as including the difference between the costs incurred by the creditor in his proceedings against the debtor on a full indemnity basis and a party and party basis. The creditor withdrew his original petition but subsequently brought further bankruptcy proceedings in respect of the outstanding balance of his debt. It is not surprising that this court regarded the demands which the creditor had made in respect of costs as both extortionate and improper in the extreme.

Counsel for the debtor in the present case contended that the reasoning in the judgments in *Re Debtor (No. 883 of 1927)* (3) showed that the debtor's agreement to pay and payment in fact of the excess of solicitor and client costs over party and party costs in respect of the judgment obtained against him would of itself have been treated as evidence of extortion sufficient to disqualify the creditor, apart altogether from the other terms which the creditor had sought to impose on the debtor: in other words, counsel for the debtor claimed that *Re Debtor (No. 883 of 1927)* (3) was authority for his proposition that the obtaining of a promise by a debtor to pay solicitor and client costs as a term of acceptance of the debt by instalments or otherwise than in strict accordance with the terms of the judgment, was *ipso facto* extortion within the meaning of bankruptcy law. We cannot so read the judgments of this court: and we think, indeed, that, if they could be so read, they would be inconsistent with the reasoning in the earlier cases, and particularly with the judgments in *Re Bebro* (2).

We quote, in the circumstances, at some length from the judgments. Thus, LORD HANWORTH, M.R., said ([1928] Ch. at p. 205):

"The petitioners were not entitled to recover solicitor and client costs against the debtor, and there was no shadow of foundation for a claim against

A the debtor in respect of the costs incurred by the petitioners in these proceedings against the Sherbourne Trust, Ltd. The petitioners were therefore attempting, as the price of the dismissal of the petition and the adjournment for an uncertain time of further proceedings against the debtor, not only to obtain payment of a sum on account of the debt, and a guarantee in respect of the balance, but also to obtain payment by the debtor of some one else's debt and of some costs which he was under no liability to pay.

B "I do not hesitate to characterise that demand as most improper. Those who are engaged in bringing bankruptcy proceedings must take care that their proceedings do not constitute an abuse of the process of the court; and to make a demand of this nature was to attempt to extract from the debtor, who was in a most difficult position—he had explained in his letter of Feb. 28, 1927, that the ruin of his future career was involved—costs of an amount in excess of his liability and further costs for which he was under no liability, being costs for which the Sherbourne Trust, Ltd., were liable, and an amount in excess of what the Sherbourne Trust, Ltd., were liable to pay."

C Later LORD HANWORTH, M.R., said (*ibid.*, at p. 206):

D "As I have already said, the debtor ought to be made a bankrupt, and in the ordinary course the receiving order would have been a perfectly right order to be made by the registrar; but there is a principle which must be jealously guarded—namely, that the process of the bankruptcy court must not be abused."

E Then, finally, after referring to earlier cases including those of *Re Shaw* (1) and *Re G.* (5), LORD HANWORTH, M.R., said (*ibid.*, at p. 208):

F "It is said here that all that was done was that some £15 was obtained from the debtor in respect of costs which he did not owe, costs which were the difference between party and party costs and solicitor and client costs. That is not an accurate way of putting it; the attempt was to obtain not only those costs but also a further sum of £160 in respect of costs which the debtor had no concern with at all."

There followed the short passage about fair distribution which I have earlier cited*.

SARGANT, L.J., said ([1928] Ch. at p. 209):

G "I now come to what appears to me to be the ground on which the appeal succeeds. It relates to the action of the petitioning creditor in obtaining a sum of £15 in excess of the costs to which he was legally entitled, and, what is much more important, the attempt to obtain £160 for costs as between solicitor and client in respect of a matter for which the debtor was in no way liable. To my mind, that was a demand which comes within the phrase 'extortion', as it has been used in the cases to which the Master of the Rolls has referred and to which I will not refer again."

H The lord justice observed (*ibid.*, at p. 210):

I "To my mind the attempt to obtain so large a sum as £160 for costs due from some other person for which the debtor could not by any stretch of imagination be deemed to be personally liable, was a very strong instance of an attempt to use bankruptcy proceedings—the threat of bankruptcy—for the purpose of obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditor."

It is plain, in our view, that the gravamen of the charge of extortion was, in the view of SARGANT, L.J., related to the demand for £160 for costs in the proceedings against a third party. Finally, LAWRENCE, L.J., stated (*ibid.*, at p. 211):

"The debtor alleges that there are several sufficient causes for not making

* See p. 71, letter E, ante.

the receiving order, but the only one of any substance is that the petitioning creditors on the occasion of the previous bankruptcy proceedings by them for the same debt attempted to extort the payment of money for which the debtor was not liable as the price of allowing that petition to be dismissed, and that the attempt partially succeeded."

The passage most strongly relied on by counsel for the debtor in the present case, is, however, that where LAWRENCE, L.J., said (*ibid.*, at p. 212):

"An attempt to do so [that is, to use bankruptcy proceedings for the purpose of obtaining a collateral advantage], even though unsuccessful, will be sufficient to disentitle a petitioning creditor to an order, and, therefore, the fact that in the present case the debtor refused to pay the costs of the Sherbourne Trust, Ltd., and that that demand was not insisted upon, does not absolve the petitioning creditors from the consequences of having made that demand. The principle upon which the court acts in these cases is that it treats a demand of this nature as evidence that bankruptcy proceedings were taken not with the bona fide intention of obtaining adjudication but for some collateral purpose.

"As regards the demand for solicitor and client costs in the action against the debtor, I agree with Mr. Fortune that it stands on a somewhat different footing, but it has this vice in it, that it was a demand for a sum for which the debtor was not legally liable, and that demand was acceded to and has, to a certain extent, succeeded. If these demands had been made in the proceedings now before the court, then speaking for myself I should have had no hesitation in declining to make a receiving order upon the petition."

It is this last cited passage which seems at first sight most strongly to support the contention of counsel for the debtor. In spite, however, of the paragraph break which appears in the report, we feel no doubt that the lord justice was not purporting to consider the sum of £15 solicitor and client costs in isolation and to be expressing an opinion on what would have been the result of a case different from that which was before the court. The vice of the conduct of the creditors lay in the whole nature of their demand and the use which they sought to make of the threat of bankruptcy proceedings to obtain from the debtor substantial sums for which, in other circumstances, he could not possibly have been asked to render himself liable. LAWRENCE, L.J., concluded his judgment ([1928] Ch. at p. 213):

"Applying the underlying principle of all those cases to the present case, it seems to me to be clear that the creditors here have utilised bankruptcy proceedings for the purpose of extorting, or attempting to extort, money from the debtor for which the debtor was in no sense liable. In other words, the petitioning creditors have utilised bankruptcy proceedings for a collateral purpose, and that is a thing which the court does not allow."

In *Ex p. Henlys, Ltd.* (4), the question was whether the taint of extortionate conduct on the part of a creditor would extend to disqualify him, not only from obtaining a receiving order in respect of the tainted debt, but also from proceeding to enforce the debt by way of judgment summons. This court being of opinion that the disqualification did not in any event so extend, the question with which we are concerned was not material for this court's decision; and, as we have already said, the court deliberately avoided expressing any opinion one way or the other whether, on the facts of the case, there had been extortion. HARMAN, J., who had been of opinion that the disqualification did extend to proceedings by way of judgment summons, had held that the case was one of extortion. The relevant facts were that after a creditor had agreed to accept payment of his debt by instalments he sent a sudden and peremptory demand for payment of his solicitor and client costs in addition, with the obvious purpose and intention of using the bankruptcy proceedings as a means of getting these

A extra costs paid by the debtor. As JENKINS, L.J., said in this court ([1953] 1 All E.R. at p. 426):

"It is . . . plain from the peremptory terms of the demand for the £12 12s. contained in their letter of Nov. 22, that this was precisely the impression which the judgment creditors' solicitors intended to produce, or, in other words, that they were using the threat of bankruptcy proceedings based on the notice of Nov. 16 as a means of exacting payment of the £12 12s."

B In the first court, HARMAN, J., had, in the course of his judgment, used this language ([1952] 2 All E.R. at p. 774):

C "Of course, in many cases there is extortion in the ordinary sense—unconscionable demands of various kinds—but in bankruptcy the term has a much wider meaning and includes matters in which very little, if any, moral obloquy is involved. In the present case the solicitors demanding the sum of costs did so, I think, because they were ignorant of bankruptcy rules or bankruptcy practice, and I do not accuse them or their clients of any moral obloquy. Nobody pretends there is. Nevertheless, the principle does exist that the threat of the penal sanction of bankruptcy must not be used to obtain a collateral advantage of any kind."

D We venture, for our part, to disagree with the learned judge if, by his language, he meant to imply that extortion in bankruptcy has a wholly special and artificial significance divorced altogether from the ordinary sense of the word. We agree, however, with his statement of the principle that the "penal sanction of bankruptcy must not be used to obtain a collateral advantage."

E JENKINS, L.J., in this court similarly stated the principle ([1953] 1 All E.R. at p. 432):

F "The object of proceedings in bankruptcy is to make the debtor's assets available for rateable distribution amongst his creditors. No creditor is entitled to have recourse to such proceedings for the purpose of obtaining some collateral advantage for himself. Moreover, the threat of bankruptcy, with the deprivation of property and status which it involves, may be a potent instrument of oppression and of 'extortion' in no mere technical sense. These, in effect, are the considerations dwelt on in the authorities to which I have referred, and they amply account for the strictness of the rule against 'extortion' which has been laid down and firmly maintained by the courts in bankruptcy, and for the penalty for breach of that rule which it has been found necessary to provide in the shape of disqualification from founding any subsequent bankruptcy proceedings on any debt in relation to which a charge of 'extortionate' conduct has been made good."

G We add only that, as the learned lord justice later observed (*ibid.*, at p. 433), extortionate conduct will in the given circumstances be shown even though the collateral benefit obtained is trifling in comparison with the amount of the debt.

H We conclude our citations from the cases by a reference to the judgment of the Privy Council delivered by LORD WATSON in *King v. Henderson* (7). In that case the Board held that it was not an abuse of the process of sequestration that the creditor had been actuated, not only by a desire to obtain payment of the debt, but by his knowledge that the result of a sequestration order would be automatically to exclude the debtor from a partnership firm. LORD WATSON, however, stated the general principle as follows ([1898] A.C. at p. 731):

I "Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought or a fraud upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper

legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable."

From these citations the following conclusions, which we have already earlier intimated, may in our judgment be drawn. (i) There is no such hard and fast rule as counsel for the debtor suggested, namely, that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law, notwithstanding the absence of any mala fides or anything amounting to oppression in fact. In our judgment, the decision in *Re Bebro* (2) involves, necessarily, the rejection of such a proposition. (ii) There is equally no rule that extortion has, in bankruptcy law, a special and artificial significance divorced altogether from the ordinary implication of the word. (iii) The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court, and, therefore, disqualified from invoking the powers of the court by proceedings which he has abused. (iv) On the other hand, having regard to what JENKINS, L.J. [in *Ex p. Henlys, Ltd.* (4), [1953] 1 All E.R. at p. 432], called the "potent instrument of oppression" which bankruptcy proceedings (with their potential consequences on property and status) provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and, if it concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat) the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused. (v) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

In the above tabulation we have not specifically referred to those cases—a distinct class in themselves with which the present case is not concerned—where a creditor attempts to perpetrate a fraud on the other creditors, though such attempts are an obvious example of abuse of the process of the courts.

It remains to determine whether, on the facts of the present case as we have fully stated them at the beginning of this judgment, the petitioning creditor has been guilty of "extortion". If the question were put, as it were as a question for a jury on a consideration of all the narrated facts—is the petitioning creditor guilty of using or threatening bankruptcy proceedings at all as an instrument of oppression?—we cannot think that any but a negative answer could sensibly be given. If, however, the matter be examined more in its details, then, in our view, the most significant and vital matter of fact is that the debtor's promise, if required, to pay solicitor and client costs (as a term of obtaining the creditor's acceptance of his proposal to meet the debt by instalments and by means of an assignment of the Hingeless company's rights) was given at a time when bankruptcy proceedings had not been mentioned or hinted at by the petitioning creditor—at a time, indeed, prior even to the issue of a summons for judgment in the Queen's Bench action. Counsel for the debtor criticised the

A phrases in the registrar's notes "in view of free agreement as to costs" and "as the question of costs was voluntary and moving from the debtor". But, even if these phrases involve an over-simplification, it is, at least, clear that the promise was not given as a result of any threat on the creditor's part of bankruptcy, or, indeed, of any threat at all. The promise was made at an interview of the debtor's own seeking in order to see if the creditor could be persuaded to
B accept something less than its strict rights entitled it to require. It was not, indeed, until after the promise had been clearly made that the debtor was informed that the creditor would, in any case, proceed to judgment.

Once the promise had been given, the matter of solicitor and own client costs ceased to have any real significance in the subsequent negotiations, which were concerned exclusively with the amounts and times of the instalments and the
C question of the assignment of the Hingeless company's rights. It has been clearly and rightly conceded that the subsequent quantification and the reference to "reasonable costs" added nothing of significance to what had gone before. Although there were two references to bankruptcy in the petitioning creditor's solicitors' letter of Sept. 2, the purpose of that letter was to ask for the more precise information which the debtor had already promised to give and the
D purpose of the references was, in regard to that matter, no more than to indicate urgency. It is true that the debtor's solicitors on Sept. 6 stated the anxiety of their client to avoid bankruptcy, but the letter contains nowhere any suggestion that he was acting under the stimulus of a threat either as regards costs or otherwise. We have already said that nothing relevant turns, in our judgment, on the naming of the sum of £21 during the telephone conversation of Sept. 13.
E We note, however, that the figure was given because the matter was specifically raised by the debtor's solicitors; and we think it not wholly unimportant for the purposes of the present case that from Sept. 6 onwards the debtor was, in fact, being advised and represented by solicitors of great experience in this kind of matter. We think also, in regard to this conversation, that the final words in the record, "We don't want any security. Our client wants the money",
F indicate clearly, as we construe the words, that the petitioning creditor was not using the threat of bankruptcy proceedings to get a collateral advantage but was anxious only to obtain payment of its judgment debt. The letters of Sept. 13 provide equally, in our view, no support for any allegation of extortion; and it is, in our judgment, highly significant that the debtor's solicitors in their letter of that date, although they complained of the creditor's "demand" for payment
G of the £40 for which, they said (quite wrongly, as is admitted), the debtor was not legally liable, made no such suggestion in regard to the costs; and the emphasis in the letter from the petitioning creditor's solicitors of the same date was on the justification for that claim of £40, to which alone their one reference to bankruptcy was related. We do not think anything that occurred on Sept. 20 can provide any further assistance for either side, and we do not understand that
H counsel for the debtor made any real point of the events of that day.

As we have earlier said, we think that a demand by a creditor for solicitor and own client costs, if made by a creditor under the shadow or threat of bankruptcy proceedings, will always, and rightly, be looked on by the court—to say the least—with the greatest suspicion; for these costs can never, as such, be the subject of any legal claim; and a promise to pay them, even though apparently
I given in consideration of some concession to the debtor, will easily and readily be attributed to the threat without which the promise would never have been given. As we have tried to show, however, the promise in the present case was given when there had been no threat of bankruptcy proceedings and, in our judgment, in circumstances when no shadow of future events of that kind affected it. Thenceforward the matter of costs played no further significant part in the proceedings, at least if judged from the viewpoint of possible oppression or extortion by the creditor. In our judgment, therefore, the registrar was

right to hold that on the special facts of this case there was no extortion by the petitioning creditor. We think that the appeal should be dismissed. A

Appeal dismissed.

Solicitors: *Isadore Goldman & Son* (for the debtor); *Ruston, Clark & Ruston* (for the petitioning creditor).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] B

Re ALDHOUS (*deceased*). NOBLE v. TREASURY SOLICITOR. C

[CHANCERY DIVISION (Danckwerts, J.), March 24, 1955].

Administration of Estates—Advertisement for claims—No claims by beneficiaries—Estate wound up—Balance of estate transferred to Crown as bona vacantia—Grant of administration de bonis non to next of kin—Effect of grant—Form of advertisement—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 27. D

By her will dated Jan. 29, 1948, a testatrix appointed C. to be her sole executor, and gave a legacy to him and his wife, but made no other disposition of her estate. On Feb. 3, 1948, the testatrix died, and probate was granted to C. He advertised pursuant to the Trustee Act, 1925, s. 27 (1), in the "London Gazette," "The Times" and a local newspaper, giving notice in the newspapers "that all persons having any claims against the estate of the [testatrix] . . . are required to send particulars to the undersigned solicitors to the executor" before a certain date "after which date the executor will distribute the estate having regard only to claims then notified." C. received no claim from next of kin of the testatrix in respect of that part of her estate as to which she died intestate, and he paid the debts and funeral and testamentary expenses, and retained the legacy. On Sept. 10, 1949, C. paid the residue of the estate to the Treasury Solicitor on the footing that the testatrix had left no lawful next of kin and that the residue was bona vacantia. On Mar. 3, 1953, C. died intestate and no grant of representation to his estate was obtained. On Mar. 11, 1954, the plaintiff, who claimed to be one of the next of kin of the testatrix, obtained a grant of administration de bonis non to the estate of the testatrix. The Treasury Solicitor refused to recognise the plaintiff's title to give a good discharge for the assets which the Treasury Solicitor had received from C., but (without admitting liability) was prepared to account for and transfer those assets to any persons who established their claims to be next of kin of the testatrix. E

Held: (i) the testatrix's estate having been administered by C. according to law and the assets having been distributed after advertisements had been published under the Trustee Act, 1925, s. 27, the plaintiff could not give the Treasury Solicitor a good discharge in respect of those assets as they were not unadministered at the date of the grant of administration de bonis non to the plaintiff. F

Harvell v. Foster ([1954] 2 All E.R. 736) distinguished. G

(ii) in view of the voluntary recognition by the Treasury Solicitor of the next of kin as the persons entitled to the assets, an inquiry as to the next of kin of the testatrix would be ordered. H

Observations on the form of advertisement under the Trustee Act, 1925, s. 27 (1). I

[For the Trustee Act, 1925, s. 27, see 26 HALSBURY'S STATUTES (2nd Edn.) 89.]

A Cases referred to:

- (1) *Newton v. Sherry*, (1876), 1 C.P.D. 246; 45 L.J.Q.B. 257; 34 L.T. 251; 40 J.P. 584; 23 Digest 224, 2715.
- (2) *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 23 Digest 390, 4607.
- (3) *Harvell v. Foster*, [1954] 1 All E.R. 851; *revsd.* C.A., [1954] 2 All E.R. 736; [1954] 2 Q.B. 367.
- (4) *Re Ponder*, [1921] 2 Ch. 59; 90 L.J.Ch. 426; 125 L.T. 568; 23 Digest 464, 5357.

B

Adjourned Summons.

The plaintiff, as administratrix de bonis non of the estate of Charlotte Agnes Aldhous, deceased, applied to the court by originating summons for a declaration that the plaintiff had power to give a good receipt and discharge to the Treasury Solicitor for the part of the estate of the testatrix as to which she died intestate and which was now held by the Treasury Solicitor. Alternatively the plaintiff sought an inquiry as to the persons beneficially entitled to any property as to which the testatrix died intestate.

D

V. M. C. Pennington for the plaintiff.

Denys B. Buckley for the Solicitor for the affairs of H.M. Treasury.

DANCKWERTS, J.: Charlotte Agnes Aldhous died on Feb. 3, 1948, having five days earlier made a will dated Jan. 29, 1948, by which she appointed Patrick Aloysius Coyne to be her executor and gave to Mr. Coyne and his wife £100 free of legacy duty. She made no other disposition in respect of her estate and consequently she died intestate as regards all the rest of her property which amounted altogether to something over £1,400.

E

Mr. Coyne obtained a grant of probate on Apr. 13, 1948, and in July, 1948, he issued advertisements in pursuance of the Trustee Act, 1925, s. 27. These advertisements in the "London Gazette" of July 2, 1948, are in the form which permits advertisements to be made in respect of a number of estates with a common direction applying to them all in pursuance of arrangements made by the Lord Chancellor's Office (see [1948] W.N. part 2, 47).

F

The form of advertisement I will take from "The Times" of July 26, 1948, in which the advertisement was also inserted as well as in the "West London Observer" of July 2, 1948. The form of advertisement is:

G

"Charlotte Agnes Aldhous, deceased. Pursuant to the Trustee Act, 1925. Notice is hereby given that all persons having any claims against the estate of the above-named late of 21 Richmond Gardens, Shepherds Bush, in the county of London, who died on Feb. 3, 1948, are required to send particulars thereof to the undersigned solicitors to the executor on or before Sept. 30, 1948, after which date the executor will distribute the estate having regard only to the claims then notified."

H

This form of advertisement has been used for a long time, and was based, as it appears to me, on the provisions of the Law of Property Amendment Act, 1859, which is generally known as Lord St. Leonard's Act and, in fact, uses the words "claims against the estate" of the deceased person.

I

It is clear from the decision of BRETT, J., in *Newton v. Sherry* (1), that such a form of advertisement would be effective not only in respect of claims of creditors but in respect of the claims of next of kin of a deceased person or, I suppose, of persons entitled under the will of a deceased person to share in the estate of that deceased person. It is unfortunately worded if it is intended to notify persons without legal training that they are to put in their claims to share beneficially in an estate. "Claims against the estate" of a deceased person suggests much more naturally claims by creditors than by beneficiaries. In fact the wording of the advertisement does not follow the wording of the enactment which is now in force, viz., the Trustee Act, 1925, s. 27 (1), which (as amended

by the Law of Property Amendment Act, 1926, s. 7, s. 8 (2) and schedule) provides: A

“ With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and in a newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.” B C

It is plain that that section applies to the claims of beneficial owners as well as to the claims of creditors in respect of any estate or trust fund. The words “ against the estate ” do not appear anywhere in s. 27 (1), and I cannot help thinking that the time has come when advertisements for creditors or for persons beneficially interested in the estate of a deceased person should be re-cast so as to follow more accurately the wording of the present operative section, s. 27, and should be put in such a way as to indicate to normal people that it is not merely the claims of creditors which are required to be sent in, but also those of beneficiaries. Section 27 (2) provides: D

“ At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section—(a) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or (b) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.” E F

The advertisements which I have mentioned were issued by the executor in the present case. It appears that he dealt with all creditors who put in any claims and that no claims whatever came in from any next of kin. Accordingly, on Sept. 10, 1949, the executor paid over £1,445 to the Treasury Solicitor on the footing that the deceased had left no lawful next of kin and that the Treasury Solicitor on behalf of the Crown had become entitled to all the remaining assets. G H

On Mar. 3, 1953, the executor died intestate and no representation to his estate has been obtained, but on Mar. 11, 1954, the plaintiff, Charlotte Esther Noble, a married woman, who claims to be a lawful niece of the whole blood of the deceased and one of the persons entitled to the undisposed estate of the testatrix obtained a grant of administration de bonis non to the estate of the testatrix. The grant states that an affidavit for Inland Revenue had been delivered wherein it was shown that the gross value of the said unadministered estate in Great Britain (exclusive of what the said deceased may have been possessed of or entitled to as trustee and not beneficially) amounts to £1,400. I

The present summons has been taken out by the plaintiff against the Treasury Solicitor as a result of the refusal of the Treasury Solicitor to recognise the plaintiff's title to give a full receipt in discharge of the moneys paid over to him. It appears that there are next of kin in addition to the plaintiff, whose claim may

A or may not be good. The Treasury Solicitor, whether or not he is under any lawful obligation so to do, is prepared to account for and pay over the moneys which he has received to any persons who establish their claim to be the lawful next of kin. The relief asked for by the plaintiff is:

B “A declaration that the plaintiff has power to give a good receipt and discharge to the Treasury Solicitor for the part of the estate of the testatrix as to which she died intestate and which is now held by the Treasury Solicitor or alternatively an inquiry as to the persons entitled to the part of the estate of the testatrix as to which she died intestate and directions as to the distribution thereof.”

C It is contended on behalf of the Treasury Solicitor that there is, in fact, no unadministered estate left, and that, therefore, the grant which was obtained by the plaintiff was nugatory. It is pointed out that the advertisements which have been issued in accordance with the provisions of s. 27 of the Trustee Act, 1925, have the result of protecting the executor in respect of the payment which he made to the Treasury Solicitor. It is plain, I think, that no proceedings could be brought against the executor or his estate for what he did because he D administered the estate in accordance with law.

E On the other hand, it is contended on behalf of the plaintiff that an estate is never fully administered in the complete sense because at any time assets of the estate may arise or be discovered, and it may, therefore, be the function of the personal representative of the deceased to recover those assets. In support of that proposition I have been referred to *Attenborough v. Solomon* (2), and in particular to the observations of VISCOUNT HALDANE, L.C. ([1913] A.C. at p. 85). The facts of that case were that fourteen years after the death of the deceased one of the two executors attempted to pledge some of the assets of the estate. It was held by the House of Lords that after that lapse of time the executors must be presumed to have assented to the trusts of the will and to have become trustees, and that they could no longer, therefore, exercise the power of a personal F representative to raise money by pledge for the purpose of satisfying, for instance, creditors of the estate. Therefore, the existing trustees were entitled to recover the pledged assets. The decision seems to me to give no assistance whatever to the plaintiff's contentions, although the observations of LORD HALDANE, L.C. ([1913] A.C. at p. 85) do suggest that there may be some functions still existing in the case of a personal representative after the debts had been fully paid or G ought to have been fully paid.

I have also been referred to *Harvell v. Foster* (3). In that case the testator gave all his estate to his daughter (who was the plaintiff) and appointed her his sole executrix. When he died in 1948, the plaintiff was under twenty-one years of age. Accordingly administration with the will annexed was granted to her H husband during her minority. The husband and two solicitors as sureties gave to the Principal Probate Registrar a joint and several administration bond that the husband would “well and truly administer the estate” according to law, and, further, that he would “make or cause to be made a just and true account of the administration of the said estate.” What happened was that the husband having got in the assets amounting to £950 did not account for them as he should have done to the plaintiff. He paid her only £300, and himself misappropriated the rest. He disappeared with them and he never accounted at all. The I action was against the sureties on the point that the husband had not properly administered the estate. LORD GODDARD, C.J. ([1954] 1 All E.R. at p. 854), thought that the claim failed because, the debts and liabilities having been fully discharged, on the authority of the decision of SARGANT, J., in *Re Ponder* (4), the husband had become a trustee for his wife and the administration had been fully completed, but the Court of Appeal decided otherwise. They thought that the administration could not be fully completed until the administrator had

accounted to the persons properly entitled to the assets. Obviously that had not been done in that case because the administrator had misappropriated them. That decision does not apply to the present case because there is no suggestion here that any proceedings could have been brought against the executor who acted in accordance with the law by issuing advertisements pursuant to the Trustee Act, 1925, s. 27, and distributed the assets after having complied with the provisions of the section. It is true that it turns out that he paid the assets over to the wrong person, but no complaint could be made against him because he dealt with the claims which he had, and he was not aware and had no notice of the claims of the true next of kin. That seems to me to distinguish the present case from the decision of the Court of Appeal in *Harvell v. Foster* (3). The executor had fully administered the estate in accordance with law and there are no unadministered assets in respect of which the plaintiff's grant could take effect. A B C

It is true that the next of kin might have the right to follow the assets into the hands of somebody who had acquired them without a proper title to them, but that is a relief which is given to them by the statute and by law in their capacity as beneficiaries. It is of no assistance to the plaintiff in her capacity of administrator de bonis non.

It appears that although in some cases the beneficiaries might be entitled to follow the assets, in the present case the beneficiaries could not follow the assets strictly into the hands of the Treasury Solicitor because he, having obtained the payment as the representative of the Crown, has accounted to the Crown and the assets have gone into the consolidated fund. It may be that they could never be strictly recovered against anybody at all in the present case, but the Treasury Solicitor has voluntarily recognised the claims of the next of kin as being the persons who were really properly entitled to the assets of the estate and he is prepared to provide the money for the satisfaction of their claims. Accordingly if I had to decide the case strictly, I should have to hold that the plaintiff could not give an effective discharge to the Treasury Solicitor, and it would be very doubtful whether she could obtain any relief on the present application; but with the co-operation of the Treasury Solicitor the order which I propose to make is as follows: "The Treasury Solicitor, while not admitting any liability, being willing to account for the sums paid to him by the executor of the deceased to whoever shall be shown to be the lawful next of kin of the deceased" and then direct an inquiry as to next of kin and reserve liberty to apply. D E F

Order accordingly.

Solicitors: *Rose, Johnson & Hicks* (for the plaintiff); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

J. v. J.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), March 18, 1955.]

Divorce—Maintenance of wife—Assessment—Factors to be considered—Ability of husband—Husband living on overdrafts—Conduct of wife—Delay in filing discretion statement—Wife's adultery not a cause of break-up of marriage—

B

Wife not proceeding with charges of cruelty against husband—Lack of sincerity—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 19 (2), (3).

The parties were married in May, 1940, and there were two children of the marriage. In 1940 the husband was a branch manager of an insurance association. In 1943 the husband entered the employment of an insurance company at a salary of £1,000 p.a. with a car. In 1945 the husband began to commit adultery with his secretary, Mrs. W. In 1948, when he had become managing director at £3,500 p.a. plus car and expenses, he left his employment and bought an estate for £29,500 which he equipped as a country club at a further cost of £12,000. Most of this money was borrowed. In March, 1949, the club was largely destroyed by fire. In September, 1949, the wife left the husband because he had continued to commit adultery in spite of promises to her not to do so. In 1949 the wife herself began to commit adultery. On Oct. 14, 1949, the wife presented a petition for divorce on the ground of the husband's adultery in August and September, 1949. On Nov. 3, 1949, the petition was ordered to be heard as an undefended cause. In December, 1952, the wife, having obtained leave, amended the petition by asking for the court's discretion to be exercised in her favour. The wife signed a discretion statement which was not filed. In February, 1953, the husband filed an answer alleging, by way of defence, connivance, condonation, collusion and undue delay, and cross-prayed for a decree of divorce on the ground of the wife's adultery. In May, 1953, the wife filed a reply refuting the allegations of the husband made by way of defence. In June, 1953, the wife amended her petition to allege adultery by the husband from 1946 onwards, and filed a supplemental petition alleging (i) adultery by the husband with Mrs. W. after the date of the original petition and (ii) cruelty. The allegations of cruelty were largely based on the husband's persistence in the adulterous association with Mrs. W. On July 3, 1953, the wife signed a discretion statement which was filed. On Oct. 16, 1953, the husband's answer was struck out on his application. On Dec. 17, 1953, the suit was heard undefended and a decree nisi granted to the wife. On Jan. 29, 1954, the decree was made absolute.

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In February, 1954, the husband acquired a bombed site and started to erect houses at a cost of £40,000. By the end of 1954, the husband had sold various houses on the country club estate for £12,500, and was in the process of converting other buildings at a cost of £17,500. The value of that property on completion would be £34,800. He was also interested in two other property development schemes. The husband was living and carrying on this business on bank overdrafts and loans. His taxable income for the year 1953-54 was shown as £60. On an application by the wife for an order for the payment of maintenance under the Matrimonial Causes Act, 1950, s. 19 (3), for the period (by consent) of approximately one year from Sept. 1, 1954,

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Held: (i) in determining what sum was reasonable for the husband to pay to the wife under s. 19 (3) of the Act of 1950, the court must take into account the three factors referred to in s. 19 (2) viz., the "fortune", if any, of the wife, the "ability of her husband", and "the conduct of the parties" (*Chichester v. Chichester* ([1936] 1 All E.R. 271) applied).

(ii) there was nothing in the wife's conduct which was prejudicial to her claim for maintenance since (a) neither on authority nor on principle could delay in filing a discretion statement affect her right to maintenance, (b) it would not be right in the present case to hold against her the fact that she

made but did not proceed with her charges of cruelty, (c) there were no facts entitling the husband to raise a plea of "lack of sincerity", and (d) the wife's admitted adultery was not a cause of the break-up of the marriage and there was no reason for penalising her now that the adultery had ceased (observation of PEARCE, J., in *Duchesne v. Duchesne* ([1950] 2 All E.R. at pp. 791, 792) applied).

(iii) the word "ability" in s. 19 (2) should be broadly construed in the light of the realities of each case, and might include in certain circumstances ability to provide money by overdraft or through loans (observations of LORD MERRIVALE, P., in *N. v. N.* (1928) (138 L.T. at pp. 696, 698) applied).

(iv) on the facts, the husband had assets of high value, and an outstanding ability to secure loans and overdrafts for general as well as for business expenditure; his standard of living was in excess of £1,000 p.a. tax free plus a car, and a reasonable sum for him to pay to the wife would be £5 10s. per week free of tax as from Sept. 1, 1954, for the ensuing year.

Per CURIAM: I would commend the practice that a husband should not be allowed to raise on an application for maintenance allegations relating to the wife's conduct unless proper notice had been given by affidavit or otherwise (see pp. 90, 91, post.)

Appeal allowed. Cross-appeal dismissed.

[As to Orders for the Payment to the Wife of Monthly or Weekly Sum as Maintenance on Decree of Dissolution, see 10 HALSBURY'S LAWS (2nd Edn.) 786, para. 1244 note (t); and for cases on the subject, see 27 DIGEST (Repl.) 613-616, 5742-5764.]

For the Matrimonial Causes Act, 1950, s. 19 (2), (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 407.]

Cases referred to:

- (1) *Clifford v. Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 27 Digest (Repl.) 417, 3462.
- (2) *Duchesne v. Duchesne*, [1950] 2 All E.R. 784; [1951] P. 101; 27 Digest (Repl.) 615, 5760.
- (3) *Ward v. Ward*, [1947] 2 All E.R. 713; [1948] P. 62; [1948] L.J.R. 997; 112 J.P. 33; 27 Digest (Repl.) 706, 6739.
- (4) *Rose v. Rose*, [1950] 2 All E.R. 311; [1951] P. 29; 114 J.P. 400; 27 Digest (Repl.) 618, 5777.
- (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
- (6) *Chichester v. Chichester*, [1936] 1 All E.R. 271; [1936] P. 129; 105 L.J.P. 38; 154 L.T. 375; 27 Digest (Repl.) 617, 5768.
- (7) *N. v. N.*, (1928), 138 L.T. 693; 27 Digest (Repl.) 618, 5772.
- (8) *Howard v. Howard*, [1945] 1 All E.R. 91; [1945] P. 1; 114 L.J.P. 11; 172 L.T. 38; 27 Digest (Repl.) 622, 5804.
- (9) *Barker v. Barker*, [1952] 1 All E.R. 1128; [1952] P. 184; 3rd Digest Supp.
- (10) *Shearn v. Shearn*, [1931] P. 1; 100 L.J.P. 41; 143 L.T. 772; 27 Digest (Repl.) 629, 5897.
- (11) *Klucinski v. Klucinski*, [1953] 1 All E.R. 683; 117 J.P. 187; 3rd Digest Supp.
- (12) *Lyde v. Barnard*, (1836), 1 M. & W. 101; 5 L.J.Ex. 117; 150 E.R. 363; 26 Digest 31, 189.
- (13) *Sherwood v. Sherwood*, [1929] P. 120; 98 L.J.P. 66; 140 L.T. 230; 27 Digest (Repl.) 633, 5937.
- (14) *Bellenden (formerly Satterthwaite) v. Satterthwaite*, [1948] 1 All E.R. 343; 27 Digest (Repl.) 624, 5835.

A Summons.

On Dec. 17, 1953, the wife was granted a decree nisi of divorce, which was made absolute on Jan. 29, 1954. The wife applied for an order for maintenance under the Matrimonial Causes Act, 1950, s. 19.

B On Feb. 9, 1955, Mr. Registrar FORBES made an order in her favour directing the husband to pay her the sum of £2 per week. The wife appealed and the husband cross-appealed.

G. B. M. Reed and T. H. Thomas for the wife.

Joseph Jackson and J. C. J. Tatham for the husband.

Cur. adv. vult.

C Mar. 18. **SACHS, J.**, read the following judgment: This appeal and cross-appeal from an interim order for maintenance made on Feb. 9, 1955, by Mr. Registrar FORBES in favour of the wife raise two main issues. The first is as to how to interpret and apply the phrase "ability of the husband" in assessing what is reasonable for him to pay for the support and maintenance of the wife: the second is as to what can properly be taken into account in relation to the conduct of the wife in assessing that sum. The first point involves the questions whether **D** "ability" includes in the special circumstances of the present case "ability to overdraw", and if so, how far it is reasonable to rely on the husband increasing his overdraft or otherwise obtaining loans: the second includes questions whether or not it is right to take into account delay on the part of the wife in filing a discretion statement, the fact that the wife at a late stage of the proceedings charged the husband with cruelty but did not pursue that charge when **E** the case became undefended as regards the husband's admitted adultery, and what the registrar referred to as the "lack of sincerity" of the wife. The case is one of complexity, particularly on the financial side, and has followed, as regards the pleas of the parties, a long, tortuous and by no means stereotyped course. As a result, the investigation before the registrar of an application issued by the wife in May, 1954, took three days and the argument before me occupied in the **F** aggregate some twenty-three court hours spread over six days. The cause of that regrettable state of affairs I will discuss later.

The history of the matter, in so far as it is common ground, is as follows. The marriage took place in May, 1940, the husband then marrying for the second time at the age of thirty-six, the wife being aged only twenty. In **G** September, 1941, a daughter was born, and in 1943 a son, both now in the custody of the wife. By great misfortune the girl has proved to be of less than normal intelligence, and is provided for in a manner to which I will refer later. In 1940 the husband was a branch manager of an insurance association at a salary of £750 p.a. with a car. In 1943 he went into the employ of an insurance company, starting at £1,000 p.a. and by 1948 he was its managing director at £3,500 p.a. **H** plus car and expenses. While with that company a Mrs. W. was his secretary, and according to a discretion statement he filed (and which I have read by consent of both counsel) he began to commit adultery with her in 1945, and continued persistently to commit such adultery with varying frequency till 1949, when the wife left him. After that the adultery continued and in due course they proceeded to live as man and wife until he married her in April, 1954. **I** In 1948 the husband left his employment and shortly afterwards bought for £29,500 an estate, vested it in a company of which he owned all the shares except four, and furnished and equipped it as a country club at a cost put by his counsel at a further £12,000. The great bulk of this money seems to have been borrowed; the figures given in evidence are not clear, but it looks as if all but £4,000 was loaned to him in one way or another. The husband and the wife lived on the estate and both joined in the work of running the club. In March, 1949, a bad fire destroyed a large part of the club and in September, 1949, the marriage broke up on the wife finding (according to, *inter alia*, her discretion statement)

that he was continuing to commit adultery with Mrs. W. despite a series of promises made after the wife had discovered the association in 1946. The wife in her turn and in circumstances related in her discretion statement in 1949 had come to commit adultery. From 1949 onwards the husband busied himself with the affairs of the company, against which a compulsory liquidation order was made in April, 1949. As between cutting his losses and leaving himself free to return to an insurance office and making what he could out of the estate, he chose the latter course. The property was conveyed to him in May, 1953. By the end of 1954 he had sold various houses on it for £12,500: and now the main building and the cottage in which he lives are being re-instated and converted under a £17,500 building contract. How all this was financed I will mention later. Suffice it for the present to say that the value on completion of the property is assessed in a valuation of October, 1954, at £34,800. In February, 1954, the husband embarked on a further building project. He acquired a bomb-wrecked site in a square in London S.W. for about £10,000, and is there erecting some seven houses. This I will refer to as the S.W. scheme. To the £40,000 finance for this project I will also refer later. The value of the houses on completion is not in evidence, but counsel have agreed that the husband said he expected on completion there would be a "substantial profit", so that their completed value will be well in excess of £50,000. In addition to these properties the husband referred in evidence before the registrar to two further development schemes in which he appears to be concerned. The registrar's note reads:

Buckingham Scheme	.. 3 conversion
	9 new houses
West End Scheme	.. 17 new houses
	9 mews conversion.

On the break-up of the marriage in September, 1949, the husband had left the wife and the children in the three bedroomed cottage on the estate that had been the matrimonial home. In January, 1953, under pressure of the threat of eviction proceedings in the name of the country estate company (in liquidation) the husband secured the eviction of the wife and children from the cottage. He has since lived there and is now living there with Mrs. W. whom, as previously stated, he has married.

It is convenient first to deal with the second point—the conduct of the wife. As to this the learned registrar says in his written note of the reasons for his decision:

"Counsel for the [husband] urged strongly that regard should be had to the conduct of the [wife]. When she first filed her petition she omitted to ask for the exercise of the court's discretion. She subsequently obtained leave to do so, and her failure to plead cruelty until a subsequent date would, as the husband's counsel put it, indicate some lack of sincerity on her part. I feel bound to hold that the wife's conduct is a factor which I think must be taken into account."

The only reasons which the registrar there appears to specify as against the wife relate to the course of the divorce proceedings. That course being also relevant to further arguments put before the court, it is convenient to summarise what happened. The petition of the wife is dated Oct. 14, 1949, is short, and alleges against the husband adultery in August and October, 1949. On Nov. 3, 1949, the petition was ordered to be heard as an undefended cause. No further movement in the case is disclosed in the court file till December, 1952, when the wife obtained leave to, and did, amend by asking for discretion. A discretion statement was signed in December, 1952, by the wife, but was not filed. In February, 1953, the husband filed an answer and particulars (together some four foolscap pages) alleging by way of defence connivance, condonation, collusion

A and undue delay. In addition there was a cross-prayer for a decree on the grounds of the wife's adultery. In May, 1953, the wife having changed her solicitor and counsel and having obtained legal aid, filed a reply setting out details of her refutation of the allegations made by the husband by way of defence. In June, 1953, she amended her petition to charge her husband with adultery from 1946 onwards and filed a three-page supplemental petition alleging first adultery
B by the husband with Mrs. W. after the date of her original petition, and secondly cruelty. The bulk of the charges of cruelty had reference to the husband's relations with Mrs. W., his failure to give up Mrs. W. despite the wife's entreaties, and his persistence in the association with Mrs. W. Reference was also made to the circumstances of the wife's eviction from the cottage on the country estate and certain financial matters. On July 3, 1953, she signed the discretion
C statement now before the court. The next relevant step—an important one—was that on Oct. 16, 1953, the husband's answer was struck out. I am told this was done on his application. The case, having thus become once more undefended, was heard on Dec. 17, 1953, the date of the decree nisi, which was made absolute on Jan. 29, 1954.

I now revert to the reasons given by the registrar. Neither on authority nor
D on principle does it seem that mere delay in filing a discretion statement can of itself affect the wife's right to maintenance. Nor in this case can I see any reason why it should. That delay can constitute matter as between the wife and the court to be taken into account on the issue whether the court should exercise its discretion. It cannot be taken into account as between the parties under the heading of "conduct of the parties" in s. 19 (2) of the Matrimonial Causes Act,
E 1950. Equally, while leaving open the question whether the bringing of gross unfounded charges in the course of the proceedings might not be taken into account, it seems to me wrong in the present case to seek to hold against the wife that she made, but did not in a then undefended cause unnecessarily proceed with, a charge of cruelty so closely linked on the facts with the adultery on which she gained her decree. Next it is to be noted that the reasons given by the registrar
F refer to "lack of sincerity" on the part of the wife. In the present case lack of sincerity could not affect the grant of the decree nisi, and I doubt if it can affect the question of maintenance. The registrar, however, was not referred to any of the cases such as *Clifford v. Clifford* (1) in connection with the meaning in matrimonial causes of the words "lack of sincerity" and in particular its relationship to estoppel. There is no factor in evidence in the present case that could
G entitle the husband to raise a plea of "lack of sincerity" in relation to the wife's claim for maintenance. Accordingly with all diffidence, in that I am differing from an experienced registrar, I consider that he misdirected himself in law when dealing with the wife's conduct and I must look at that aspect of the case de novo.

Accordingly there fall to be considered further points which counsel for the husband has urged in relation to the wife's conduct. As regards these I should
H first mention that I have had the advantage of reading the husband's discretion statement, a document apparently not referred to before the registrar. It contains some illuminating admissions as to the persistence of the husband in his adultery from 1945 onwards with his then secretary, Mrs. W., with whom he has lived as man and wife since 1951. The statement lays against the wife as leading to that adultery pre-1945 coldness and lack of affection, coupled with her being a party to "unpleasant incidents" between the husband and her
I parents. These allegations are not particularised (as to which see *Duchesne v. Duchesne* (2), [1950] 2 All E.R. at p. 792), have not been put on oath in the course of the maintenance proceedings, and are allegations with which the wife neither has had nor could have had an opportunity to deal in the course of those proceedings. The husband did not refer to them in his long examination in chief. Incidentally it is common ground that the registrar was asked to consider the conduct of the parties on the documents before him, and these did not refer to

the above allegations. Before me counsel for the husband did not suggest that conduct of the wife was a contributory cause of the break-up of the marriage, but I have considered that possibility. Noting that both parties seem to agree that difficulties started in 1943, when the husband first joined an insurance company where Mrs. W. was his secretary, and that the wife says the husband as from that date ceased to have sexual intercourse with her, and noting the persistence of his attachment to Mrs. W. over so many years, I have no doubt that this attachment was the true cause of the break-up of the marriage. Having rid himself of his wife and his children too, and put Mrs. W., his third wife, in their place, the husband cannot in my view succeed in any attempt to put on the young wife any material part of the blame for the break-up.

In those circumstances can he in this particular case in the maintenance proceedings successfully fall back on the wife's admitted misconduct? The wife's conduct was reprehensible, but it followed on six years' lack of sexual intercourse and unhappiness, and the husband's conduct was indeed black. The wife's conduct not being a cause of the break-up, I see no good reason for penalising her now that her adultery with the man in question has long ceased—at any rate in the ranges of figures here under consideration where any discount off the husband's liability would in any event have been but small (see *Duchesne v. Duchesne* (2), [1950] 2 All E.R. at p. 791). In this I am glad to find myself in agreement with the experienced registrar who by implication also rejected counsel for the husband's argument on this point. Further, having made inquiry since coming to that conclusion, I am fortified by the knowledge that the conclusion is in no way inconsistent with the way in which such problems are currently regarded in maintenance proceedings. In considering the wife's conduct I have, of course, noted that the husband asked for the offensive allegations in his answer to be struck out. Not only was that an admission that his version of how his wife behaved in relation to his association with Mrs. W. constituted a false charge, but he is in law precluded from alleging otherwise, for the reasons given in *Duchesne v. Duchesne* (2). That being the position as to the husband's allegations in his answer and the story as set out in the particulars, I see no reason why in acceding to his counsel's request to take into account the facts detailed in the discretion statement, I should not have regard to the wife's statement that she begged the husband to give up Mrs. W., but that she could not break up the association, or that the marriage was reasonably happy till the husband met Mrs. W. In fact I reached my general conclusion from other material, but those passages support it. Finally at the request of counsel for the husband I record his unusual submission that I should reduce the wife's maintenance (under the heading still of her "conduct") because of an alleged false statement in an affidavit as to the urgency of an operation to her feet. I reject the suggestion that the accuracy of statements in maintenance proceedings as to means or potential means can affect the proportion of the husband's means to be paid to the wife. It might incidentally be a poor look-out for many husbands if I held otherwise, and an especially poor look-out for this particular husband.

Before I leave this issue as to the conduct of the wife it is desirable to refer to the lack of particularisation of the allegations made against her. There is no trace in the husband's affidavits that he was going to rely in any way on allegations against the wife in order to discount his own liability. In *Duchesne v. Duchesne* (2) the need for proper particulars is mentioned ([1950] 2 All E.R. at p. 792). Further, in *LATEY ON DIVORCE* (14th Edn.), at p. 246, the principle involved is well stated in broad terms as follows:

"The charges should be made with precision in the husband's affidavit. If the wife denied them, there should be an order for oral evidence before the registrar . . ."

A practice commonly followed at present is to refuse to allow allegations relating

- A to the wife's conduct to be raised on an application for maintenance unless proper notice has been given by affidavit or otherwise. If such notice has been given, an order that an issue on the subject be tried can, if necessary, be made or the matter can be dealt with in the course of the hearing of the summons, according to the nature of the case. That practice I would commend. In the present case I would not myself have permitted an argument that ranged over a wide
- B area of un-particularised allegations but for the fact that in some form or other issues relating to conduct had in fact been canvassed before the registrar. Whether or not the facts relied on by a husband are later found to be in controversy, it is obviously highly desirable that any charges made should be reduced to writing in a form enabling first the wife's advisers to consider before the hearing how to meet the charges, and later an appellate court to know
- C precisely what the charges were.

- At this stage it is convenient to dispose of an additional point on which argument was addressed to me. Counsel for the husband stressed the earning capacity of the wife, a factor to which the registrar referred and, in conclusion, dealt with in these words: "taking into account therefore . . . her potential earning capacity", a capacity he treated as one of the three main factors in assessing the
- D amount to be paid. Whether or not he took into account her full earning capacity (as might be thought from the word "potential" as used without any modification), is not fully clear. Approaching the matter, as it were de novo, I note that at no stage during her married life did the wife enter into employment outside the matrimonial home, except in so far as she assisted the husband in the joint enterprise of running a country club during the period before the fire.
- E Having regard to her duties towards the children and the fact that the husband was previously earning a considerable salary this is not surprising. After the marriage broke up there came a time when the wife of her own initiative sought training to become a saleswoman with a well-known firm, but this employment she had to give up in August, 1954, owing to an operation affecting her feet. In respect of that operation and subsequent treatment she has incurred liabilities
- F of £147, which have been met in the first instance by her father who is about to retire. From then onwards there has been a period when she has been unable to work. So far as can be gathered from the evidence she is now available for sedentary work, but so far has secured only a temporary post at £8 a week at the Ideal Home Exhibition. She has no other income. She now lives with her parents in a small flat. This is a source of inconvenience when the son comes on
- G his holidays, and it would not be practicable for the daughter, who has had to go into a National Health Scheme institution, to come there on the visits which the doctor has advised she should make so as to have the company of her mother and her brother. The wife wishes to have accommodation of her own. Applying to this situation the guidance available from the judgment of LORD MERRIMAN, P., in *Ward v. Ward* (3), and the judgments of the Court of Appeal in *Rose v. Rose* (4),
- H I take the view that the wife is not under an obligation in the circumstances to go out and earn, and that if she does obtain employment the husband is not entitled to have the whole amount of what she earns taken into account in any calculations which affect maintenance. On the other hand, I propose to assume that she will work when she can and that there should accordingly be some "discount" applied to whatever amount would otherwise be ordered against the
- I husband as regards maintenance. I felt but small attraction for the argument that the husband was entitled to insist on the mother of his children adopting regular employment whilst those children are in her custody. It seemed an even less attractive proposition when one realised that this husband was living alone with his present wife (Mrs. W.) in a cottage which was being reconstructed and added to at his expense, the present wife (Mrs. W.)—a trained secretary—neither going out to work nor having in her home her own son aged twelve years. That son was being boarded out with an aunt: and indeed the husband asserts that

£2 a week for fifty-two weeks should be taken into account for the expense he pays for boarding out that stepson. As Mrs. W.'s former husband is paying £6 a month for the stepson's maintenance, and he could be provided for at the cottage on some such cost, I may say that on the evidence before me the claim that the whole of this £2 a week should have priority over the wife's right to maintenance seemed a little unreal. A

I now turn to the main issues in the case—those relating to the financial position of the husband. Before, however, one can proceed to an analysis of the vital figures and facts on which a decision must turn, it is unfortunately necessary to deal with the question argued as to the husband's veracity. In the upshot I doubt very much if, for reasons later stated, conclusions on this subject materially affect the ultimate result. But so long and so hot has been the contest that it is my duty to deal with it, for the assistance of any appellate court to which this case may go. For the husband it is argued that the registrar, who has had the benefit of watching the husband give evidence, in giving his reasons implicitly either assumes or asserts him to be a witness of truth. With that argument I am inclined to agree. Then, his counsel proceeds, it is for me to follow the principles laid down in *Watt (or Thomas) v. Thomas* (5), and here again I agree. Counsel for the wife, as against this, submits that looking with care at the documents and the evidence of the husband in the light of the course the present case has taken, I ought to conclude that the husband is greatly lacking in frankness and is indeed very unreliable as a witness. I start my examination of the facts on the basis that a man who rises to be the mainspring of an insurance company is very able. Next, that from this and from his methods of conducting recent large property development enterprises he must obviously be a man of special financial talent and of commercial integrity. In addition, his insurance experience was such that he must have not only high knowledge of what is important in assessing a financial situation, but acute awareness of the meaning of figures and of how to be exact. On the other hand, it is common knowledge that men of quite unquestionable commercial integrity may somehow justify to themselves most questionable methods on certain matters outside commerce, such as the defeating of the claims of an ex-wife. Next, I observe that this man, of all men, could by means of schedules supported by original documents, very easily have presented to the court a clear-cut picture of his present schemes, of the results he planned, and of the times at which those plans were expected to mature. If not by schedules, he could have achieved the same result by other clear evidence. The same observations apply to a considerable degree to explanations of his current expenditure. Instead, the registrar and this court were faced with prolonged argument on a welter of potentially confusing facts, a mass of figures in confused order, a complete absence of books of account or even a wages book, no schedules or summaries prepared by or for the husband, no proper affidavits of documents or lists of documents. Further there has been much dispute as to what documents were or were not put in evidence before the registrar. [His LORDSHIP referred to the husband's affidavit in reply, to his affidavit of documents, and to his bank pass-sheets, and continued:] In the upshot, in the documents as now analysed in a way that was perhaps not practicable on their first impact at the hearing before the registrar, I have no hesitation in concluding that in his attempts to minimize the wife's claims the husband has been devoid of frankness and indeed generally unreliable. I have reached my conclusion without need to examine in detail the circumstances much stressed by counsel for the wife, in which the husband, an insurance expert, in April, 1949, lent his name to a sworn declaration after the fire that the assets of the company that owned the club were worth £96,000 as against liabilities of £41,000, when in fact the assets proved to be worth a great deal less. Suffice it to say that this seems to confirm my conclusion that the husband has a somewhat elastic view B C D E F G H I

A of the value of assets according to whether it is to his advantage to put the value high or to his advantage to put the value low.

In cases of this kind, where the duty of disclosure comes to lie on a husband, where a husband has, and his wife has not, detailed knowledge of his complex affairs, where a husband is fully capable of and has had opportunity to explain those affairs, and where he seeks to minimise the wife's claim, that husband can
B hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap such that two alternative inferences may be drawn, the court will normally draw the less favourable inference, especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative. Had I simply proceeded on that footing my findings would have been little if at all different from those I have reached after coming to the conclusion above stated as to the husband's frankness and reliability. To the above duty of disclosure and the consequences of non-compliance I will later have to refer further.

Now, at length I can pass to what must unfortunately be a detailed task—such analysis of the figures in evidence as that evidence permits. In the main
D these figures relate to two topics: first, his capital position, secondly, his expenditure on household, personal affairs, and on other matters which do not solely come under the heading of “business expenses”. At the outset it should be stated that according to a letter referring to his income tax returns his (taxable) income was:—

E	1951-52	£44
	1952-53	£69
	1953-54	£60

As to this there is, as previously noted, an absence of any copies of income tax returns or any proper material as to how his returns were computed. In the sketchy documents put in evidence there is for instance no trace of the figure at which he put his business expenses or of his loan and overdraft charges in 1952-53 and 1953-54. It should, however, be made clear at this stage that whilst the bank accounts disclosed show on the face of them relatively small balances, either in black or in red, in substance the husband is and has been for some time living and carrying on business on money borrowed on a large scale. But no banker of his has been called, and the court's knowledge of the size of the loans and the security pledged against them is incomplete. No direct evidence was given as to how much more he is entitled to borrow or can reasonably expect to borrow.

[His LORDSHIP considered the evidence of the husband's means and continued:] Those being the facts the question arises as to what is the law applicable. On this aspect of the case much assistance was given to me by both
H counsel. Indeed it is right to record that when it came to legal points, whilst the argument for the husband had on facts and figures failed to crystallise save on invitation, it was full, lucid and interesting on the law. For the wife it was submitted that there was ample evidence on which the husband had been shown able to pay to the wife maintenance at an annual rate of £500. Indeed, whilst in his first address counsel for the wife put the upper limit at £500 and expressed his willingness in effect to accept a compromise, in his closing address he suggested that a figure in excess of £500 p.a. could be ordered. A summary of his argument was that the husband was a man of large assets and that his capacity to pay had been established by his own expenditure. He also put forward certain submissions as to what were the capital profits the husband was earning, and what were the likely sums that would be received when the two estates were bringing in revenue—if the husband was aiming at a revenue-producing investment. For the husband, on the other hand, it was submitted that there should be no more than a nominal order made against him, and that the wife should be left to apply

again when the husband had informed her that the projects, or at any rate one of them, were completed. He urged that it was wrong in principle to order maintenance where there was no income, no capital from which income could be derived, and no capital which could be trenched on to produce an annual payment. Apart from that he did not submit any misdirection on law or fact by the registrar, and prayed in aid the figure of £800 which the registrar regarded as available in determining the husband's ability to pay. As regards the potential further overdrafts, he submitted it was wrong to put pressure on the husband to use moneys given for one purpose in order that they might be turned to another, i.e., the maintenance of the wife; also that it was not right that the husband should at the court's instance have to borrow money in order to provide for a former wife.

The application to the registrar was made under the Matrimonial Causes Act, 1950, s. 19 (3). His order very properly was made as an "interim" order. Both counsel have invited me to review the position on the footing that I am concerned with the proper payment to be made for a year or so from Sept. 1, 1954. This seems to me a correct attitude. Both counsel have argued on the basis that though s. 19 (3) is phrased differently from s. 19 (2), yet in determining what "the court may think reasonable" under sub-s. (3) the court takes into account the three factors referred to in sub-s. (2), viz.: the fortune, if any, of the wife, "the ability of her husband", and "the conduct of the parties". That basis is correct, as is shown by many authorities, notably *Chichester v. Chichester* (6), though not always so stated expressly in them. Thus decisions on applications under sub-s. (2) in so far as they deal with those phrases may well be relevant to cases arising under sub-s. (3). The fact that the present issues in this particular case arise on an interim order, only affects the matter by avoiding the need of an estimate beyond October, 1955.

The first point is as to the meaning of the "ability of the husband" in relation to the facts as found by me. No decision involving reasonably parallel facts has been found, but I derive considerable assistance from passages in the judgment of LORD MERRIVALE, P., in *N. v. N.* (7). There he was considering (under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1), which was the equivalent of s. 19 (2) of the Act of 1950) the way to regard income which the husband had alienated by settling it on his second wife. The facts were quite different, especially in so far as they relate to a stratagem adopted by the husband, but that does not detract from the value of the guidance given in general terms. In his judgment LORD MERRIVALE treats "ability" as broadly interchangeable with the word "faculties" as used by the ecclesiastical courts when they were still seized of matrimonial causes and he states (138 L.T. at p. 696) in relation to their decisions on maintenance issues:

"The ecclesiastical courts showed a degree of practical wisdom . . . They were not misled by appearances . . . they looked at the realities . . . The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term 'faculties' describes the capacity and the ability of the respondent to provide maintenance . . . I conceive that I must take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation . . ."

In another passage (*ibid.*, at p. 698) these phrases occur:

"Here is an interest in a great business. Here is great business capacity. All of these are advantages to which the wife during the marriage, the petitioner, was legitimately entitled to look forward. They are not accidental accessions of fortune. They are benefits which have arisen during the course of years, and by the development of the husband's 'faculties' and position he has secured the sum, which has been spoken of, as available."

- A That case was cited but distinguished by DU PARCQ, L.J., in *Howard v. Howard* (8), which concerned moneys held by trustees on protective trusts. It was decided that the court ought not to seek to force independent trustees to exercise their discretion otherwise than they felt right. Counsel for the husband relied on that case as showing that the court ought not to seek to force the bank to give this husband further credit. To my mind, however, the analogy fails. What
- B is being considered in the present case is not the independent discretion of a trustee but the ability of the husband to enter into a contract with a bank or other potential lender, i.e., his own capacity to provide money, not someone else's. Further I note that in *Howard v. Howard* (8) the court were prepared to take into account sums which trustees in their discretion in fact paid to the husband. Next, counsel for the husband relied on *Barker v. Barker* (9), but
- C there is no cause in the present case to make an order that is vague or uncertain, or one which will have that "palpably absurd or oppressive" result with which *Barker v. Barker* (9) was concerned in relation to "security".

- I would add that all the modern cases cited by counsel for the husband related to the ordering of security where the husband had moneys out of which unsecured maintenance was in fact ordered, and must of course be examined in that light.
- D Thus, for instance, counsel urged that the emphasis of the judgment in *Shearn v. Shearn* (10) and other authorities lay in phrases referring to "present income", but one must read that judgment in relation to the practical point to be decided. Little assistance can be derived from reference to such phrases when the husband was earning an income independently of the property which it was sought to bring into the net of "security". *Shearn v. Shearn* (10) concerned a professional man earning £2,400 a year and the real issue was whether or not he should be
- E ordered to give security on property producing no income. There HILL, J., in considering whether or not to order security, was examining, inter alia, the relative advantages to the wife of so doing or of refraining from so doing. In relation to the word "ability" counsel for the wife, in addition to *N. v. N.* (7), referred me to *Klucinski v. Klucinski* (11), where LORD MERRIMAN, P., said, in relation to the husband's capacity to earn by working overtime, that his "earning capacity" must be taken into account. Attention was also called to the President's phrase in *Chichester v. Chichester* (6), where in relation to the facts there under consideration he observed ([1936] 1 All E.R. at p. 273) parenthetically as to the word "ability" that it "means ability to pay, of course"; and to LORD GREENE, M.R.'s words in *Howard v. Howard* (8) where he says ([1945]
- F 1 All E.R. at p. 95):

"What has to be looked at is the means of the husband, and 'means' means what he is in fact getting or can fairly be assumed to be likely to get."

- And finally I note that the word "ability" in relation to financial matters was already in use in a pecuniary connotation in 1857 in another statute, viz., s. 6 of the Statute of Frauds Amendment Act, 1828, and that in *Lyde v. Barnard* (12),
- H PARKE, B., said (1 M. & W. at p. 112), that the word "means in its ordinary sense some quality belonging to the third party."

- From these authorities it appears that the word "ability", so carefully used in the statute (the Matrimonial Causes Act, 1950, s. 19 (2)) without adjective or ancillary words, should be broadly construed in the light of the realities of each case. It seems highly inadvisable to try to list or define the many varying elements
- I that may constitute "ability" to provide maintenance, especially as each generation has its own ways in relation to money matters. Suffice it to say that ability, in my view, undoubtedly may include in certain circumstances ability to provide money by overdrafts or through loans. One cannot follow the precept "look at realities" and at the same time shut one's eyes to the fact that as regards a section of the business community this is to some degree an age of overdrafts and capital gains. Thus in the present case we have a typical instance of a man who is earning capital gains with the aid of his ability to obtain over-

drafts. Such men and such occupations are far from unknown, and include those who acquire reversionary interest of various types on borrowed money. They may live more than comfortably without being possessed of salary, of dividends or of assets readily realisable for sums much in excess of their overdrafts. A

Next I turn to the degree of pessimism or optimism to apply to the husband's prospects. There was cited for the wife the judgment of LORD HANWORTH, M.R., in *Sherwood v. Sherwood* (13), which concerns a professional man suffering from temporary misfortune. There, in looking much further into the future than I am here called on to do, he says ([1929] P. at p. 126): B

" . . . is it not right to take into account not merely those features which would be regarded by a pessimist, but also those features which would be regarded by an optimist ? " C

In that case, where definite evidence was lacking through no fault of the husband, the answer was affirmative. In the present case, too, one must take a balanced view.

Having regard to the authorities mentioned the summary of the relevant factors may be thus stated. The husband has assets of high value, he is a property developer of initiative and resource, he is obviously seeking to earn by capital gains, and he appears to be well on the way to making such gains. He has assets of high value and he has an outstanding ability to secure loans and overdrafts. As to the limits of the latter available to him, no limits have been put in evidence, and nothing in the evidence leads to the conclusion that money is being advanced to him by Barclays Bank solely for the purpose of expenditure in his business; on the contrary the inference to be drawn from the evidence available is that it is open to him to overdraw in respect of his general expenditure and that no questions are being put to him how the money he draws is being spent. If that were all that was known the matter of assessing the order proper to be made for the benefit of the wife would still have been one of difficulty. The difficulty would have been to assess what was the reasonable sum which the husband could be expected to devote each year to his non-business expenses. D

In the present case, however, there is available the previously analysed material relating to his non-business expenditure and the standard of living of the husband and his third wife (Mrs. W.). Their standard during 1954 was clearly in excess of £1,000 p.a. tax free plus a car. His non-business expenditure exceeds that sum, and indeed one way or another there is much to be said for looking at the husband as a £1,500 a year man—or something like that—all tax free. To that extent he has to no small degree provided the court with his own assessment of his available means. There is no reason to suppose that either his capacity to spend or his standard as stated above either need be or will be curtailed as his two first projects approach completion. E

What, then, is a reasonable figure for the wife, if one bears in mind the words of LORD MERRIVALE, P., in *N. v. N.* (7) (138 L.T. at pp. 696, 698) as to taking into account what would have been that wife's position if her husband had properly discharged his marital obligation ? Certainly she should not have been penniless (as counsel for the husband in effect suggested she should be) or provided for by a mere £2 a week. What is reasonable for him to pay the wife in the particular circumstances is yet a matter on which there may be a "generous ambit within which reasonable disagreement is possible", to use the words of ASQUITH, L.J., when he dealt so clearly with an analogous point in *Bellenden (formerly Satterthwaite) v. Satterthwaite* (14) ([1948] 1 All E.R. at p. 345). Again, the just discount to apply in respect of the wife's earnings is a matter susceptible of a bracket when it comes to figures. After taking all factors into account I found myself faced with potential upper and lower figures for the ultimate result that varied by at least £150 per annum. My own figure is taken from well inside the lower half of that bracket and is £5 10s. per week. In adopting that F

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A figure I have not excluded from consideration the husband's general position, nor the wife's, who also has debts, nor the fact that as my order will be effective from Sept. 1, 1954 (the date the wife's salary ceased) it will create arrears. After having since September, 1952, paid nothing for the wife's maintenance, the husband from Nov. 30, 1954, to date has paid £26 17s. 6d. in all. So the arrears from Sept. 1, 1954, to Mar. 21, 1955, will amount to some £160, which I consider B should be paid by monthly instalments of £30 each.

The appeal of the wife is accordingly allowed, and the registrar's interim order is varied by ordering maintenance at the rate of £5 10s. per week free of tax from Sept. 1, 1954, the first payment at the current rate to be made on Mar. 25, 1955. The arrears created by this order are to be paid separately and in addition to the £5 10s. per week as follows: first instalment of £30 on Apr. 5, 1955, thereafter C £30 a month on the fifth day of each month, the final arrears payment of course being an odd sum. In order to pay £5 10s. per week, obviously the husband need overdraw at no greater rate than he has been doing and yet maintain an appropriate standard of living. Alternatively, if in so far as he may prefer to overdraw further I have no doubt that he can provide both current maintenance and arrears with the same ease as he did a hire-purchase deposit D and the cost of a new engine for the 21 h.p. car he chooses to run. The cross-appeal of the husband is dismissed. The reasons leading me to make the order "free of tax" need in the circumstances no amplification. Indeed, I do not imagine that the order in favour of the children would have been in its present form had it been realised at the time that the husband would seek so to interpret it that he would deduct tax that he had never paid. The result of his so doing E is in effect to prevent the wife from obtaining the sum which the court intended her to have for the maintenance of the children.

From the conduct of this case and from the fact that I have been requested to adjourn this judgment into court rather than to give a brief statement of the result I arrived at, it has been assumed by me that this matter may be taken to an appellate court, despite the fact that the figure involved only relates F to a single year. Accordingly, I have dealt with the whole matter at much greater length than would be necessary if I had not thought it right to provide as much assistance as possible to any higher court to which this case may go. Lest, however, it be said that I encouraged the idea of an appeal, it is right for me to make it plain that my view is to the contrary, having regard not least to the manner in which the case has been presented on fact, the expense G involved in relation to the sum at stake, and the fact that the order is only an interim order. By October, 1955, the husband will be able, if he so chooses, to present an exceedingly clear picture, at any rate as to the two schemes which I have discussed in detail, of his financial position, though what will be the position as to his other schemes cannot be forecast. I hope that by then some degree of good sense will have prevailed and that it will be practicable for the two parties H to come to an agreement relating to some longer period than one year. In the meanwhile the capacity of the husband to provide the sum ordered seems to be quite undoubted on such evidence as he has thought fit to put before me. As regards costs, a shocking waste of court time has resulted from the husband's failure to provide proper material as to facts and figures, and to a lesser degree from his failure to crystallise his case at the right stage. Whatever had been the result of the proceedings before me, I consider that at least half the costs would I have had to be assessed as due to the way in which the case has had to be presented by reason of the husband's failure to clarify facts and issues at the proper stages.

Order accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the wife); *Wedlake, Letts & Birds* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

W. YOUNG & SON (WHOLESALE FISH MERCHANTS), LTD. A
 v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (McNair, J.), February 21, 22, 23, 24, 25, 28, March 15, 1955.]

Railway—Standard terms and conditions of carriage—Goods at owner's risk—Delivery prevented by restraint of labour—Standard Terms and Conditions of Carriage of Merchandise by Merchandise Train at Owner's Risk Rates (S.R. & O. 1927 No. 1009), conditions 3, 14, 16. B

The plaintiffs were Danish fish importers. Their method of trade was by agreement with the Railway Executive to have their fish consigned by rail from the port of Harwich to Bishopsgate station, and thence by delivery van to their premises in London. The usual practice in the trade was to pass all imported fish through Billingsgate market. The Billingsgate fish porters objected to the plaintiffs' method as they lost the handling charges to which they would have been entitled if the fish went through the market. Through their trades union they brought pressure to bear on the tonnage staff at Bishopsgate (who handled the unloading of consignments and whose remuneration varied with weight handled) and the cartage staff (who delivered the consignments when re-loaded on to vans), threatening that if any Danish imported fish passed through Bishopsgate direct to London merchants they, the Billingsgate staff, would cease handling all Danish imported fish at Billingsgate. C

A consignment of fish having been accepted by the defendants for delivery to the plaintiffs at owner's risk rates and having arrived at Bishopsgate, the tonnage staff, acting with the authority or approval of their local trade union committee, refused to handle it. The defendants, believing that disciplinary measures would have entailed a major stoppage of work, sold the fish and tendered the proceeds to the plaintiffs. The plaintiffs brought this action claiming damages for the detention of the fish and the failure to deliver it, and for a declaration that the defendants as common carriers were bound to accept the plaintiffs' goods for carriage and for delivery to their premises in London. The defendants relied on conditions 14 and 16 of the Standard Terms and Conditions of Carriage applicable to the carriage of merchandise by merchandise train at owner's risk rates (conditions lettered "B") (here called "the standard conditions"). D

Held: (i) although the action of the Bishopsgate staff constituted wilful misconduct by the defendants or their servants within the meaning of condition 3 of the standard conditions, yet the condition was exemptive and imposed no responsibility on the defendants for loss arising from such misconduct; and on the true construction of the standard conditions the exemption, provided by condition 14, from liability for non-delivery of goods caused by stoppage or restraint of labour extended to stoppage or restraint of labour by the defendants' own staff. E

(ii) the defendants were protected by condition 14 of the standard conditions, because the action of the Bishopsgate staff in refusing with the authority of the local trade union committee to handle the consignment amounted to a partial stoppage or restraint of labour within that condition and in fact prevented delivery, and the condition applied although the goods had reached Bishopsgate station. F

Per CURIAM: (i) the phrase "loss, damage or delay" in para. (c) of condition 16 of the standard conditions refers to the physical loss of goods and does not cover such pecuniary loss as that which the plaintiffs suffered in this case (see p. 103, letter C, post). G

(ii) it can well be said that the delivery of a particular consignment is prevented by a strike if the effect of an attempt to deliver the consignment H

A would be that strike action would be directed against all other consignments being handled at the same time (see p. 103, letter F, post).

[**Editorial Note.** This action was begun against the Railway Executive, but consequent on the abolition of the executive was continued against the British Transport Commission pursuant to the British Transport Commission (Executives) Order, 1953 (S.I. 1953 No. 1291). References to the railway companies in the standard conditions apply, after the nationalisation of the railways, to the commission by virtue of the Transport Act, 1947, s. 14 (4) (19 HALSBURY'S STATUTES (2nd Edn.) 1034), and, in view of the date of the contract in the present case which was subject to those conditions, the order of 1953.

As to Carriage of Goods by Railway at Owner's Risk, see 27 HALSBURY'S LAWS (2nd Edn.) 137, para. 314; and for cases on the subject, see 8 DIGEST (Repl.) 67-71, 446-474.]

Cases referred to:

- (1) *Tabb & Burlertson v. Briton Ferry Works, Ltd.*, (1921), 6 Lloyd's Rep. 181.
- (2) *Thomson (D. C.) & Co., Ltd. v. Deakin*, [1952] 2 All E.R. 361; [1952] Ch. 646; 3rd Digest Supp.
- D (3) *Reader v. South Eastern & Chatham Ry. Co. & London & North Western Ry. Co., Van den Berghs, Ltd. v. Great Western Ry. Co.*, (1921), 38 T.L.R. 14; 8 Digest (Repl.) 47, 281.
- (4) *Smith, Ltd. v. Great Western Ry. Co.*, [1922] 1 A.C. 178; 91 L.J.K.B. 423; 127 L.T. 1; 8 Digest (Repl.) 70, 473.
- (5) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest (Repl.) 443, 3365.
- E (6) *Becker, Gray & Co. v. London Assurance Corpn.*, [1918] A.C. 101; 87 L.J.K.B. 69; 117 L.T. 609; 29 Digest 208, 1675.
- (7) *Hackney Borough Council v. Doré*, [1922] 1 K.B. 431; 91 L.J.K.B. 109; 126 L.T. 375; 86 J.P. 45; 20 Digest 205, 37.

Action.

F The plaintiffs had a long established business as importers of Danish fish. Contrary to the normal practice of fish importers the plaintiffs made no use of the Billingsgate fish market but contracted with the Railway Executive to have their fish delivered by railway vans from Bishopsgate station, where it arrived after transportation by rail from Harwich, to their premises first in Mint Street and later at Elizabeth Street, Victoria. The plaintiffs claimed that this method enabled them to offer their fish to the public fresher, quicker and cheaper. The plaintiffs re-commenced operation of this method of trade after the war time controls were relaxed but the Billingsgate fish porters attempted to assert a claim that all imported fish must pass through Billingsgate and bear the customary portage charges. To further their claim they had brought pressure to bear on the staff at Bishopsgate station threatening that, if the Bishopsgate men were party to the delivery of any Danish fish direct to merchants in London, the Billingsgate porters would refuse to handle any imported fish even though consigned to Billingsgate.

H The Billingsgate porters were all members of the Transport and General Workers' Union. They had established the closed shop principle at the fish market and were sufficiently well organised to bring the work of the market to a stop in support of any claim they thought legitimate. Any attempt to bring in outside labour would have resulted in a general stoppage. At Bishopsgate station all the operatives were members of the National Union of Railwaymen. The tonnage staff handled the unloading of consignments from the trains and their remuneration depended in some measure on the weight handled; the cartage staff delivered the goods when re-loaded on to vans. The interests of the cartage and tonnage staff were handled by a local departmental committee. In September, 1949, after the fish trade was released from war time control, the Billingsgate porters informed the Bishopsgate men's committee that the venue

of sale of all consignments of Danish fish for the London area was to be Billingsgate. In October, 1949, when two consignments of Danish fish for other consignees were delivered from Bishopsgate direct to London merchants, the Billingsgate porters ceased handling Danish fish. The cessation of work was short-lived in view of attempts being made to persuade the shipping company not to accept Danish fish unless consigned to Billingsgate. The plaintiffs, however, continued to ship their fish consigned to Bishopsgate for direct delivery to their premises. A B

For the next two years the Billingsgate porters continued to bring pressure to bear on the Bishopsgate men and fresh trouble developed in August, 1952, when the Billingsgate porters informed the chairman of the Bishopsgate men's committee that in future all Danish sea fish traffic must pass through Bishopsgate to Billingsgate and that if this was not complied with the Billingsgate porters would refuse to handle any Danish fish at all. The Bishopsgate men agreed without dissent to co-operate with the Billingsgate porters to obtain the result they desired. On Aug. 30 their decision was reported to the continental traffic manager at Liverpool Street, who then issued instructions that fish accepted by the Railway Executive for conveyance to places other than Billingsgate was not to be delivered to the latter point. C D

On Sept. 8, 1952, the Billingsgate porters, having learnt that a consignment of Danish fish was going to by-pass Billingsgate, notified the railway representative at the fish market that no further Danish fish would be handled there. The Bishopsgate men's committee then instructed the Bishopsgate staff not to handle any of the plaintiff company's fish and the men, acting on these instructions, refused to load it into vans for delivery. When they learnt of this action the Billingsgate porters agreed to call off their stoppage. It was found as a fact that the Billingsgate porters would not have removed their ban unless satisfied that the plaintiff company's fish was not going to be handled by the Bishopsgate men and that, if the railway officials at Bishopsgate had attempted disciplinary measures against the men, the whole work of the station would have come to a standstill. The consignments of the plaintiffs' company's fish affected by this incident were sold by the defendants. E F

HIS LORDSHIP found as a fact that those responsible for giving orders necessary for the discharge of the railway authorities' contractual duty were powerless to do more than they did and that they were correct in their decision not to carry the matter of the consignments of Sept. 8, 1952, to a trial of strength.

On Sept. 29 two further shipments of the plaintiffs' fish arrived at Bishopsgate. These had been consigned from Denmark to the plaintiffs in London; the bills of lading provided that the goods should be forwarded to the plaintiffs by rail at owner's risk rates to Bishopsgate Station, but the contractual obligation of the defendants, arising out of a long course of dealing, was to deliver the goods to the plaintiffs at their premises at Victoria, a separate charge being made for that service. The Bishopsgate porters refused to handle the consignments, but the fish was loaded on to a van by other staff though the van did not leave the station as this would have brought about a stoppage of work. Discussions involving a representative of the plaintiff company took place but were unsuccessful and the fish was eventually sold by the defendants and realised £54 7s. 10d., which sum was tendered to the plaintiffs before action brought. HIS LORDSHIP found that if attempts had been made by the plaintiffs to collect the consignments with their own vans at Bishopsgate or if the consignments had been delivered to the railway office at Billingsgate and the plaintiffs had endeavoured to collect the consignments in their own vans there, a major stoppage of work would have resulted. G H I

In this action the plaintiffs claimed against the defendants damages for their detention of and their failure to deliver the fish to the plaintiffs' premises and a declaration that the defendants were bound to accept the plaintiffs' goods for

A carriage and for delivery to their premises at Victoria. The defendants relied on the Standard Terms and Conditions of Carriage (S.R. & O. 1927 No. 1009)* subject to which they had contracted to carry the plaintiffs' fish at owner's risk rates. Condition 14 of the relevant Standard Terms and Conditions of Carriage (conditions lettered "B") provides:

B "Where perishable merchandise . . . (d) is not delivered in consequence of riots, civil commotions, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general . . . the merchandise may be sold by the company and payment or tender of the proceeds of any such sale after deduction of all proper charges and expenses in relation thereto shall (without prejudice to any claim or right which the sender or consignee may have against the company otherwise arising under these conditions) discharge the company from all liability in respect of such merchandise or the carriage or delivery thereof."

Condition 16 provides:

D "The company shall not in any case be liable for . . . (c) loss, damage, or delay to the extent to which the same is caused by or arises from . . . (ii) riots, civil commotions, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general."

E. M. Gorst, Q.C., and W. D. Collard for the plaintiffs.

E. S. Fay for the defendants.

Cur. adv. vult.

E Mar. 15. MCNAIR, J., read the following judgment in which, after reviewing the evidence and making findings as previously stated, he continued: On the facts so narrated, I am satisfied (1) that the action of the Bishopsgate men in refusing to handle the consignment in question amounted to "wilful misconduct" within the meaning of condition 3 if this condition be applicable; F (2) that the action of the Bishopsgate men in carrying out a decision or approved by their local departmental committee amounted to a partial stoppage or restraint of labour within the meaning of conditions 14 and 16† (if applicable) (see *Tabb & Burtleson v. Briton Ferry Works, Ltd.* (1), *D. C. Thomson & Co., Ltd. v. Deakin* (2) ([1952] Ch. at p. 663) and was not merely an act of insubordination by a particular group of men; G (3) that such action did in fact prevent delivery in accordance with the contract; (4) that it would have been impracticable to effect any alternative delivery otherwise than through the normal machinery of Billingsgate market which the plaintiffs were not prepared to accept; and (5) that there was no failure by the railway officials either on Sept. 29, 1952, or at any earlier material date to take reasonable steps to prevent such action or to avert its consequences.

H I next turn to the question whether, on the facts so found, the defendants are protected by conditions 14 and 16 on which they rely. The main difficulty in the way of the defendants is the presence in the conditions of condition 3. This provides as follows:

I "The company shall not be liable for loss, damage, deviation, misdelivery, delay or detention of or to a consignment or any part thereof, except upon proof that the same arose from the wilful misconduct of the company or their servants. Provided that nothing in this condition shall exempt the company from any liability they might otherwise incur in the following cases:—(a) Non-delivery of the whole of a consignment or of any separate

* Condition 3 is stated at letter H, *infra*; and conditions 15, 17 of the conditions applicable to carriage at company's risk rates are set out at p. 103, *post*, in the footnote.

† For conditions 14 and 16 of the Standard Terms and Conditions of Carriage of Merchandise by Merchandise Train at Owner's Risk Rates, see letters B to D *supra*.

package forming part of a consignment, properly packed, and addressed in accordance with condition 1 hereof, unless such non-delivery is due to accidents to trains or to fire. . . . Provided however that the company shall not be liable in the said cases of non-delivery . . . upon proof by them that the same has not been caused by the negligence or misconduct of the company or their servants."

On the basis of this condition, it was argued on behalf of the plaintiffs that, though in form this condition is exemptive, properly construed it affirmatively imposes liability on the defendants where the loss, and in particular the non-delivery, has arisen from the wilful misconduct of the defendants' servants, and that accordingly the phrase "restraint of labour", etc., in conditions 14 and 16 must be read as not applying to restraint of labour of the defendants' own servants or at least as not applying when such restraint of labour on their part amounts to wilful misconduct. Further in support of this contention, it is urged that the words in brackets in condition 14, namely, "without prejudice to any claim or right which the sender or consignee may have against the company otherwise arising under these conditions", are designed or, if not designed, are apt to preserve the claim under condition 3. Counsel were not able to refer me to, nor have I been able to find, any reported decision in which the relationship between those two conditions has been considered. It is true that in *Reader v. South Eastern & Chatham Ry. Co. & London & North Western Ry. Co.*, *Van den Berghs, Ltd. v. Great Western Ry. Co.* (3) (a case arising out of the railway strike of 1919 and before the Standard Terms and Conditions had been settled by the Railway Rates Tribunal under the Railways Act, 1921*), ROWLATT, J., held that somewhat similar conditions relating to strikes did exempt the railway company from the consequences of a strike of their own men. But an examination of the record in that case does not disclose whether the carriage was at owner's risk rates or whether in the terms of carriage there was any condition comparable with condition 3. It is clear from such cases as *Smith, Ltd. v. Great Western Ry. Co.* (4), and other cases, that the conditions applicable to owner's risk rates did, prior to 1921, include provisions exempting the company for loss unless proved to have arisen from wilful misconduct of their servants. On the whole, though with some doubt, I have come to the conclusion that the plaintiffs' argument on this point should not prevail. First, I do not consider that it is right to read condition 3 as imposing affirmatively on the defendants responsibility for loss arising from wilful misconduct. Condition 3 is only one of a number of exemptive conditions, on any one of which the defendants can rely if they can bring themselves within its terms fairly construed. By way of illustration, I refer to condition 4, which exempts the defendants from liability

"for loss or injury (from whatever cause arising) of or to any articles or property described in the Carriers Act, 1830 . . . when the value . . . exceeds £25, unless the nature and value thereof be declared on delivery . . ."

Secondly, it is not without significance that in the Standard Terms and Conditions of Carriage when carried at company's risk rates it is clear that the present argument would not be open to the plaintiffs, since there is in these conditions no provision comparable with condition 3. It would be strange indeed if the Railway Rates Tribunal approved conditions exempting the railway company

* The Railways Act, 1921, provided in ss. 42-45 (19 HALSBURY'S STATUTES (2nd Edn.) 933, 934) for the submission to the Railway Rates Tribunal (now superseded by the Transport Tribunal) of the terms and conditions of carriage, which, when approved by the tribunal were to come into force as the Standard Terms and Conditions of Carriage (S.R. & O. 1927 No. 1009). The date fixed for the coming into force of these terms was Jan. 1, 1928.

- A from loss arising from strikes of their own servants (see conditions 15 and 17*) when carried at company's risk rates and at the same time denied them such exemption when the goods were carried at owner's risk rates. Further, I think it is possible without undue straining of the language used to confine the effect of the saving words in the brackets in condition 14 to cases where the claim or right arose before the happening of the events which gave rise to the right of sale.
- B For instance, if goods in transit are damaged or pilfered in such circumstances as to impose liability on the company before the events occurred which made delivery impossible, a claim for that damage or pilferage would be preserved notwithstanding a subsequent sale under condition 14.

- I accordingly hold that the defendants are, in the events which have happened, protected by condition 14. I should, however, have felt great difficulty in holding that protection was given by condition 16, since, as at present advised, I am disposed to the opinion that the word "loss" in the phrase "loss, damage or delay" in para. (c) of that condition refers to physical loss of the goods and does not cover that form of pecuniary loss which the plaintiffs have suffered in this case from the sale of their goods by the defendants.

- The conclusion at which I have arrived also makes it unnecessary for me to reach any affirmative holding on the alternative plea advanced by the defendants, namely, that the failure to deliver was due to a strike, stoppage or restraint of labour by the Billingsgate men. On this it was argued by counsel for the plaintiffs that mere apprehension of a strike is not sufficient, and reference was made to such cases as *Bank Line, Ltd. v. A. Capel & Co.* (5) ([1919] A.C. at p. 454); *Becker, Gray & Co. v. London Assurance Corpn.* (6), and *Hackney Borough Council v. Doré* (7). Had it been material, I should have been disposed to hold that inasmuch as, on my appreciation of the facts, an attempt to force through the plaintiffs' delivery would have resulted in a refusal by the Billingsgate men to handle any of the Danish fish traffic, the defendants' failure to deliver to the plaintiffs was not due to a mere apprehension of a restraint, but to an existing condition of restraint. It seems to me that it can well be said that delivery of a particular consignment is prevented by a strike if the effect of an attempt to deliver the consignment would be that strike action would be directed against all the other consignments being handled at that time. However, as I stated above, in view of the conclusions which I have reached on the main case, it is not necessary for me to pronounce any affirmative conclusion or finding on this latter matter.

G *Judgment for the defendants.*

Solicitors: *Edell & Co.* (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

H

* Conditions 15, 17 of the Standard Terms and Conditions of Carriage at company's risk rates (conditions lettered "A") are as follows:

I Condition 15. "Where perishable merchandise: . . . (d) is not delivered in consequence of riots, civil commotions, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general . . . The merchandise may be sold by the company and payment or tender of the proceeds of any such sale after deduction of all proper charges and expenses in relation thereto shall (without prejudice to any claim or right which the sender or consignee may have against the company otherwise arising under these conditions) discharge the company from all liability in respect of such merchandise or the carriage or delivery thereof . . ."

Condition 17. "The company shall not in any case be liable for . . . (c) Subject to these conditions, loss, damage or delay proved by the company to have been caused by or to have arisen from . . . (ii) Riots, civil commotions, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general . . ."

SCRACE v. WINDUST.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.),
March 22, 1955.]

Rent Restriction—Alternative accommodation—“Suitable to the needs of the tenant and his family”—Whether tenant’s mother-in-law included in “family”—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5 c. 32), s. 3 (3).

Rent Restriction—Alternative accommodation—Reasonably equivalent security of tenure—Statutory tenant of whole house offered weekly tenancy of part of house—Proposal by landlord to convert house into two separate and self-contained premises—Converted premises decontrolled—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5 c. 32), s. 3 (3) (b) —Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 35 (1) (a).

A dwelling-house to which the Rent Restrictions Acts applied consisted of a lounge, a dining-room and a kitchen on the ground floor, and three bedrooms, a bathroom and a w.c. on the first floor. The landlord claimed possession of the house from the statutory tenant and offered as alternative accommodation the lounge and the whole of the top floor on a weekly tenancy at a rent to be agreed. Under the proposal made by the landlord, one of the bedrooms would be converted into a kitchen; a separate door would be provided on the ground floor for the landlord, who would keep the original kitchen and the dining-room for her own occupation; and the part of the house offered to the tenant would be completely partitioned off from the part which the landlord proposed to keep for herself. Until October, 1954, some two months before the claim for possession came before the county court judge, the premises were occupied by the tenant, his wife and an adult son. Towards the latter part of October, 1954, the tenant’s mother-in-law, who had been a widow since 1945, came to stay with him. Since 1945 the mother-in-law had stayed with her three children and her sister in turn, and for fifteen months prior to October, 1954, she had been staying with a son. Before the commencement of the county court proceedings, there had been negotiations between the landlord and the tenant as to alternative accommodation, and the tenant had never mentioned that his mother-in-law would be staying with him. On the evidence, the judge was not satisfied that the mother-in-law was a permanent resident so as to rank as a member of the tenant’s family, within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and he made an order for possession subject to the availability of alternative accommodation. On an appeal by the tenant,

Held: (i) the question whether the tenant’s mother-in-law was a member of his family, within s. 3 (3) of the Act of 1933, was one of fact, and the burden being on the tenant in the circumstances to satisfy the court that she was a member of the tenant’s family and there being no such evidence as to constrain the court to hold that she was, the decision of the county court judge that she was not a member of the tenant’s family for the purpose of considering the sufficiency of alternative accommodation should stand.

(ii) the alterations proposed by the landlord would, when effected, result in the production of two separate and self-contained premises which would be excluded, by s. 35 (1) of the Housing Repairs and Rents Act, 1954, from the protection of the Rent Restrictions Acts, and, therefore, as the effect of the transaction would be to give to the tenant an unprotected weekly tenancy of part of the house in exchange for a protected tenancy of the whole house, the requirement of s. 3 (3) (b) of the Act of 1933 as to security of tenure was not satisfied, and the landlord was not entitled to possession.

Per JENKINS, L.J.: if the landlord were to offer the same alternative accommodation to the tenant for a term of years, instead of only on a weekly

A tenancy, the landlord might be able to satisfy the county court judge that the security of tenure provided in respect of the alternative accommodation was reasonably equivalent to the security provided by the Rent Restrictions Acts (see p. 109, letter B, post).

B **Quaere**, whether the tenant, by refusing to allow workmen to have access to the premises to make the proposed alterations, could prevent the making of the order which was sought (see p. 109, letters C to H, post).

Appeal allowed.

[As to Suitable Alternative Accommodation, see 20 HALSBURY'S LAWS (2nd Edn.) 332, para. 398, and 1954 Supp.; and for cases on the subject, see 31 DIGEST (Repl.) 714-719, 7995-8033.]

C For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, see 13 HALSBURY'S STATUTES (2nd Edn.) 1048.

For the Housing Repairs and Rents Act, 1954, s. 35, see HALSBURY'S STATUTES (2nd Edn.), Interim Service, 295.]

Appeal.

D The defendant, the statutory tenant of a dwelling-house, appealed from an order of His Honour JUDGE ARMSTRONG, at Bournemouth County Court, dated Dec. 16, 1954, granting possession of the premises to the plaintiff, the landlord, subject to the availability of alternative accommodation.

E The alternative accommodation proposed by the landlord was a part of the same house, on a weekly tenancy, after conversion of the house into two separate and self-contained premises. The tenant contended (i) that the alternative accommodation was inadequate because his mother-in-law, who was living with him in the house, should be considered as part of his family for the purpose of s. 3 (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933; (ii) that the alternative accommodation would not comply with the requirement of s. 3 (3) (b) of the Act of 1933 in regard to security of tenure, because, under s. 35 (1) of the Housing Repairs and Rents Act, 1954, both parts of the house would be decontrolled as a result of the conversion; and (iii) that, as a statutory tenant, he could not be compelled to allow workmen into the premises to do the work necessary to effect the conversion.

F *A. G. de Montmorency* for the tenant.

D. H. Stansfeld for the landlord.

G **SIR RAYMOND EVERSLED, M.R.:** I will ask JENKINS, L.J., to deliver the first judgment.

H **JENKINS, L.J.:** This is an appeal by the defendant tenant, Mr. Edward William Windust, from an order of His Honour JUDGE ARMSTRONG made in the Bournemouth County Court on Dec. 16, 1954, whereby he ordered the tenant to give up possession of the premises known as "Goldendene", Walkford Way, Christchurch, Hampshire, subject to the availability of alternative accommodation.

I The tenancy originated in an agreement dated Jan. 8, 1941, between a predecessor in title of Miss Scrace, the present landlord, of the one part, and the present tenant and his brother-in-law, Mr. Culley, of the other part. The reversion expectant on the determination of that tenancy passed from the original landlord to a Mrs. Hayward, and she left it by her will to the present landlord. Notice to quit the premises had been given by the landlord, and the tenant had, consequently, become a statutory tenant, Mr. Culley having, at an earlier date, relinquished his tenancy.

The premises consist of two floors. There is a ground floor, with a hall leading, through doors on the right, to a lounge and, behind that, a dining-room; at the end of the hall there is a kitchen and opening out of it a coal cellar. There is a garage attached on the kitchen side of the house, but there is no access to that through the house. On the first floor there are three bedrooms—two

moderate sized ones and one smaller one, a bathroom and a w.c. The proceedings for possession in which the order under appeal was made were launched by the landlord solely on the ground that suitable alternative accommodation could be provided for the tenant and his family. The proposal made, in the form in which it was presented to the court in the proceedings leading to the present order, was that the tenant should take the lounge on the ground floor, together with the whole of the top floor. A partition was to be made in the hall, partitioning off the stairs, so that the tenant would have separate access to the upper floor by means of the staircase, which would then be appropriated to his exclusive use. There was also to be provided a door, by means of which he could have access to the lounge, from what would then be his own private entrance hall. A separate door was to be provided on the ground floor for the landlord, who would keep the kitchen and the dining-room and also, I think, the coal cellar. I think that under these proposals the tenant was also to have the garage which I have mentioned. Upstairs the smaller bedroom was to be converted into a kitchen, and water and means of heating were to be installed for use in that new upstairs kitchen.

The tenant opposed the claim for possession on a number of grounds. He said that the alternative accommodation provided was inadequate, and he said further that the proposal being to give him a weekly tenancy only of the alternative accommodation and the transaction involving as it did the conversion of the one dwelling-house into two separate and self-contained dwelling-houses, the effect of the transaction would be to give him less security of tenure than he had in his existing dwelling-house, inasmuch as each part of the divided house would be taken out of the protection of the Rent Restrictions Acts. That argument turns on s. 35 of the Housing Repairs and Rents Act, 1954. It was next said on behalf of the tenant that he objected to the doing on the premises of the work necessary to provide his separate self-contained alternative accommodation; and it was said that, as a statutory tenant, he was entitled to remain in the premises undisturbed and could not be compelled to allow workmen in to do the necessary work.

I will deal with the several points which I have mentioned, as to the tenant's contention that the alternative accommodation was inadequate. The position was that he had living with him in the house, at the time of the judgment, his wife, his son aged twenty-eight or twenty-nine years, and his mother-in-law, a Mrs. Culley. There were thus himself, his wife, his mother-in-law, and his son, making four persons in all; and he maintains that the alternative accommodation offered, giving only three bedrooms and a small kitchen, would be inadequate for this party of four. The tenant and his wife would share one room and Mrs. Culley would be in another, leaving the remaining one for the son. There would be, in effect, a kitchen and, including the lounge, three bedrooms, with no separate sitting-room, for the four occupants. That argument turned on the question whether Mrs. Culley was a member of the tenant's family within the meaning of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The learned judge, having heard the tenant and his wife and Mrs. Culley give their evidence, was not satisfied that Mrs. Culley was a member of the family; and, accordingly, he ruled her out of consideration in determining whether the accommodation was adequate. In my view, he was well warranted in doing that on the evidence.

Before the landlord had recourse to litigation there were negotiations which continued over a considerable period, with a view to accommodation in part of the premises being provided for the tenant as alternative accommodation; and in November, 1953, the landlord's solicitors offered the upper flat; that is to say, the accommodation which I have described, without the lounge on the ground floor. Negotiations proceeded on the footing that that accommodation would be adequate and no mention was made at that stage of Mrs. Culley,

- A who at that time was living at Southampton with one of her sons. The negotiations resulted in agreement on almost all points, on the basis that the tenant should have the rooms on the upper floor only, and also, I think, the use of the garage; and it is curious that in the course of the correspondence, although the accommodation then being offered was merely the upper floor, the tenant objected to a provision in the proposed tenancy agreement which would prevent him from taking a lodger. Finally, in May, 1954, those negotiations broke down; and they broke down, not on account of any inadequacy in the accommodation offered, but on a dispute about the garden. It was common ground that the landlord was to have the front garden and that the back garden was to be divided longitudinally. The tenant in May, 1954, raised the point that he was being given the west of the garden when he ought to have the east; and this was not agreeable to the landlord. Finally, over that matter of the garden the negotiations went off.

- The result of that was that the landlord took proceedings for possession in the county court. Those proceedings came before the same learned judge in August, 1954, and he refused an order on the ground that the alternative accommodation, as then offered, was not adequate. At that time Mrs. Culley did not enter into the calculation, her name never having been mentioned throughout the negotiations. The learned judge found, however, that early in August, 1954, there was, apparently, a proposal between the tenant and Mrs. Culley that she should come to "Goldendene". In fact, she did come in the following October and it was claimed at the hearing in December, 1954, that she was a member of the tenant's family. The learned judge's note of the evidence is very brief, and the only evidence about Mrs. Culley, as it appears on the note, was that the tenant said:

"Now Mrs. Culley lives with us. Seventy-five. Arthritis both hands. She came in third week of October. She came from her youngest son in Southampton. This was suggested a fortnight before last court case [i.e., the proceedings in August.]"

- F Mrs. Windust, the tenant's wife, said: "Mother used to stay with her children in turn". Mrs. Culley herself said that she has been "a widow since 1945. Sold my home up then. Seventy-five last July. Old age pensioner. Used to share room with my sister at Fareham." There is, obviously, nothing in that evidence which could be said to constrain the learned judge to hold that Mrs. Culley was a permanent resident and thus could rank as a member of the tenant's family. The learned judge, according to a note of his judgment taken by counsel, which the learned judge approved, said:

"No doubt, a mother-in-law housed by her son-in-law is normally regarded as a member of his family. The position in regard to Mrs. Culley is not so easy. Mrs. Culley was widowed in 1945."

- H Then the learned judge went on to explain that she had two sons, a daughter (Mrs. Windust), and a sister; that after the death of her husband she had alternated between the various households; and that she had settled more permanently in Southampton about fifteen months ago, and stayed there until October, 1954, as a more or less permanent resident. The learned judge said that, owing to a boy in that family growing up and the accommodation becoming inadequate, she then moved. The learned judge continued:

- I "It is then said that [the tenant] decided that he and his wife would make a permanent home for her in the future. I do not know why they did not do so before with the whole house at their disposal. It may be that she is not altogether welcome wherever she goes. It is said that the matter came to a head in August, but that since proceedings had then already been started it was not thought right to mention it, and in fact it was not mentioned . . . In August it was not thought right to warn either [the landlord] or the court that accommodation might be required for Mrs. Culley. These matters

must be considered in order to decide if there was either a moral duty or a necessity for [the tenant] to provide accommodation for his mother-in-law in October."

The learned judge felt himself bound, as he said, to regard with suspicion "the fact that even after these proceedings were started there was still no word to the landlord about the tenant's mother-in-law"; and he concluded that part of his judgment by saying:

"In the circumstances, the burden is clearly on [the tenant] to satisfy me that [Mrs. Culley] is a member of his family and I am not satisfied that that is so."

Accordingly, the learned judge concluded that he should disregard Mrs. Culley in deciding as to the adequacy or inadequacy of the accommodation offered. In my judgment, the question is one of fact and one which the learned judge has concluded after seeing and hearing the witnesses; and it cannot possibly be said that there was no evidence on which he could properly come to the conclusion that Mrs. Culley was not, for this purpose, a member of the tenant's family. In my view, therefore, that objection fails.

I next deal with the objection under the Housing Repairs and Rents Act, 1954. That Act received the royal assent on July 30, 1954, and came into operation one month later. Section 35 (1) of the Act is in these terms:

"The Act of 1920 shall not apply to a dwelling-house which consists, and consists only, of premises falling within either of the following paragraphs, that is to say,—(a) separate and self-contained premises produced by conversion, after the commencement of this Act, of other premises, with or without the addition of premises erected after the commencement of this Act; (b) premises erected after the commencement of this Act."

It is said for the tenant that s. 35 (1) clearly applies in the present case. It is said on his behalf that the two dwelling-houses provided by the landlord's scheme are separate and self-contained premises produced by "conversion, after the commencement of this Act, of other premises", namely, the whole of the house "Goldendene". There is no doubt that the landlord's proposal would have the effect of producing two separate and self-contained sets of premises, with a complete physical division of one from the other, and no internal communication between them; and further of making each of them self-contained, having all the necessary living accommodation in itself and without any sharing or anything of that sort. Even the stairs, as I have mentioned, were to be partitioned off, so that the tenant's premises could be reached from his own front door without passing through any part of the plaintiff's premises or sharing any means of access with her.

I see no answer to this objection. It seems to me that the alterations or the conversion here proposed to be effected would, when effected, result in the production of separate and self-contained premises which, by the terms of s. 35, would thereby be excluded from the protection of the Rent Restrictions Acts. In my judgment, therefore, the tenant is entitled to succeed on that ground as the matter stands at present, for at present what is offered consists of the premises which I have described—the upper floor and the lounge and I think also the garage—on a weekly tenancy at a rent to be agreed. If it is the case that s. 35 (1) of the Act of 1954 is to take those premises out of the protection of the Act, then the tenant would get in exchange for his existing protected tenancy of the whole house an unprotected weekly tenancy of part of it. In my view, that could not be regarded as satisfying the requirements of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: but that section does not say that the alternative accommodation must necessarily consist of premises to which the principal Acts apply, because sub-s. (3) provides as follows:

- A "Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—(a) of a dwelling-house to which the principal Acts apply; or (b) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply."
- B

Therefore, if in the present case the landlord were to offer the same alternative accommodation to the tenant, but for a term of years instead of only on a weekly tenancy, she might be able to satisfy the learned county court judge that the security of tenure provided in respect of alternative accommodation was reasonably equivalent to the security provided by the Rent Acts, but, as the matter stands at present, I cannot see that this requirement is fulfilled.

- C Finally, this point was taken on behalf of the tenant. It was said that the tenant is in possession of the whole of the premises as a statutory tenant and he is entitled to remain in undisturbed possession of those premises until such time as he is ordered to give up possession by an effective order of the court. He says that he is under no obligation, therefore, to allow access by workmen to the premises for the purpose of effecting the conversion which is to produce the alternative accommodation offered to him. That attitude on the part of a tenant situated as this tenant is may be regarded as an unreasonable attitude; but the argument is one which it is not altogether easy to answer and I do not propose, speaking for myself, to attempt any decided answer to it for the purposes of the present case. It may be that in such a case, if the learned county court judge was satisfied that the necessary work could be done without any serious degree of interference to the tenant, he might properly disregard the objection and find himself satisfied that suitable alternative accommodation would be available for the tenant when the order or judgment took effect, and would be available because the landlord, by whom and at whose expense the alteration was to be done, was ready, willing and able to do it and the only obstacle to its being done was the tenant himself. Alternatively, it might be possible for a landlord, who was seeking possession on the ground that alternative accommodation is available, to evolve some scheme under which accommodation was temporarily provided for the tenant and his family in some other place so as to leave the dwelling-house in question free for the proposed conversion to be effected. The attitude taken by the tenant here is, in this respect, so unreasonable that it seems to me probable that any court would be disposed, if it could, to evolve some method of meeting it in one or other of the ways that I have suggested, or possibly by some other method. Be that as it may, I do not propose to express any view on this question for the present purpose; but I think that this appeal should be allowed on the ground that the effect of s. 35 (1) of the Act of 1954 would be to take the alternative accommodation out of the protection of the Rent Acts and that, on the footing of the weekly tenancy now proposed, there would be no security of tenure reasonably equivalent to the security afforded by those Acts. Therefore, I would allow this appeal.
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SIR RAYMOND EVERSLED, M.R.: I am of the same opinion and, although we are differing from the learned county court judge, I am in so full agreement with what has fallen from JENKINS, L.J., that I cannot add anything useful for myself.

ROMER, L.J.: I also entirely agree.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield*, agents for *R. E. Druiitt & Allfree*, Christchurch (for the tenant); *Jaques & Co.*, agents for *J. W. Richardson*, Christchurch (for the landlord).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LLEWELLYN v. LLEWELLYN (BEYNON AND PRICE,
Parties cited).

[COURT OF APPEAL (Denning, Hodson and Parker, L.J.J.), February 3, 4, 1955.]

Divorce—Cruelty—Delay—Petition by wife dismissed on ground of unreasonable delay—Discretion—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (i).

By her petition dated Oct. 9, 1953, the wife alleged that the husband had been guilty of cruelty towards her from the date of their marriage in April, 1943, until Jan. 9, 1953, when she left the matrimonial home. The husband had in fact been guilty of cruelty, which had not been condoned, but the final act of cruelty was committed in July, 1951. After that date the wife had remained with the husband for her own convenience, not with the idea of re-establishing the marriage, and had conducted herself with hostility towards him. The court having refused a decree in the wife's favour on the ground of her unreasonable delay in presenting her petition, she appealed.

Held: the court was not to be used as a place to which a party to a marriage could come for redress whenever it suited him or her, having meanwhile held the weapon of redress over the head of the other party to the marriage; and since the wife had chosen to remain with her husband for eighteen months following his final act of cruelty, and had so remained for her own convenience and not for the purpose of re-establishing the marriage, the court was entitled in its discretion to refuse her a decree nisi.

Appeal dismissed.

[**Editorial Note.** By statute the court is not bound to pronounce a decree of divorce if, in the opinion of the court, the petitioner has been guilty of unreasonable delay in presenting the petition; see Matrimonial Causes Act, 1950, s. 4 (2), proviso (i); 29 HALSBURY'S STATUTES (2nd Edn.) 394.

As to delay as a discretionary bar in divorce, see 10 HALSBURY'S LAWS (2nd Edn.) 683, para. 1014; and for cases on the subject, see 27 DIGEST (Repl.) 414, 415, 3437-3450.]

Cases referred to:

- (1) *Lowe v. Lowe*, [1952] 2 All E.R. 671; [1952] P. 76; 3rd Digest Supp.
- (2) *Rickard v. Rickard & Bond*, (1921), 37 T.L.R. 26, 511; 27 Digest (Repl.) 414, 3438.
- (3) *Boulting v. Boulting*, (1864), 3 Sw. & Tr. 329; 33 L.J.P.M. & A. 33; 9 L.T. 779; 164 E.R. 1302; 27 Digest (Repl.) 383, 3152.

Appeal.

The wife appealed from an order of DAVIES, J., dated July 27, 1954, whereby he dismissed the wife's petition on the ground of unreasonable delay.

By her petition dated Oct. 9, 1953, the wife alleged that her husband had been guilty of cruelty towards her from the date of the marriage in April, 1943, until Jan. 9, 1953, when she left the matrimonial home. She alleged by her petition that

“As a result of the respondent's bad conduct and continuous unkindness the petitioner was obliged to leave the respondent on Jan. 9, 1953, since when she has been apart from him.”

By his answer the husband denied cruelty but by a cross-prayer he asked for a decree nisi of divorce on the grounds of his wife's cruelty and of her adultery with two parties cited.

DAVIES, J., held that the husband had not proved either cruelty or adultery on the part of the wife and rejected both allegations. The judge held that the husband had been guilty of cruelty towards his wife and that such cruelty had not been condoned. He further found that the final act of cruelty committed

A by the husband was in or about July, 1951; that there was no further act of cruelty between that date and Jan. 9, 1953, when the wife left the husband; that, although the wife had remained with the husband for that period of eighteen months she had not done so for the purpose of re-establishing the marriage, but for her own convenience, holding her hand until it seemed suitable for her to strike, and throughout the period the wife had been guilty not of cruelty
B but of "objectionable conduct" towards her husband and had shown hostility towards him. In the exercise of his discretion the learned judge dismissed the wife's petition although she had proved her allegations of cruelty up to July, 1951, on the ground that she had been guilty of unreasonable delay in presenting her petition.

C *Elwyn Jones, Q.C., and Phillip Wien for the wife.*
H. Edmund Davies, Q.C., and Meurig Evans for the husband.

DENNING, L.J.: I will ask HODSON, L.J., to give the first judgment.

HODSON, L.J., stated the facts and continued: The argument in this court has been directed, first, to the question whether there was unreasonable
D delay on the wife's part, and, secondly, to the further question whether, if there was unreasonable delay, the learned judge was right in exercising discretion in the way that he did. Counsel for the wife, rightly, made his main attack on the first question, because the learned judge did purport to exercise his discretion and it was not possible for counsel to point to any particular in which he had misdirected himself as to the principles on which discretion was exercised;
E counsel also recognised that this court does not readily interfere with the exercise of judicial discretion, except of course where a judge has misapprehended the facts or acted on some wrong principle.

So far as unreasonable delay is concerned, counsel said that he himself was taken by surprise because the case was not fought on the basis of whether or not there was unreasonable delay, the question having come into the judge's mind without counsel having had an opportunity of addressing him on it. If
F the learned judge had accepted the wife's evidence that cruelty had been proved throughout from April, 1943, until January, 1953, there would have been no question of unreasonable delay. The petition was presented in October, 1953, and the period between January and October has no bearing on this question of delay at all. Contrary, I suppose, to the anticipation of everyone in this case,
G the learned judge's finding of cruelty stopped short at July, 1951, and therefore, before I deal further with the question of delay, I will refer a little further to the facts of this case. [HIS LORDSHIP reviewed the evidence of the incidents of cruelty and concerning the subsequent conduct of the wife, pointing out that in the court below the judge had taken the view that the final incident of July, 1951, when the husband had acted with cruelty to the wife, had given her a
H complete case on which she could have brought and maintained proceedings, but that during the months which followed she was not patiently enduring events with the idea of re-establishing the marriage but was merely holding her hand until it was convenient for her to strike at her husband, that her conduct throughout that period was hostile to him, and that she left him when it suited her to do so, she having entered into the marriage in belief in his wealth and having
I found that from a worldly point of view the marriage was not much good to her. HIS LORDSHIP continued:] The learned judge felt himself able to say:

"Although I find that there was some cruelty culminating in an act in July, 1951, in the exercise of my discretion, the wife not having acted properly, I will dismiss the petition."

In my judgment this court should not interfere with the learned judge's finding that there was in those circumstances unreasonable delay. It is true that in cases of petitions for divorce on the grounds of cruelty there is nothing in the

books to guide one, but the statutes to which we have been referred make unreasonable delay a discretionary bar to all suits for divorce and since 1937 the same consideration has applied to suits for judicial separation. In considering unreasonable delay which appeared as a discretionary bar in the Act of 1857*, it appears I think from the authorities that the statutory provision merely carried on the ecclesiastical practice which existed before, so that some assistance is to be gained by looking at earlier cases in considering the principles on which this court will act. *KARMINSKI, J.*, in *Lowe v. Lowe* (1) made a review of those cases in which the judges have from time to time dismissed petitions on the grounds of unreasonable delay, where the purpose of the proceedings was not relief from the marriage for a spouse who was complaining of the injury inflicted on him or her, but some other purpose. In *Rickard v. Rickard & Bond* (2), where adultery was alleged, the court upheld the judgment of *HORRIDGE, J.*, who had said (37 T.L.R. at p. 26) (and this language was approved by the Court of Appeal) that the court could not be used as a place to which people could come for redress just when it suited their monetary interests to do so. *LORD STERNDALE, M.R.*, agreed (*ibid.*, at p. 512), substituting, however, the words "monetary interests of their families" because that was the interest in that particular case. The principle seems to me to be the same whatever interests are to be considered: the court is not to be used as a place to which people can come for redress just when it suits them, and if the learned judge who tries the case comes to the conclusion that a weapon is being held in reserve over the head of the spouse who is affected, the court is entitled, in my judgment, in the exercise of its discretion to refuse to accede to the prayer of the petition. That is, I think, the effect of the learned judge's conclusions in this case, having regard to the finding of fact that from 1951 until the parting this woman made no attempt to continue the marriage but rather made herself continually objectionable to her husband, until it suited her to leave. In that state of affairs, on those findings, I think this appeal fails.

DENNING, L.J.: I agree. The last act of cruelty was in July, 1951, but the wife did not leave until January, 1953, eighteen months later. During that time the husband repented and sought a reconciliation with his wife, but she refused; she rejected all his overtures and she was extremely nasty to him. In addition she corresponded secretly with another man, who sent affectionate letters to her. After eighteen months she left the house without any further cause at all, taking the two children with her. The husband was very upset, very anxious for her to come back, but she refused to do so, and then brought this charge of cruelty against him. There is no previous case of cruelty in the books where delay has been found to be a reason for refusing a divorce, nevertheless I think the judge was justified in refusing it here. If the husband repents of his wrongdoing and seeks forgiveness, as he has done here, the wife cannot stay in the house and refuse to forgive him, and all the while hold the past over his head, ready to strike with a divorce whenever it suits her. She cannot play fast and loose with the marriage in that way.

The principle in *Boulting v. Boulting* (3) (3 Sw. & Tr. at p. 337) is in point:

"The petitioner must feel and suffer under the wrong of which complaint is made, and the court must be satisfied that the remedy is sought as a genuine relief from the pressure of that grievance. Such is the beaten track of the decisions. It is impossible to tread too faithfully in footsteps so wisely placed."

So here it cannot be said that the wife, when she left the house, still suffered under the grievance of eighteen months before. The learned judge thought that she was disappointed in the marriage, disappointed because her social position was not what she had hoped for, and eventually at long last, for different

* Matrimonial Causes Act, 1857, s. 31 (repealed).

A reasons altogether than cruelty, she left her husband. In these circumstances I think that the learned judge was entitled to find that there was unreasonable delay in staying on for these eighteen months before starting proceedings for cruelty. I agree that the appeal should be dismissed.

B PARKER, L.J.: I agree with both judgments and there is nothing I can usefully add.

Appeal dismissed.

Solicitors: *C. James Hardwicke & Co.*, Cardiff (for the wife); *O. G. Davies*, Bridgend (for the husband).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

C

R. v. DRISCOLL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Gorman, J.J.), April 4, 1955.]

D Criminal Law—Sentence—Supervision order—Previous convictions—Imprisonment for non-payment of fine—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 22 (1).

E An offender who has been convicted and sentenced to a fine, and then has been committed to prison in default of payment of the fine, has not thereby been sentenced to imprisonment within s. 22 (1) (a) of the Criminal Justice Act, 1948; and, accordingly, the conviction cannot be taken into account for the purposes of making an order under the sub-section in relation to the offender.

[For the Criminal Justice Act, 1948, s. 22 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 373.]

Appeal.

F The appellant, Gerald Edmund Arthur Driscoll, was convicted at the West London Magistrates' Court of three offences of larceny as a bailee and one offence of obtaining goods by false pretences. He was committed for sentence under the Magistrates' Courts Act, 1952, s. 29, to the County of London Sessions where, on Oct. 10, 1954, he was sentenced to three years' imprisonment and made subject to an order under s. 22 of the Criminal Justice Act, 1948. Of the two previous convictions of offences for which the appellant had been sentenced to imprisonment, required by s. 22 (1) (a) of the Act of 1948 to enable an order under that sub-section to be made, one was a conviction for a customs offence for which the appellant had been sentenced to a fine and to imprisonment in default of paying it, and had in fact been imprisoned on non-payment. The appellant now appealed against his present sentence, and on his appeal the question was raised whether a conviction and sentence to a fine and to imprisonment in default of paying it was a conviction for which the appellant was sentenced to imprisonment within s. 22 (1) (a) of the Act of 1948.

S. A. Morton for the appellant.

J. C. Phipps for the Crown.

I LORD GODDARD, C.J., delivered the judgment of the court, in which he stated the facts and continued: Section 22 (1) of the Criminal Justice Act, 1948, provides:

"Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . . the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the

offender, it otherwise determines, order that he shall for a period of twelve months . . . ”

report to the police. The appellant was sentenced to three years' imprisonment at the County of London Sessions, on which occasion two previous offences were proved against him. One of these was the offence of obtaining credit by fraud, for which he was sentenced to twelve months' imprisonment, and on which no question arises. The other was a conviction in respect of a customs offence for which he was ordered to pay a fine and to undergo imprisonment in default. He was in fact imprisoned in default. The question is whether that order of imprisonment in default of payment of a fine is a sentence of imprisonment within the meaning of s. 22 (1) (a). To decide that, we have to look at the definitions in s. 80 (1), which provides:

“ ‘Impose imprisonment’ means pass a sentence of imprisonment or commit to prison in default of payment of any sum of money or for failing to do or abstain from doing anything required to be done or left undone.”

If that section applied, there would be no doubt, but the words “impose imprisonment” do not appear in s. 22. They appear only in s. 17, s. 18 and s. 19, to which I need not, for this purpose, refer. Further on, in s. 80 (1), there is the definition of the word “sentence”:

“ ‘Sentence’ includes an order for detention in a detention centre, an order for custody in a remand home under s. 54 of the Children and Young Persons Act, 1933, and an order sending an offender to an approved school, but does not include a committal in default of payment of any sum of money . . . ”

It is argued that the words “payment of any sum of money” refer only to the power of justices to make orders such as, for instance, maintenance orders and various other orders whereby a magistrates' court can, in the exercise of what I may call civil jurisdiction, order a man to pay certain sums and commit him to prison if he does not do so. Parents are sometimes ordered to pay sums of money for the maintenance of their children if they are sent to approved schools. The most common committal order made in a magistrates' court is a committal order in respect of maintenance which has not been paid by a man for the maintenance of his wife. On full consideration, however, especially a consideration of the sections in the Criminal Justice Administration Act, 1914, to which counsel for the appellant has called attention, we think that “payment of any sum of money” does include payment of a fine.

Section 1 of the Criminal Justice Administration Act, 1914*, started by dealing with the effect of non-payment of fines, and it was that Act which, for the first time, introduced into the criminal law the obligation to give a person time to pay a fine, unless there were special circumstances. Section 1 (1) of that Act provided:

“A warrant committing a person to prison in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued forthwith unless the court which passed the sentence is satisfied . . . ”

of certain matters. It is there that we find the expression

“in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction”,

and a fine is a sum which is adjudged to be paid by a court of summary jurisdiction or any other court. It is true that, when one turns to s. 41 of that Act, it was provided:

“For the purposes of this Act, unless the context otherwise requires,—

(1) The expression ‘sentenced to imprisonment’ shall include cases where

* Now replaced by the Magistrates' Courts Act, 1952, s. 69 (32 HALSBURY'S STATUTES (2nd Edn.) 474).

A imprisonment is imposed by a court on any person either with or without the option of a fine, or in respect of the non-payment of any sum of money . . . ”

B That definition is distinguishing, no doubt, between a committal for non-payment of a fine and committal for non-payment of any sum of money, but that definition of “sentenced to imprisonment” is quite different from the definitions in s. 80 (1) of the Criminal Justice Act, 1948, of “sentence” or “impose imprisonment”.

C The Director of Public Prosecutions has appeared in this case, and he submits to the court that the argument which counsel for the appellant has put forward is right. Accordingly, we decide that, where there has been a committal in default of payment of a fine, that is not a conviction which can be taken into account under s. 22 (1) (a) of the Criminal Justice Act, 1948, for the purpose of imposing an order under that section. I do not think that we need deal with any matter connected with preventive detention, but the decision we give in this appeal is confined to the making of an order under s. 22 (1), and we point out that it does not affect the convictions under s. 21 (1), which deals with corrective training. To this extent, the appeal is allowed, so that the order under s. 22 will be set aside.

Order set aside.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

E

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G

CORRIGENDUM.

Chancery Division—Practice Direction.

Delete at [1955] 1 All E.R. 784 line G, the words beginning “*Infant—Marriage*” and ending with “1925” in the following line.

There is no right of appeal to the High Court from an order of a court of summary jurisdiction giving or refusing consent to the marriage of an infant (*Re Queskey*, [1946] 1 All E.R. 717).

BRYANT v. BRYANT.

[COURT OF APPEAL (Singleton, Hodson and Morris, L.J.J.), March 24, 1955.]

Divorce—Custody—Bigamous marriage and subsequent lawful marriage—Jurisdiction to grant custody of children of bigamous marriage—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1).

Nullity—Bigamous marriage—Children of marriage—Custody—Power of court to make order—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1).

On Oct. 23, 1941, the petitioner and respondent were bigamously married, the respondent having a wife still living at that date. There were two children of the bigamous marriage born in 1942 and 1947 respectively. In 1948 the respondent's prior lawful marriage was dissolved and on Sept. 9, 1948, he and the petitioner went through a second ceremony of marriage. On Oct. 14, 1954, the petitioner was granted a decree of nullity of the bigamous marriage and a decree of dissolution of the second marriage of Sept. 9, 1948. On an application by her for an order under the Matrimonial Causes Act, 1950, s. 26 (1), for the custody of the children of the bigamous marriage,

Held: the jurisdiction of the court under s. 26 (1) of the Matrimonial Causes Act, 1950, extended to children of a marriage which was null and void, since the wording of the sub-section expressly covered children, the marriage of whose parents was the subject of nullity proceedings; accordingly an order for custody should be made in favour of the petitioner.

Galloway v. Galloway ([1954] 2 All E.R. 143) distinguished.

Appeal allowed.

[For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

Cases referred to:

(1) *Galloway v. Galloway*, [1954] 2 All E.R. 143; [1954] P. 312.

(2) *Langworthy v. Langworthy*, (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest (Repl.) 689, 6597.

Appeal.

The petitioner appealed from an order dated Dec. 8, 1954, of His Honour JUDGE FRASER HARRISON, sitting as a special commissioner for the trial of matrimonial causes, at Liverpool, whereby he refused to make an order for custody under s. 26 (1) of the Matrimonial Causes Act, 1950, of the petitioner's two children of a bigamous marriage.

The facts appear in the first judgment.

E. Somerset Jones for the petitioner wife.

The respondent did not appear.

SINGLETON, L.J.: This is an appeal on a question of custody. It arises under s. 26 (1) of the Matrimonial Causes Act, 1950, a sub-section which appeared in much the same form in earlier legislation. Sub-section (1) reads:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

The sub-section has given rise to discussion in the courts, as reference to *Galloway v. Galloway* (1), which was cited to us, shows. The question is how it applies in this case?

On Oct. 23, 1941, the petitioner, Mrs. Daphne Madeleine Bryant, went through

- A a form of marriage with the respondent, William Austin Bryant. Mr. Bryant had been married a couple of years earlier, and he had a wife, Joan, still living, so that the marriage with the petitioner was a bigamous marriage. In due course the fact of his earlier marriage was discovered, Mr. Bryant was prosecuted, and was sentenced to twelve months' imprisonment for bigamy. A decree of dissolution of his first marriage was granted in 1948, and on Sept. 9, 1948, the
- B petitioner again went through a form of marriage with him. Two children were born of her bigamous marriage, one in 1942 and the other in 1947, and one girl was born in the year 1950 of the petitioner's lawful marriage of Sept. 9, 1948. By her petition, dated Oct. 14, 1954, the petitioner sought a decree of nullity of the bigamous marriage on the ground that the respondent had had a wife living at the time when the ceremony was performed, and the petitioner also sought a
- C decree of dissolution of the marriage of Sept. 9, 1948, on the ground of the respondent's adultery. She succeeded on both those prayers, and then asked for an order under s. 26 of the Matrimonial Causes Act, 1950, for custody of the two children of the bigamous marriage, and of the one child of the lawful marriage. I say no more about the later marriage. All we are concerned with here is the custody of the two children of the bigamous marriage.
- D It has been said that s. 26 (1) is so worded as to enable an order to be made in the case of children born of a marriage which turns out to be null and void, and that that is the reason for the use of the words " the marriage of whose parents " instead of the words " husband and wife ". It is said in this case, therefore, that the two children born of the bigamous marriage were within s. 26 (1), and the court is entitled to make provision with respect to custody, maintenance and
- E education of those two children the marriage of whose parents is the subject of the proceedings; that is, of the nullity proceedings. The commissioner did not make an order in respect of the two children of the bigamous marriage; indeed he was doubtful whether he had power to make such an order. I am satisfied that he had the power, as the matter was within the strict wording of s. 26 (1) of the Act, and that an order for custody ought to have been made.
- F There will, therefore, be an order in favour of the wife for the custody of those two children, and the proper course is to refer any question of maintenance to chambers.

HODSON, L.J.: I agree. I think the matter is perfectly clear, and I only add this: It appears that some difficulty was in the learned commissioner's mind because of the headnote in *Galloway v. Galloway* (1), which reads as follows ([1954] P. 312):

" . . . the jurisdiction of the court under s. 26 (1) of the Matrimonial Causes Act, 1950, did not extend to an illegitimate child born of parents in circumstances precluding its legitimization per subsequens matrimonium under the Legitimacy Act, 1926 . . . "

- H That language does not cover the whole field, and in particular does not cover the children with whom we are concerned in this case, namely, children of a void marriage who are expressly covered by the language of s. 26 (1) of the Matrimonial Causes Act, 1950, to which reference has been made in this case, in *Galloway v. Galloway* (1) or by the corresponding earlier legislation referred to in *Langworthy v. Langworthy* (2).

- I **MORRIS, L.J.:** I agree. It seems to me that s. 26 (1) refers to the children of the marriage union even where the marriage is declared to be null and void.

Appeal allowed.

Solicitors: *Chamberlain & Co.*, agents for *Williams, Elsby & Bren*, Bootle (for the petitioner wife).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

EVANS v. JONES.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.J.J.),
March 21, 22, 1955.]

Agriculture—Agricultural holding—Compensation for deterioration—Deterioration of particular parts of holding—Cost of reclaiming fields in bad state of cultivation—Liability of tenant to repair fences, hedges and ditches—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 57 (1), (2), s. 58—Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184), schedule, para. 5.

After the termination of an oral tenancy agreement relating to an agricultural holding, the landlord served a notice on the tenant, pursuant to the Agricultural Holdings Act, 1948, s. 70 (2), of his intention to make certain claims for compensation in respect of the dilapidation and deterioration of, or damage to, the holding, the nature and particulars of the claims being specified in the schedule to the notice. The claims were stated to be made under the Agricultural Holdings Act, 1948, s. 57, and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948. Claims of the former category included claims for such matters as the rehabilitation of fields alleged to be in a bad state of cultivation. Claims under the regulations included claims under para. 5 of the schedule thereto for the repair or cleansing of fences and ditches. The tenant contended (i) that the claims for rehabilitation were in law claims for deterioration within s. 58 of the Act of 1948 and were not maintainable under s. 57 thereof; and (ii) that para. 5 of the schedule to the regulations of 1948 did not impose on the tenant an obligation to put things into a better state of repair or condition than they were in at the beginning of the tenancy.

Held: (i) the claims for rehabilitation of fields were, having regard to their nature, claims for non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry, were within the scope of s. 57 (1) of the Act of 1948 and were not excluded therefrom by s. 58 of the Act.

Per SIR RAYMOND EVERSLED, M.R.: section 58 covers, inter alia, the case where, as a result of the specific failures by the tenant (which failures are subject to the claims made under s. 57), the landlord can also prove a general depreciation of his farm as a whole; that claim being, however, subject to the limitation that he must always, in the kind of case where there is also a claim under s. 57, bring into account anything that he recovers under s. 57 (see p. 121, letter I, post).

(ii) the tenant's obligation under para. 5 of the schedule to the regulations of 1948 was to repair and to keep and leave clean and in good tenantable repair, order and condition, the various things mentioned in the paragraph, and was not merely to keep and leave those things as clean and in as good repair as they were at the commencement of the tenancy; but, in determining whether the obligation had been complied with as regards any particular item, regard should be had to its age and character and its condition at the commencement of the tenancy.

Appeal allowed; cross-appeal dismissed.

[**Editorial Note.** As between landlord and tenant a tenant who covenants to keep premises in repair is liable to put them into proper repair if they are not in such repair at the beginning of the lease (see, generally, 20 HALSBURY'S LAWS (2nd Edn.) 210, para. 230). In determining the extent of the tenant's obligation under a covenant to repair regard is had to the state of the premises at the beginning of the tenancy (see 20 HALSBURY'S LAWS (2nd Edn.) 208, para. 228). The decision in the present case results in a similar conclusion being reached on

- A the extent of a tenant's obligations of repair under Part 2 of Sch. 1 to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184).

As to Compensation for Deterioration of Holding, see 1 HALSBURY'S LAWS (3rd Edn.) 323, 324, paras. 669, 670.

- B For the Agricultural Holdings Act, 1948, s. 57, s. 58 and s. 70, see 28 HALSBURY'S STATUTES (2nd Edn.) 72, 80.

For the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, see 1 HALSBURY'S STATUTORY INSTRUMENTS 87.]

Appeal.

- C The landlord of an agricultural holding appealed and the tenant cross-appealed from a judgment of His Honour JUDGE TREVOR MORGAN, dated Nov. 26, 1954, at Lampeter County Court, on a Special Case stated by an arbitrator under the Agricultural Holdings Act, 1948.

- D By an oral agreement made on or about Sept. 29, 1949, the holding, which contained some 145 acres, was let to the tenant on a yearly tenancy commencing on Sept. 29, 1949. On Sept. 23, 1952, the tenant gave notice of his intention to quit on Sept. 29, 1953. On Aug. 28, 1953, the tenant served on the landlord a notice, pursuant to the Agricultural Holdings Act, 1948, s. 70, of his intention to make against the landlord certain claims arising out of the termination of the tenancy. By agreement between the parties the tenant vacated the holding on or about Oct. 23, 1953. On Nov. 24, 1953, the landlord served on the tenant a notice, pursuant to s. 70 of the Act of 1948, of his intention to make against the tenant certain claims, arising out of the termination of the tenancy, for compensation in respect of the dilapidation and deterioration of, or damage to, the holding, the nature and particulars of the claims being set out in the schedule to the notice. There were twenty-five claims, of which items 1-21 inclusive related to clearing water courses, laying fences, reclaiming fields, and clearing and re-building banks. Item 22 related to the garden, and items 23-25 to buildings. The total of the amounts claimed was £904 7s. In the column headed "Statutory provision or term of tenancy agreement under which claim is made", there were references to the Agriculture Act, 1947, s. 11, the Agricultural Holdings Act, 1948, s. 57, and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184).

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I The claims of the parties having been submitted to arbitration under s. 70 of the Act of 1948, it was contended, among other things, on behalf of the tenant, in respect of the landlord's claim (a) that the obligation on the tenant under the regulations of 1948 was to repair and not to put into repair; (b) that the items claimed under the regulations were not the responsibility of the tenant thereunder; (c) that, so far as the claim was a claim for dilapidations, it did not fall within or satisfy the requirements of s. 57 (2) or of s. 15 of the Act of 1948, in that the landlord did not suffer damage, nor did the matters in respect of which the claim was brought constitute dilapidations in law; and (d) that items 4, 5, 6, 7, 8, 9, 10, 12, 16, 17 and 18 were claims for deterioration under s. 58 of the Act. These items alleged that certain fields were in a bad state of fertility or cultivation and claimed, among other things, the cost of reclaiming the fields. A number of these items also claimed the cost of laying fences, and clearing and re-building banks.

The questions of law submitted by the arbitrator for the opinion of the court were: (i) Was the obligation laid on the tenant by the regulations of 1948 to repair and not to put into repair? (ii) Were the items claimed by the landlord under the regulations the responsibility of the tenant? (iii) Was the claim for dilapidations maintainable in law? (iv) Were items 4, 5, 6, 7, 8, 9, 10, 12, 16, 17 and 18 claims for deterioration under s. 58 of the Act of 1948 and, accordingly, not maintainable in the arbitration? In answer to these questions the county court judge held: (i) that the obligation laid on the tenant by the regulations of 1948

was to repair and not to put into repair; (ii) that certain items in regard to the buildings were not the responsibility of the tenant; (iii) that the claim for dilapidations was maintainable at law by reason of s. 57 of the Act of 1948; and (iv) that the items specified in question (iv) were not claims for deterioration under s. 58 of the Act, but were claims for dilapidations under s. 57 and were maintainable in the arbitration.

J. T. Plume for the landlord.

Anthony Cripps for the tenant.

SIR RAYMOND EVERSHED, M.R. : This appeal raises certain questions which resolve themselves, on examination, into two (one on the appeal and one on the cross-appeal), both under the Agricultural Holdings Act, 1948. The appellant, Mr. Evans, was the landlord and the respondent, Mr. Jones, was the tenant of the farm known as Mock Farm, Ffostrasol, Llandyssul, in the county of Cardigan. The tenancy was an oral yearly tenancy which lasted from Sept. 29, 1949, to Sept. 29, 1953, when, as a result of a notice to quit served by the tenant, it expired. The tenant thereupon claimed compensation for tenant right, and the landlord claimed compensation for what are called, compendiously in the Act, dilapidations. Those claims were submitted, according to the Act,* to arbitration. The questions with which we are concerned arose on a Special Case stated by the arbitrator to the county court, and the appeal is from the judge's answers to those questions.

The questions were as follows: "(i) Is the obligation laid on the tenant by [the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184)] to repair, and not to put into repair?" I can pass over question (ii).

"(iii) Is the claim for dilapidations [the landlord's claim] maintainable in law? (iv) Are the claims numbered [there are eleven numbers, referring to items in the schedule to the landlord's notice of claim] claims for deterioration under s. 58 of [the Agricultural Holdings Act, 1948] and accordingly not maintainable in this arbitration?"

I think, as will later appear, that questions (iii) and (iv) are really part of the same problem and can be dealt with as a single point, being the matter raised on the cross-appeal. As may be discerned from the form of question (iv), the claim by the landlord was not under s. 58 of the Act, but exclusively under s. 57. I will, accordingly, first read s. 57:

"(1) The landlord of an agricultural holding shall be entitled to recover from a tenant of the holding, on the tenant's quitting the holding on the termination of the tenancy, compensation in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry. (2) The amount of the compensation payable under the foregoing sub-section shall be the cost, as at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage."

Then sub-s. (3) provides an alternative right in the landlord to claim compensation for breach of obligations in the tenancy, but the sub-section applies only in cases of a written contract of tenancy, which was not this case. It was admitted by counsel for the tenant, and it is quite clear, in view of the terms of s. 57 (2), that the cost of doing the necessary work is the proper basis of compensation in so far, of course, as the claims are found to be established under s. 57. The question, however, raised on the cross-appeal and by the third and fourth of the arbitrator's questions is whether certain of the claims made by the landlord

* See s. 70 of the Agricultural Holdings Act, 1948; 28 HALSBURY'S STATUTES (2nd Edn.) 80.

A are properly made under s. 57 or whether they should have been made under s. 58. I will deal with that matter first, although it is only on the cross-appeal. Section 58 is as follows:

B “Where, on the quitting of an agricultural holding by the tenant thereof on the termination of the tenancy, the landlord shows that the value of the holding generally has been reduced, whether by reason of any such dilapidation, deterioration or damage as is mentioned in sub-s. (1) of the last foregoing section or otherwise by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry, the landlord shall be entitled to recover from the tenant compensation therefor, in so far as the landlord is not compensated therefor under sub-s. (1) of that section or in accordance with sub-s. (3) thereof, of an amount equal to the decrease attributable thereto in the value of the holding as a holding, having regard to the character and situation of the holding and the average requirements of tenants reasonably skilled in husbandry.”

D Then there is a proviso that compensation cannot be recovered under s. 58 unless the landlord has, not later than one month before the termination of the tenancy, given notice in writing to the tenant of his intention to claim compensation under the section. No such notice was given in this case by the landlord, and it is, therefore, not in doubt that no claim can now be preferred by the landlord, and no claim in fact has been made by the landlord, under s. 58.

E In order to illustrate the point which is submitted by the cross-appeal, it will be convenient to take two of the items mentioned by the arbitrator, items 8 and 9. Item No. 8 refers to a certain field of 5.923 acres, and says of it:

“Many consecutive hay crops have been taken from this field without applying fertilisers. Cost of fertiliser, three tons of basic slag, £13; ten hundredweights compound fertiliser with potash, £10; twelve tons of lime, £18: [total] £41.”

F Item No. 9 relates to another field of rather larger dimensions:

“This pasture field contains rough herbage with weeds and moss in abundance. It is in a bad state of fertility. Cost of reclaiming same at £10 per acre, £108.”

G Although it is perhaps anticipating what I shall say later, it will be observed that those allegations are allegations, not of breaches of anything in the regulations of 1948 to which I will later come, but of non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry.

H It is said, however, by counsel for the tenant that those claims which I have read were of a nature only capable of being put forward under s. 58. I am quite unable to agree with that contention. Whether or not the claims, and, in particular, the two examples, Nos. 8 and 9, which I have read, are well founded in fact will depend on the conclusions of the arbitrator; but, as I have said, the allegation is, right or wrong, that, as respects those two fields, the tenant has failed to fulfil his responsibilities to farm them according to the rules of good husbandry, for example, by not properly feeding or fertilising the pastures. If that claim is made good, then, according to s. 57, the landlord is entitled by way of compensation to the cost of bringing those fields back into a proper state of health. Section 58 covers, inter alia, the case where, as a result of the specific failures by the tenant (which failures are subject to the claims made under s. 57), the landlord can also prove a general depreciation of his farm as a whole; that claim being, however, subject to the limitation that he must always, in the kind of case where there is also a claim under s. 57, bring into account anything that he recovers under s. 57, so that he does not in any case recover twice over. I, therefore, think that the cross-appeal fails, and that the learned judge rightly answered the two questions (iii) and (iv) submitted to him by the arbitrator. I emphasise that I do not say, and quite clearly the judge did not say, that the

claims, of which I have read two examples, are necessarily good claims. That is a matter of fact for the arbitrator. A

I now return to the other question raised on the appeal, which is not, perhaps, so easy. The first question submitted by the arbitrator is general in terms, but, as I have understood the case, it is found, in fact, to relate to certain specific matters, namely, fences, hedges and ditches, and it refers to the application and effect of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948. In order to introduce those regulations, I must refer first to s. 6 (1) of the Agricultural Holdings Act, 1948, which provides: B

“The Minister may . . . make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment which shall be deemed to be incorporated in every contract of tenancy of an agricultural holding, whether made before or after the commencement of this Act . . .” C

At first sight, the reference to “fixed equipment” does not sound readily applicable to hedges, fences and ditches, but there seems little doubt that it is, in fact, so applicable. The regulations of 1948 were made in pursuance of powers under the Agriculture Act, 1947, s. 37 (1)*, but they are now beyond question applicable to the Act of 1948, and must be treated as made in pursuance of the powers under s. 6 (1) of the Act of 1948. D

The form of this statutory instrument is, first, three operative paragraphs, the effect of which, so far as relevant, is that the provisions of the schedule are to constitute the regulations to which s. 6 (1) looked forward. Part 1 of the schedule† is headed “Rights and liabilities of the landlord” and Part 2 “Rights and liabilities of the tenant”. Part 2 begins: “Except in so far as such liabilities fall to be undertaken by the landlord under Part 1 hereof”. The liability of the tenant, under para. 5, is: E

“To repair and to keep and leave clean and in good tenantable repair, order and condition, the farmhouse . . . together with all fixtures and fittings, drains, sewers, water supplies, pumps, fences, live and dead hedges, gates, field walls, posts, stiles, bridges, culverts, ponds, water courses, ditches, roads and yards in and upon the holding, or which during the tenancy may be erected or provided thereon . . .” F

Paragraph 9 contains a specific obligation: “To cut and lay a proper proportion of the hedges in each year of the tenancy so as to maintain them in good and sound condition.” Paragraph 10 is: “To dig out, scour and cleanse all . . . ditches . . . as may be necessary to maintain them at sufficient width and depth . . .” G

It seemed to us, when counsel for the landlord started his argument, that there might be a question whether the formula “responsibilities to farm in accordance with the rules of good husbandry”, which is the test, so to speak, of liability under s. 57 (1), comprehended a failure on the tenant’s part in the performance of the obligations imposed on him by Part 2 of the schedule now under consideration. We were, however, relieved from expressing any view on that matter, because counsel for the tenant conceded, for the purposes of this appeal, that the tenant was liable under s. 57 (1) if it was shown in fact that he had failed to perform on their proper construction, *inter alia*, the obligations imposed by Part 2, paras. 5, 9 and 10, of the schedule to the regulations of 1948. H

The answer of the learned judge to the first question posed by the arbitrator was that the obligation imposed by the regulations of 1948 was to repair, but not to put into repair. The learned judge went on to say: “There is no liability on the tenant to put the farm in a better condition as to hedges, fences or ditches I

* Section 37 (1) of the Act of 1947 was repealed by the Agricultural Holdings Act, 1948, s. 98 and Sch. 8; but the regulations were continued in force by virtue of s. 100 (1) of the Act of 1948, for the purposes of, in this instance, s. 6 of that Act.

† The schedule to the regulations (S.I. 1948 No. 184; 1 HALSBURY’S STATUTORY INSTRUMENTS 87) comprises three Parts, of which Part 1 contains paras. 1-4, Part 2 contains paras. 5-13, and Part 3 contains para. 14.

- A than it was when he first took possession." The actual matters of fact involved under this question are not, apparently, of great magnitude; but the question is not whether "repair" involves putting into repair (though I should have thought, *prima facie*, that the two things were the same), but of the meaning of the later words in para. 5 of the schedule, "to keep and leave clean and in good tenable repair, order and condition". I see no reason why those words should not mean
- B what they say. The matter is not advanced by substituting, if it were permissible so to do, some other words for the words in the regulations themselves. In my judgment, the tenant's obligation under para. 5 is to repair and keep and leave clean and in good tenable repair, order and condition the various things which are there enumerated, and is not merely to keep and leave those things as clean and in as good repair as they happened to be at the commencement of the tenancy. In determining, however, whether the obligation has been complied with as regards any particular item, regard should, I think, undoubtedly be had to its age and character and its condition at the commencement of the tenancy. In other words, I think that the arbitrator will judge the facts as they are presented to him in the light of all the circumstances, including the condition of the items, their age and so on, at the time when the tenant took over, and I
- D think also that he will take into account, as counsel for the landlord conceded, the length of the tenancy and the time, therefore, which the tenant had to do that which he was called on to do. The question is in every case whether, as a matter of good husbandry and common sense, and having regard to all these matters, the tenant in fact did perform the obligations stated in the regulations of 1948, to keep and leave the fences, hedges and ditches in good tenable
- E repair, order and condition. I would, for my part, put no gloss on the words used in the regulations; but, having expressed my opinion on the plain meaning of the terms, I would leave it to the arbitrator to form his opinion on all the separate matters in the light of all the relevant circumstances.

- The notice of appeal asks, in para. (i), that it may be adjudged that the obligations of the tenant under the regulations were to put and keep in repair, and to
- F leave in clean and good tenable repair, order and condition the hedges, fences and ditches. I think that to put in the words "put and" is not only unnecessary but also futile, and rather obscures the real issue. In saying that, I am not blaming counsel for the landlord or the learned judge, because that was the form in which the question was submitted by the arbitrator; but, the question having been so submitted, I find myself unable to agree with the comment
- G on it which was made by the learned judge. In other words, I agree with counsel for the landlord that the learned judge sought to put an unjustified limitation on the meaning of the words used in the regulations. My conclusion is that the court should not answer, as a matter of general and academic principle, questions such as this by adding words to the terms of the regulations; but, having stated that para. 5 of the schedule to the regulations ought, in my
- H judgment, to take effect according to its terms and that its application is not, on the face of it, limited by reference to the condition of the premises when the tenant went in, I would leave it to the arbitrator to determine in the light of all the relevant circumstances and facts whether the tenant in fact performed his obligations. I think, therefore, that the appeal ought to be allowed, and that the cross-appeal must be dismissed.

I JENKINS, L.J. : I agree.

ROMER, L.J. : I also agree.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Ellis & Fairbairn*, agents for *James Jones, Son & Francis*, Llandysul (for the landlord); *Amphlett & Co.*, agents for *Amphlett Lewis & Evans*, Llandysul (for the tenant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL (at the relation of ALLEN) v.
COLCHESTER CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), March 23, 24, 31, 1955.]

Ferry—Public ferry—Franchise—Owner's duty to maintain and operate—Owner sustaining loss—Whether mandatory injunction will be granted.

Injunction—Mandatory injunction—Discretion over grant of remedy—Franchise ferry—Owner sustaining loss—Injunction to maintain and operate ferry refused.

The defendants were the owners of a franchise ferry across the River Colne in Essex connecting F. and W. The ferry had not been used extensively in recent times and in 1953 the defendants ceased to operate it. In the five years up to 1953 its operation had involved the defendants in a loss of over £1,000. The ferry was a convenience to the inhabitants of F. This action was brought at the relation of an inhabitant of the village of F. claiming a declaration that the defendants were bound to operate the ferry and for a mandatory injunction to them to do so at all reasonable times.

Held: (i) a mandatory injunction would not be granted because (a) the court could not compel the performance of personal services or the doing of a continuous act requiring the continuous employment of people (*Lumley v. Wagner* (1852) (1 De G. M. & G. 604) and *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.* (1874) (9 Ch. App. 331) applied), and (b) as the ferry could only be maintained at a loss, it would be inequitable to order the defendants to continue working it.

(ii) the declaration sought would not be made because no useful purpose would be achieved by it and no relief consequential on such a declaration could be granted.

Semble: (i) persons who, by reason of the failure to operate the ferry, are put to greater expense than they would have incurred had the ferry been in operation can recover the difference in an action against the owners of the ferry (see p. 127, letter G post); and (ii) the remedy by writ of scire facias for the repeal of a franchise of public ferry is still available (see p. 127, letter D, post).

[**Editorial Note.** In the judgment in this case LORD GODDARD, C.J., draws attention to the old remedy, applicable where the owner of a franchise fails in his duty, viz., the writ of scire facias, and intimates that this writ, which has fallen into disuse, would still be able to be issued from the Crown Office. Scire facias on the revenue side of the Queen's Bench Division was abolished by the Crown Proceedings Act, 1947, s. 13 and Sch. 1; but the writ of the same name on the Crown side of that Division was preserved by virtue of the exception of proceedings on the Crown side from the definition of civil proceedings in s. 38 (2) of the Crown Proceedings Act, 1947, 6 HALSBURY'S STATUTES (2nd Edn.) 71. It is this writ which provides a remedy by which Crown grants, charters and franchises may be rescinded. The fiat of the Attorney-General is needed if proceedings for the writ are to be maintained by a subject.

As to the duties of an owner of a public ferry and remedies for neglect of them, see 15 HALSBURY'S LAWS (2nd Edn.) 26, 27, paras. 36, 37; and for cases on the subject, see 24 DIGEST 975, 73-82.

As to the discretion over granting mandatory injunctions, see 18 HALSBURY'S LAWS (2nd Edn.) 24, 25, para. 37, and, as regards mandatory injunctions involving the doing of work, p. 27, para. 40; and for cases on the subject, see 28 DIGEST 395-403, 231-310.

As to the court's not granting specific performance of a contract for work or service, see 31 HALSBURY'S LAWS (2nd Edn.) 334, para. 366; and for cases on the subject, see 42 DIGEST 436, 437, 74-90.]

A Cases referred to:

- (1) *Letton v. Goodden*, (1866), L.R. 2 Eq. 123; 35 L.J.Ch. 427; 14 L.T. 296; 30 J.P. 677; 24 Digest 970, 34.
- (2) *Peter v. Kendal*, (1827), 6 B. & C. 703; 5 L.J.O.S.K.B. 282; 108 E.R. 610; 24 Digest 981, 150.

B

- (3) *R. v. Eastern Archipelago Co.*, (1853), 1 E. & B. 310; 118 E.R. 452; *affd.* Ex. Ch., (1853), 2 E. & B. 856; 23 L.J.Q.B. 82; 22 L.T.O.S. 198; 118 E.R. 988; 11 Digest (Repl.) 659, 826.

- (4) *Payne v. Partridge*, (1690), 1 Salk. 12 (91 E.R. 12); 1 Show. 225 (89 E.R. 556); sub nom. *Paine v. Partrich*, Carth. 191 (90 E.R. 715); 24 Digest 976, 87.

C

- (5) *R. v. Oxford & Witney Turnpike Roads Trustees*, (1840), 12 Ad. & El. 427; 113 E.R. 873; 26 Digest 375, 1006.

- (6) *A.-G. v. Staffordshire County Council*, [1905] 1 Ch. 336; 74 L.J.Ch. 153; 92 L.T. 288; 69 J.P. 97; 26 Digest 353, 797.

- (7) *A.-G. v. Roe*, [1915] 1 Ch. 235; 84 L.J.Ch. 322; 112 L.T. 581; 79 J.P. 263; 26 Digest 451, 1666.

D

- (8) *A.-G. v. Cory Brothers & Co.*, *Kennard v. Cory Brothers & Co.*, [1921] 1 A.C. 521; 90 L.J.Ch. 221; 125 L.T. 98; 85 J.P. 129; *subsequent proceedings*, [1922] 2 Ch. 1; 36 Digest (Repl.) 286, 346.

- (9) *Lumley v. Wagner*, (1852), 1 De G.M. & G. 604; 42 E.R. 687; 11 Digest (Repl.) 439, 814.

- (10) *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, (1874), 9 Ch. App. 331; 43 L.J.Ch. 575; 30 L.T. 208; 38 Digest 343, 526.

E

- (11) *Greene v. West Cheshire Ry. Co.*, (1871), L.R. 13 Eq. 44; 41 L.J.Ch. 17; 25 L.T. 409; 38 Digest 294, 249.

Action by the Attorney-General at the relation of Derrick Allen, an inhabitant of the village of Fingrinhoe, Essex, against the corporation of the borough of Colchester, the owners of a franchise ferry operating across the River Colne between Fingrinhoe and Wivenhoe, for a declaration that the defendants were bound to maintain and operate the ferry and for a mandatory injunction commanding them to operate it at all reasonable times.

F

R. C. C. J. Binney for the plaintiff.

L. K. E. Boreham for the defendants.

Cur. adv. vult.

G

Mar. 31. **LORD GODDARD, C.J.**, read the following judgment: This action is brought by the Attorney-General at the relation of one Derrick Allen, an inhabitant of Fingrinhoe, a parish on the south bank of the River Colne in Essex, for a declaration that the defendants, the Colchester corporation, are bound to maintain and operate a public ferry for foot passengers and their goods across the River Colne to the town of Wivenhoe and for a mandatory injunction commanding the defendants at all reasonable times to operate the said ferry and to carry all peaceable wayfarers who are ready and willing to pay the toll. It was alleged that on Oct. 1, 1952, the defendants wrongfully discontinued the operation of the ferry, but that it was reopened and operated from Mar. 1 to Nov. 21, 1953, and since that date the operation has wholly ceased. By their defence, the defendants admit that the ferry is an ancient franchise ferry and that they are the present owners, and they admit the allegations with regard to the discontinuance of the operation of the said ferry. They allege that the operation of the ferry has become so burdensome that no order or mandatory injunction ought to be made against them; and from an early stage of the case it was apparent (and counsel on both sides agreed) that the substantial question for decision was whether the plaintiff was entitled to a mandatory injunction.

I

There were substantially no facts in dispute, but a certain amount of evidence was called from which it appeared that Fingrinhoe is a somewhat scattered village and the inhabitants had been accustomed in the past and desire in the future to use the ferry for crossing to Wivenhoe, which is a place considerably larger in

extent and population and where there is a convenient railway service. Some two and a half miles away by road there is another ferry, at a place called Rowhedge, which is obviously not so convenient for the inhabitants of Fingrinhoe, as, even if they approach it by a footpath, which may be described as a short cut, the path passes over fields which are often very wet, and there are four stiles on the path so that it is not suitable for the use of perambulators or bicycles. To get from Fingrinhoe to Colchester station, which is the only alternative to Wivenhoe, the bus service is inconvenient and involves a change at the borough boundary. There is no doubt that the ferry is a considerable convenience to the inhabitants of Fingrinhoe both for shopping and for railway facilities and to those of the inhabitants who work in Wivenhoe. To take one instance, the relator himself works in Wivenhoe and he has a longer bicycle ride to get to Rowhedge than to get to the ferry in question and, using the ferry at the former place, he has further to bicycle when he gets on to the north bank. The corporation acquired the ferry from its former owner in 1899. I was told that the acquisition was due to the opinion of the corporation that if they owned it they would be able to make more favourable terms with some neighbouring landowner whose property they were considering acquiring. This matter was not gone into in any detail and the reason why the corporation acquired the ferry seems to be immaterial for the present purposes. A B C D

Whatever may have been the case in bygone days, it is quite obvious that in modern times the ferry is not extensively used. I was told there were only four regular users of the ferry. The number of passengers using it no doubt varied from day to day and from month to month. As many as a hundred passengers have been known to use it on some days in the summer holiday season. The toll that has been charged for very many years has only been twopence and this is quite insufficient to pay the wages of a ferryman. When the operation of the ferry was resumed after its discontinuance in March, 1953, the corporation employed a local firm of boat repairers in Wivenhoe to work it and they apparently tried the expedient of running an hourly service. The receipts which they obtained from March to October were something under £45. I need hardly say that this being an ancient ferry, the owner would not seem to be fulfilling his common law obligation if he ran such a restricted service. His duty as I understand it would be to have the ferry in operation at all hours and to convey foot passengers across the river at any time that they required the facility. It may well be that they would be entitled to charge a higher toll now, owing to the fall in the value of money, and perhaps one still higher at night; indeed it seems that the tolls charged did include one of one shilling for a doctor who might require it at night between 10 p.m. and 6 a.m. There was apparently a published schedule of tolls with which, however, I need not deal in detail. Figures were produced showing that the net loss to the corporation over five years preceding the closing of the ferry was £1,027 15s. 8d. and the corporation estimate that if they employed two men to work on a shift system the annual net loss to the corporation would be in the neighbourhood of £1,200 a year. E F G H

I had no evidence that it was used at all extensively by the inhabitants of Wivenhoe, except at the fruit picking season when farmers on the south bank hired pickers from the town, but as a franchise ferry it is open for all users of the highway. It does seem that, except at holiday times, there is no extensive use by anyone except the residents of Fingrinhoe, and not a great deal by them. I

The judgment of SIR RICHARD KINDERSLEY, V.-C., in *Letton v. Goodden* (1), concisely states the nature of a ferry, the rights of the public and the obligations of the owner. He says (L.R. 2 Eq. at p. 130):

"A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side; and as such the existence of a ferry is obviously for the benefit of the public.

A The advantage to the public is so great that the Crown has from time to time granted rights of ferry, and all common ferries have their origin in royal grant, or in prescription, which presumes such grant. Such a right of ferry is an exclusive right or monopoly, and, as such, it is in itself an evil, being in derogation of common right, for by common right any person may carry passengers across a river. But as a compensation for that derogation of common right, there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the King's highway, of which the ferry forms a part; for the owner of the ferry is under the obligation of always providing proper boats, with competent boatmen, and all other things necessary for the maintenance of the ferry in an efficient state and condition for the use of the public; and this he is bound to do under pain of indictment; and if he be found in default, he would, as it is expressed, be liable to be grievously amerced."

Now there is no doubt that an owner of a ferry who fails to perform his obligations to the public is liable to indictment, because the breach of a public duty is, in general, a misdemeanour. So the inhabitants of a parish are liable to be indicted if they fail to maintain a highway repairable by the inhabitants at large and, though modern legislation has provided more convenient methods of enforcing this duty, the liability to indictment still remains. Another consequence that may follow where the owner of a franchise fails in his duty is that he may be the subject of a *scire facias* at the suit of the Crown to repeal the franchise and, if thought necessary, to vest it in some other person: *Peter v. Kendal* (2). Although this writ which issues from the common law side of the Chancery formerly known as the Petty Bag Office has been abolished for most purposes, it still remains for the calling into the Chancery of Crown grants and franchises for their cancellation and would now be issued from the Crown Office. An example of pleading in a *scire facias* will be found in *R. v. Eastern Archipelago Co.* (3).

F But counsel for the plaintiff contends, not unnaturally, that though these common law sanctions exist they are of no advantage to those persons who are deprived of the service offered by the ferry. He contends that here equity must come to the aid of the law and by its peculiar remedy of injunction compel the corporation, as the owner of the ferry, to render the service, and that at whatever cost to themselves. I ought, perhaps, to have mentioned that it seems that a person who has suffered special damage by a ferry owner's neglect to maintain it has an action on the case against him (see *Payne v. Partridge* (4)), and while I have no desire to encourage litigation and to flood the Colchester County Court with work, it may be (I say no more) that persons who for the purpose of getting to Wivenhoe on their lawful occasions, are put to greater expense than they would have been had the ferry been in operation can recover the difference in an action against the corporation.

I So I have now to consider whether the court can, in accordance with established principles, grant a mandatory injunction to compel the corporation to work the ferry. There is no case to be found in the books of such an injunction ever having been granted nor any hint or suggestion of there being such a remedy. As a ferry is a continuation of a road and so part of a highway (see *Letton v. Goodden* (1)) it is not inappropriate to consider whether an injunction has ever been granted to maintain a road. Here again I can find no such instance. Moreover the common law remedy of *mandamus* is, in many respects, closely akin to a mandatory injunction, and it was expressly held in *R. v. Oxford & Witney Turnpike Roads Trustees* (5), that the writ would not lie to enforce the repair of a road. This case was followed by JOYCE, J., in *A.-G. v. Staffordshire County Council* (6), when he refused a mandatory injunction ordering the defendants as the highway authority to do certain work necessary to maintain the road. No doubt cases are to be found where mandatory injunctions have been granted to

do work in relation to roads, but these appear to be confined to cases where a nuisance has been created and the injunction is, in effect, to abate the nuisance. *A.-G. v. Roe* (7), cited by counsel for the plaintiff, may be taken as an example. A landowner made an excavation adjoining a highway which was not only a danger, but caused a subsidence of the road. He was ordered to protect the excavation and restore the road, i.e., in effect to abate the nuisance which he had created.

Now it has been said more than once that it is not easy to be precise as to when equity will or will not grant a mandatory injunction: see, for instance, per SCRUTTON, L.J., in *A.-G. v. Cory Brothers & Co.*, *Kennard v. Cory Brothers & Co.* (8) ([1922] 2 Ch. at p. 20). Counsel for the corporation contends that it is at any rate settled that the court will not grant injunctions requiring a person to perform personal services or to compel a company or an individual to do a continuous act which requires the continuous employment of people. Many cases were cited, but it is enough to refer to the judgment of LORD ST. LEONARDS, L.C., in *Lumley v. Wagner* (9), for the first proposition and to *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.* (10), for the second. It may be conceded that what are sometimes referred to as the railway cases form an exception. A leading example is *Greene v. West Cheshire Ry. Co.* (11). These cases turn in my opinion on this principle: if a railway company, or any other land-acquiring body, acquire land for the consideration of a money payment and a covenant to do certain work for the benefit of the person from whom they acquire it, and keep the land, they must do the work. But how can the court compel a person to maintain and work a ferry which would require him either to do the work himself or maintain and pay ferrymen as his servants? It cannot, as it seems to me, make any difference whether the owner is a municipal corporation, a commercial company or an individual, or whether the owner is rich or poor. The duty to maintain and work the ferry is the same whatever the circumstances of the ferryman. No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern. The franchise of a ferry is granted for the public benefit and the public by using it and paying the toll enable the owner to maintain and work it and probably obtain a profit for his trouble. If it is so little used that it can only be maintained at a loss, it would seem to be inequitable to order the owner to continue working it on pain of imprisonment if he is an individual, or sequestration if a corporate body, for the continued working of the ferry might force an individual into bankruptcy. It seems reasonable to assume in this case that if the franchise were forfeited no other person would be found willing to accept such a *damnosa hereditas*. I, therefore, refuse to grant an injunction. Counsel for the plaintiff contended that he was at least entitled to a declaration. I do not see that any useful purpose would be achieved thereby, and the court is always loath to make a declaration where no consequential relief is granted. I cannot see that a bare declaration will be of any assistance to the relator or the other inhabitants of the village. Should the Attorney-General desire to proceed by *scire facias* or should an indictment be preferred at the quarter sessions, the pleadings in this action can be used to prove that the ownership and the discontinuance were admitted by the corporation.

Judgment for the defendants.

Solicitors: *Lawrence Jones & Co.* (for the plaintiff): *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Colchester (for the defendants).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A

R. v. MINISTER OF AGRICULTURE AND FISHERIES,
Ex parte GRAHAM.

R. v. AGRICULTURAL LAND TRIBUNAL (SOUTH WESTERN
PROVINCE), *Ex parte BENNEY.*

B [COURT OF APPEAL (Denning and Parker, L.J.J., and Upjohn, J.), February 24,
25, 28, March 17, 1955.]

*Agriculture — Agricultural holding — Supervision order — Representations to
Minister before action by Minister—Hearing by person appointed for that
purpose—Minister's power to appoint county agricultural executive com-
mittee's sub-committee—Previous inspection by sub-committee—Sub-com-
mittee's officer's attendance, participation and preparation of report—
Agriculture Act, 1947 (10 & 11 Geo. 6 c. 48), s. 12 (1), s. 17 (2), s. 74 (4),
s. 104 (4), (5)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1), s. 19.*

C

Under the statutory authority of the Agriculture Act, 1947, the Minister
of Agriculture and Fisheries delegated the power of making supervision
orders in respect of agricultural holdings to county agricultural executive
committees and a county agricultural executive committee delegated the
power to its husbandry sub-committee, each also reserving the concurrent
power of making such an order*. Following inspection of a farm by two
members of the husbandry sub-committee, accompanied by the county
land agent, a civil servant who acted as an officer of the county committee
and the husbandry sub-committee, the county land agent on behalf of the
county committee gave the farmer notice that the Minister had under
consideration a proposal to place him under supervision and informed him
that he would be afforded an opportunity of being heard if he wished. On
receipt of notification that the farmer intended to make representations
against the proposal, the county land agent notified him that the matter
would be considered by the husbandry sub-committee. At the hearing,
seven out of eight of the sub-committee attended, including one of the two
who made the original inspection of the farm, and they were accompanied
by the county land agent, who sat next to the chairman, participated in a
legal argument on the right of the sub-committee to receive the repre-
sentations, and remained with the sub-committee after the farmer had
withdrawn, but remained in order to record the decision of the sub-committee
and not to take part in the deliberations.

D

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The sub-committee referred the matter to the county committee, which
on the report of the sub-committee (the county land agent being absent)
made a supervision order in respect of the farmer. On a motion for certiorari
to quash the order,

H

Held: the supervision order was validly made because (i) the sub-
committee was not forbidden by s. 104 (5) of the Agriculture Act, 1947, to be

* The power to make a supervision order arises where the Minister is satisfied that the occupier of an agricultural unit is not fulfilling his responsibilities to farm the unit in accordance with the rules of good husbandry; before making such an order the Minister must afford the occupier an opportunity of making representations, as, e.g., by being heard by a person appointed by the Minister (Agriculture Act, 1947, s. 12 (1); 1 HALSBURY'S STATUTES (2nd Edn.) 166). The Minister is bound to afford the occupier an opportunity of being heard by a person appointed by the Minister if application is duly made (Agriculture Act, 1947, s. 104 (4); 1 HALSBURY'S STATUTES (2nd Edn.) 216). The Act confers power to delegate the Minister's functions to county agricultural executive committees (ibid., s. 72; 1 HALSBURY'S STATUTES (2nd Edn.) 189). Functions concerning supervision orders have been delegated to these committees by the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948 No. 187); 1 HALSBURY'S STATUTORY INSTRUMENTS 233. Power for county agricultural executive committees to delegate their functions with the approval of the Minister to sub-committees is conferred by s. 71 (3) of the Agriculture Act, 1947.

I

appointed to receive representations, as the prohibition in that sub-section extended only to officers or servants of the committees or sub-committees (*R. v. Agricultural Land Tribunal (South Western Province), Ex p. Benney*, [1955] 1 All E.R. 123 overruled); (ii) on the true construction of s. 104 the Minister could appoint himself to hear representations, and accordingly could appoint his delegate, the sub-committee, and the fact that the sub-committee was a fluctuating body of persons did not prevent their being a "person appointed" within s. 104 (4) (*Davey v. Shawcroft* ([1948] 1 All E.R. 827) applied), nor imply a contrary intention sufficient to exclude s. 1 (1) and s. 19 of the Interpretation Act, 1889; and (iii) the proceedings of the sub-committee were not invalidated by the fact that the county land agent sat with the sub-committee, for he did not take part in their deliberations or decision, but it was irregular that he should sit among the sub-committee rather than separately from them.

Per DENNING, L.J.: I see no reason why a local official should not attend the hearings of the sub-committee in the capacity of clerk to the sub-committee. He must act, however, solely as clerk and not as a member of the sub-committee. He must take no part in the decision of the case, because the decision must be the decision of the sub-committee alone, and not the decision of the clerk, nor of the sub-committee and the clerk . . . He should sit at a different table and take a note of all that happens; but he should not attend at the deliberations of the sub-committee unless it asks him to do so, as, for instance, if the members wish to refresh their memories from his note of what was said. They can take his advice regarding practice and procedure but not on the facts, because the decision on the facts is for the sub-committee alone. He can from his note draft the report of the representations which the farmer has made, but it must be approved as correct by the members of the sub-committee before any use is made of it, because it is they who are responsible for it and not the clerk (see p. 135, letters E to H, post).

Appeal allowed.

Agriculture—Agricultural holding—Dispossession order—Jurisdiction of Minister—Order comprising more land than previous supervision order—Validity of order and of prior proceedings—Agriculture Act, 1947 (10 & 11 Geo. 6 c. 48), s. 17 (1), s. 74 (4).

Representations by a farmer against a proposed dispossession order under s. 17 (1) of the Agriculture Act, 1947, in respect of land then the subject of a supervision order were heard by the husbandry sub-committee of a county agricultural executive committee under powers delegated by the Minister of Agriculture and Fisheries. The farmer subsequently received notice that the Minister proposed to make the order, and he appealed against the proposal to the agricultural land tribunal. At the hearing the plan submitted by the county land agent showed 151 acres of land as being the subject of the supervision order. The tribunal dismissed the appeal. The Minister made a dispossession order against the farmer in respect of the whole 155 acres in his farm. On a motion for certiorari to quash the decision of the tribunal and the dispossession order,

Held: (i) the husbandry sub-committee had jurisdiction to hear representations against the proposed dispossession order and the decision of the agricultural land tribunal on the appeal was therefore valid.

R. v. Minister of Agriculture and Fisheries, Ex p. Graham, supra, applied.

(ii) the dispossession order must be quashed since it extended in part to land not included in the report of the agricultural land tribunal and in making the order the Minister was not, therefore, acting in accordance with the report as required by s. 74 (4) of the Agriculture Act, 1947.

A Decision of the DIVISIONAL COURT ([1955] 1 All E.R. 123) reversed in part and affirmed in part.

[As to Supervision Orders and Dispossession on Grounds of Bad Husbandry, see 1 HALSBURY'S LAWS (3rd Edn.) 341, 346, paras. 718, 722.

For the Agriculture Act, 1947, s. 12 (1), s. 17 (1), s. 74 (4) and s. 104 (4) (5), see 1 HALSBURY'S STATUTES (2nd Edn.) 166, 177, 190, and 216, 217.]

B Cases referred to:

(1) *Davey v. Shawcroft*, [1948] 1 All E.R. 827; 112 J.P. 266; 2nd Digest Supp.

(2) *Ex p. How*, [1953] 2 All E.R. 1562; 3rd Digest Supp.

(3) *Woollett v. Minister of Agriculture and Fisheries*, [1954] 3 All E.R. 529.

C Appeals.

The Minister of Agriculture and Fisheries and the Agricultural Land Tribunal (South Western Province) appealed against orders of the Queen's Bench Division dated Dec. 16, 1954, and in the second case, reported [1955] 1 All E.R. 123, ordering the issue of orders of certiorari to quash (i) a supervision order made by the Minister against the first applicant on Jan. 22, 1954, under the Agriculture Act, 1947, s. 12 (1) and (ii) the dismissal of an appeal by the second applicant against the decision of the agricultural land tribunal dated Mar. 4, 1954, to make a dispossession order against him and a dispossession order dated Apr. 30, 1954, made by the Minister under s. 17 (1) of the Act, dispossessing him of his farm. The first applicant contended that the supervision order was invalid on the ground that his representations in respect of the proposal to make it had not been validly heard as required by s. 104 (4) of the Agriculture Act, 1947, because the sub-committee of the county agricultural executive committee which had heard them (i) was prohibited from receiving them by s. 104 (5), (ii) could not have the power of receiving them delegated to it by the Minister, (iii) was not a "person appointed" to hear them within s. 104 (4) of the Act, and had not properly heard them because a member had previously inspected the applicant's farm and because the county land agent, who was prohibited from receiving the representations, had sat with the sub-committee during the hearing. The second applicant contended, inter alia, (i) that the husbandry sub-committee of the county agricultural executive committee which heard his representations before his appeal had no jurisdiction to do so and (ii) that the agricultural land tribunal which had dismissed his appeal had been concerned with only 151 acres of his land, whereas the dispossession order was in respect of 155 acres. The Divisional Court held that the husbandry sub-committees could not be appointed to hear the representations of the applicants and quashed the supervision order in the first case and the decision of the agricultural land tribunal and the dispossession order in the second case. The Minister in the first case and the agricultural land tribunal in the second case appealed.

H *The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), the Solicitor-General (Sir Harry Hylton-Foster, Q.C.), and B. S. Wingate-Saul* for the Minister of Agriculture and Fisheries and the agricultural land tribunal.

K. Diplock, Q.C., and J. R. Cumming-Bruce for the first applicant.

A. P. Marshall, Q.C., G. C. Dare and J. J. Thorpe for the second applicant.

I *Cur. adv. vult.*

Mar. 17. The following judgments were read.

DENNING, L.J.: Mr. Graham, the first applicant, is a farmer in the county of Durham. On Jan. 22, 1954, the Minister of Agriculture and Fisheries made a supervision order against him. He now comes to the Queen's courts asking that this order may be quashed. In order to understand his complaint, it is necessary to know the grades in the agricultural hierarchy. At the top there is the Minister of Agriculture and Fisheries himself, who is given by the statute power to make

supervision orders against farmers. The Minister, however, is authorised by the statute to delegate his power to the county agricultural executive committees, and he has done so. The county committee is in turn authorised by the statute to delegate the power to a sub-committee, and it has done so. It has delegated it to the husbandry sub-committee, and it has appointed that sub-committee to be a person to hear any representations that the farmer may wish to make. Notwithstanding this extensive delegation, the Minister has reserved to himself the power to make a supervision order. So has the county committee. A B

These committees are all composed of local people, who give their services for nothing. The county committee has twelve members, all appointed by the Minister, but seven are specially nominated to represent various interests. Three represent farmers, two represent owners and two represent workers. The sub-committees are composed of members of the county committee, but the county committee can add outside people to them. These committees have their secretaries and clerks who are all civil servants. They are paid officers and servants of the Ministry of Agriculture, who are specially attached to the committees for the purpose of helping them with their work, but they do other work for the Ministry as well. The one who was particularly concerned with the first applicant's case was Mr. Stroh, who is the land agent of the Durham County Agricultural Executive Committee. C D

The steps leading up to the supervision order were these. On Nov. 26, 1953, two members of the husbandry sub-committee inspected the first applicant's farm. They were accompanied by Mr. Stroh, the county land agent. On Dec. 4, 1953, Mr. Stroh, on behalf of the county committee, gave a notice to the first applicant, which said that the Minister had under consideration a proposal to place him under supervision, and informed him that, if he wished to be heard, an opportunity would be afforded to him. When the first applicant got the notice, he instructed an estate agent, Mr. Twizell, to act for him. Mr. Twizell wrote to the county committee saying that it was his intention to make representations against the proposal. On Dec. 14, 1953, the county land agent wrote to Mr. Twizell saying that the matter "will be considered by the husbandry sub-committee" at its meeting on Jan. 7, 1954. E F

On Jan. 7, 1954, the husbandry sub-committee met to hear the case. There were seven members of the sub-committee present, and the county land agent, Mr. Stroh, sat with them. He sat on the left of the chairman. Four of the members were also members of the county committee, but three were not. These three were outside persons, who had been added to the sub-committee by the county committee. Only one of the members present had inspected the farm. The other was absent. Mr. Stroh, the county land agent, of course, had inspected it. G

At the outset Mr. Twizell on behalf of the first applicant submitted that the husbandry sub-committee was not a proper person to receive the farmer's representations, and in support of his submission he read out s. 104 (5) of the Agriculture Act, 1947. Mr. Stroh, the county land agent, thereupon said that the husbandry sub-committee was a proper person and read out s. 71 (3) of the Act, which enables the county committee to delegate its functions to a sub-committee, and s. 71 (5). Mr. Stroh also expressed his opinion as to the meaning of s. 104 (5). After considering the point, the chairman ruled that the sub-committee was authorised to receive the representations. H I

After that ruling had been given, Mr. Twizell called the first applicant and an accountant to give evidence and made a submission on the merits of the case. They then withdrew. Throughout the hearing Mr. Stroh had continued sitting next to the chairman, and he remained when the first applicant and his representative withdrew. He remained with the sub-committee during its deliberations, so as to be able to record its decision, but he did not take part in these deliberations.

A The sub-committee, however, was unable to reach a decision itself. It simply referred it to the county committee. We do not know the reason. It may be that it was divided in opinion or felt the case was too much on the border-line. At any rate it simply resolved that the decision (whether a supervision order should be made or not) should be referred to the county committee.

B A fortnight later, on Jan. 21, 1954, the county committee met and it received and considered the report of the husbandry sub-committee. Mr. Stroh was not present on this occasion. After considering the report, the county committee resolved that the first applicant should be placed under supervision as regards his farming of the farm. On Jan. 22, 1954, the county committee gave notice to the first applicant that the Minister placed him under supervision.

C Let me explain for a moment what a supervision order is, and the grounds on which it is made. It is, I think, in essence a disciplinary measure rather than a judicial sentence. The statute says that if a farmer is not fulfilling his responsibilities to farm the land in accordance with the rules of good husbandry, then the Minister or his delegate can make a supervision order against him. The object of the order is, not to turn the farmer out, but to get him to farm his land properly; and, to do this, it puts him under supervision. The effect of it is that the officials of the Ministry can enter the land at all reasonable times to see how it is being farmed, and directions can be given to the farmer requiring him to do whatever is necessary to good husbandry. If he gets it into good shape, all well and good; but if he does not, he is subject to discipline. If he does not comply with the directions, he can be taken before the magistrates, who may fine him up to £100. If the farming does not show satisfactory improvement whilst the supervision order is in force, he is liable to be turned out. If it gets to the point of dispossession, the farmer has a right of appeal to the agricultural land tribunal, but he has no appeal from a supervision order. The reason, I suppose, is that a supervision order is not regarded by Parliament as being in itself a serious matter. The only right given to the farmer is that he must be given an opportunity to be heard before the order is made against him and before any directions are given. We are concerned here with this safeguard.

F The important question in this case is whether the husbandry sub-committees are proper persons to hear the farmer's representations at all. They have heard them for the last six years all over the country, but the Divisional Court has held that they must not hear them at all. There are five points put forward in favour of this view. The first point is this. The Divisional Court held that the sub-committee was prohibited by s. 104 (5) of the Act, which says that:

G "No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed . . . to receive representations relating to land in the area of the committee."

H The Divisional Court said that this sub-section was to be read as if it said that no sub-committee or district committee should be appointed to receive representations. I cannot agree. I think the sub-section should be read as if the word "of" were inserted before "any". The sub-section means that "No officer or servant of a county agricultural executive committee, or (of) any sub-committee or district committee thereof, shall be appointed to receive representations."

I My reasons are as follows. (i) It is quite common to leave out the word "of" in such a sentence. PARKER, L.J., gave a homely illustration in the course of the argument: "No eggs of hens or ducks shall be eaten for breakfast". I gave another, not so homely, but nearer to this case: "No officer or servant of a holding company, or any subsidiary company thereof, shall be eligible for a pension". The meaning of those sentences is quite plain. It is the same as if "of" were inserted. (ii) In order to get the meaning attributed by the Divisional Court, there would have to be a negative before the word "sub-committee". The sub-section would have to run thus: "No officer or servant

of a county agricultural committee *and no* (or *nor any*) sub-committee or district committee thereof, shall be appointed to receive representations". There is no such negative in this case. (iii) The view of the Divisional Court would lead to absurd results. It would mean that an officer or servant of a sub-committee could be appointed to hear representations but that an officer or servant of the county agricultural executive committee could not be appointed. There is no sense in such a difference. (iv) The corresponding section of the Agriculture (Scotland) Act, 1948, s. 80 (5), includes the word "of". It cannot be supposed that the legislature intended a difference in this respect on either side of the border. The more likely explanation is that the draftsman of the Scottish Act noticed the loose wording of the English Act and inserted the word "of" so as to give the sentence the nice precision which Scotsmen expect.

The second point on which the Divisional Court relied was that they thought that the Minister could not hear the representations himself, even if he wished to do so, but must appoint some other person for the purpose. It followed, therefore, that his delegate, the husbandry sub-committee, could not do so. I do not agree with the premise. I think that the Minister can hear the representations himself. It is important to notice that, throughout the Act, the representations are to be made "to the Minister". No matter whether they are made in writing or orally, they are representations "to the Minister". There is a very good reason for this. The Minister is the person who has to take action, and he has to consider the representations before he does so. It is specifically enacted that he is not to take action "until he has considered" the representations.

In these circumstances it cannot have been intended by Parliament that the Minister should not be at liberty to appoint himself to hear the representations. Looking at it from the Minister's point of view, it is obviously much more satisfactory for him to hear the representations at first-hand himself, rather than at second-hand through an intermediary, and, looked at from the farmer's point of view, it is plain beyond question that the Minister should be able to hear the representations himself.

The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself, unless the Act authorised him to appoint someone else. But the Act does authorise it. It authorises the Minister to appoint "a person" to hear them. This person may be someone else, but there is no reason why it should not be the Minister himself. After all, if someone else hears the representations, it is only a second best. It is no doubt authorised for the sake of convenience. The best thing is for the Minister to hear the representations himself, and he can only do this by appointing himself.

The third point is one taken by DEVLIN, J. He said that, before the hearing, the husbandry sub-committee had already inspected the land and made up its mind that a supervision order should be made. It was not right for it afterwards to be appointed to hear the farmer's representations. An independent person with a fresh mind should be appointed. I cannot agree with this reasoning because I do not think it is correct to say that, on the first inspection, the sub-committee had made up its mind. It no doubt formed a provisional view that it was a case where the first applicant should be put under supervision, but as fair minded people the members would not make up their minds until they heard what he had to say.

A simple illustration is an employer who thinks his servant is doing his work badly, but does not make up his mind to dismiss him or to put him on to other

A work until he has heard what the servant has to say. That seems to me to be the very sort of thing contemplated by s. 12 of this Act. If one inserts into the section the effect of delegation, it reads "when the husbandry sub-committee is satisfied that the occupier is not fulfilling his responsibilities to farm in accordance with the rules of good husbandry, the sub-committee, after affording to the occupier an opportunity of making representations to the sub-committee, may by order place the occupier under the Minister's supervision". So read, it seems to me to contemplate that the sub-committee may take a provisional view, but should not make up its mind until after affording the farmer an opportunity of being heard.

The fourth point is one taken by counsel for the second applicant. He said that the "person appointed" to hear representations must be a single person, or at least a number of specified persons, and not a fluctuating body like a sub-committee. I do not think this is correct. The Interpretation Act, 1889, s. 1 (1), shows that singular includes plural, and *Davey v. Shawcroft* (1) shows that the word "person" may include a sub-committee. The contrary view would lead to extraordinary results. It is quite plain that the husbandry sub-committee has by valid delegation been authorised to *consider* the representations and take action. It would be very strange if it could not also *hear* the representations. In order to consider the representations, it must have the representations before it, and there can be nothing better than for it to hear them itself.

The fifth point is one taken by junior counsel for the first applicant. He said that Mr. Stroh, the county land agent, was prohibited by the statute from receiving the representations. It was not right, therefore, for him to sit with the sub-committee to hear them, nor to write its report. I think that is putting the matter too high. The statute is designed to prevent the local officials from themselves hearing the representations as if they were inspectors appointed by the Ministry. But I see no reason why a local official should not attend the hearings of the husbandry sub-committee in the capacity of clerk to the sub-committee. He must act, however, solely as clerk and not as a member of the sub-committee. He must take no part in the decision of the case, because the decision must be the decision of the sub-committee alone, and not the decision of the clerk, nor of the sub-committee and the clerk. His position is very like that of a clerk to magistrates, whose position has recently been authoritatively stated by LORD GODDARD, C.J. (see Practice Direction [1953] 2 All E.R. 1306). He should sit at a different table and take a note of all that happens; but he should not attend at the deliberations of the sub-committee unless it asks him to do so, as, for instance, if the members wish to refresh their memories from his note of what was said. They can take his advice regarding practice and procedure, but not on the facts, because the decision on the facts is for the sub-committee alone. He can from his note draft the report of the representations which the farmer has made, but it must be approved as correct by the members of the sub-committee before any use is made of it, because it is they who are responsible for it and not the clerk. In the present case, Mr. Stroh seems to have fulfilled all these requirements except that he sat at the same table with the sub-committee, and he seems to have been present as a matter of course at the deliberations of the sub-committee. These were irregularities which will no doubt be remedied in future, but they do not invalidate the proceedings any more than similar conduct on the part of a clerk to the magistrates: see *Ex p. How* (2).

This disposes of all the points raised against the validity of the supervision order. It means that the practice hitherto adopted throughout the country is valid. The husbandry sub-committee is entitled to hear the representations, to consider them and to take action on them; and it is entitled to have the county land agent present in the capacity of clerk to the sub-committee.

There is one point, however, which was not raised before us but which I would mention. I notice that in the first applicant's case it was not the husbandry

sub-committee which took action. It referred the matter to the county committee, and it was the county committee which made the supervision order. The county committee could not fairly come to a decision against the first applicant without considering all the representations that he had to make. Indeed the statute forbade it. I ask myself, therefore: Did the county committee have all his representations before it? I should have thought its best course, when the matter was referred to it, would have been to hear the first applicant afresh itself. It could have given him notice of its meeting and invited him to make his representations direct to it. But it did not do this. It decided without hearing him or his representative. It had before it, however, a report of the husbandry sub-committee and no doubt at its meeting there were present members of the husbandry sub-committee who would put forward the first applicant's representations. In these circumstances I think we must assume that it considered all the farmer's representations; and if so, the order cannot be impugned. A B C

My conclusion is, therefore, that the supervision order was validly made against the first applicant and the appeal of the Crown must be allowed accordingly. I am glad to see, however, that the first applicant says that he has done much work and spent much money during the past year, and it is to be hoped that he has now attained such a standard of good husbandry that the order may be revoked. D

I now turn to the second applicant's case. The second applicant is the owner for life of Tucoyse Farm, Constantine, Cornwall. There is a farmhouse, a cottage and 155 acres of land. He is fifty-seven years of age now. He has farmed it himself for the last twenty-four years. His father before him farmed it for forty-eight years, and his grandfather for many years before that. The farmhouse is seventy-two years old and was built for his father on his marriage. The farm is the second applicant's sole means of livelihood and he has no other place to live. Yet a dispossession order has been made against him, turning him out of the land of which he is the owner, and out of the house where he has lived all his life, with no provision made for alternative accommodation or other work. His only offence, if it is an offence, is that he has not maintained a reasonable standard of production on the holding. E F

It may be said that those facts are not relevant to the cold points of law which have been brought before us, and in a sense this is true. All I say is that, if an English farmer is to be turned out of his farm, which he and his family have worked for generations, it should not be done except with the full authority of Parliament and in strict accordance with all the safeguards and provisions laid down by Parliament. G

The story of events is this. On Dec. 31, 1951, the Cornwall County Agricultural Executive Committee made a supervision order against the second applicant. It was registered as a land charge, together with a plan showing 151 acres as subject to the charge. Four acres were by oversight omitted. During the year 1952, detailed directions were served on the applicant, and he substantially complied with them. At the end of the first twelve months the committee held a review of the farming as required by the statute, and in consequence the supervision order was continued for another six months until June 30, 1953. No directions were served during that time. At the end of this six months another review was held. In consequence, on Sept. 15, 1953, the county land agent, Mr. Griffiths-Jones, wrote to the second applicant informing him that it had been decided to proceed with a proposal to terminate his interest in the holding and telling him that he had a right to make representations to the husbandry sub-committee. H I

The second applicant thereupon employed an estate agent, Mr. Thomas, who said he wished to be heard. On Oct. 8, 1953, the husbandry sub-committee held a hearing. The second applicant and Mr. Thomas attended. We have no information as to what happened, but it must have been unfavourable for the

A second applicant, because on Dec. 30, 1953, the county land agent wrote to the second applicant, giving him notice that the Minister proposed to make an order terminating his occupation of the farm on the ground of bad husbandry, and requiring him to let it to a tenant approved by the Minister.

There was enclosed in this letter a statement of the general grounds for the proposal, which I will read because it sets out the case against him.

B “Statement of general grounds for proposal. At the time the supervision order was made production from this farm was not considered satisfactory. Owing to the poor condition of the grassland the yield of milk from eighteen milking cows was low and the total of forty-seven cattle was considered altogether inadequate. Seasonal work was inclined to be backward, spring crops were planted late and yields were low. During the first year of supervision detailed directions were served. These were mostly complied with although the occupier was late with the work in some instances and not thorough in others.

C “At the time of the annual review it was considered that there had been an improvement in the condition of some of the pastures on the north part of the farm through better grazing by the stock available, but the management of the remainder showed no improvement. The supervision order was continued for a further six months and no directions were served. At the review it was found that the number of cattle on the holding had increased to sixty-one (including fifteen calves) of which twenty were milking cows. The cattle, however, were in poor condition for the time of the year and were grazing on rather bare inferior pastures whilst aftermaths in several fields remained ungrazed. Milk yields were still very low for a holding which is being run principally as a dairy holding. Corn crops were light.

E “The Minister is satisfied that as a result of the period of supervision there has been little or no improvement in the management of the farm and that the occupier has not shown that he is able or willing to maintain a reasonable standard of production on the holding.”

F When the second applicant received this notice, his agent promptly said that he wished to appeal. The matter went then to the agricultural land tribunal for the South Western Province. The county land agent, in accordance with the rules of procedure, furnished a plan of the land concerned. It showed the self-same 151 acres which were subject to the supervision order and it omitted the four acres.

G The tribunal heard the case on Mar. 3, 1954. The second applicant was represented by a solicitor and the Minister by a barrister from the legal department of the Ministry. The second applicant's case, to use his own words, was that

H “Tucoyse Farm is not primarily a dairy farm. It is largely hill land and it is mainly a sheep rearing farm . . . None of the land is valuable land and I am wholly unable to see why the Minister seeks to deprive me of my living which I have made satisfactorily since 1931 out of this relatively poor farm. I have no other source of living.”

I In addition the second applicant and his solicitor pointed out that the plan was wrong because it omitted the four acres, but the chairman said that the tribunal was only concerned with the land shown on the plan, i.e., the 151 acres, without the four acres.

On the next day, Mar. 4, 1954, the tribunal dismissed the second applicant's appeal. This meant that it confirmed the Minister's proposal to dispossess the second applicant, and the Minister was bound by statute to act in accordance with their report. On Apr. 30, 1954, the Minister made an order that the land comprised in the agricultural unit should be given up by the second applicant

as from Sept. 29, 1954, and that the second applicant should as from that date let it to a tenant approved by the Minister. In the schedule to the order, however, the land was set out and it comprised, not merely the 151 acres, but the whole 155.321 acres. A

I pause here to say that the second applicant had no right of appeal from the decision of the tribunal to anyone. He had no right of recourse to the Queen's courts on the merits of the case. He was bound to leave his home and his land unless he could find some technicality on which to upset the proceedings. That is why the Queen's courts have of late been asked to consider the technicalities of these cases. B

On Aug. 9, 1954, the second applicant, through his advisers, applied to the High Court to quash the proceedings and gave four main grounds:

(i) That the husbandry sub-committee had no jurisdiction to hear the representations which the second applicant made in opposition to the proposal to dispossess him. This is the same point as that which was raised in the first applicant's case, and it fails for the reasons there given. The husbandry sub-committee has jurisdiction to hear and determine a proposal for dispossession just as it has a proposal for supervision. C

(ii) That the agricultural land tribunal was not properly constituted. This was abandoned because the point has now been decided in *Woollett v. Minister of Agriculture and Fisheries* (3). D

(iii) That a document containing a record of milk sold by the second applicant was not properly admitted in evidence by the tribunal. This was not pursued before us because the tribunal was entitled to admit it under its rules of procedure.

(iv) That the tribunal was concerned with only 151 acres, whereas the order of the Minister was made in respect of 155 acres, and that the Minister could not, without the second applicant's consent, increase the area in this way. I think this last contention is right. The precise area under consideration may often be of much importance. Suppose that the Minister proposes to take a lot of poor land and misses out a small area of good land which is well farmed. The omission might just turn the scale against the farmer, which would be most unjust. Suppose next that the tribunal approves a proposal to dispossess him of poor land, but leaves him with good land. It would be very wrong if the Minister could afterwards extend the order so as to include the good land. The statute says that the Minister must act in accordance with the report of the tribunal (s. 74 (4)). He is not therefore at liberty to go beyond it. E F

In this case the point is a very technical one, because the extra four acres was made up of narrow strips on the edge of the farm and could hardly affect the decision of the tribunal, but, technical though it is, I think the second applicant is entitled to take advantage of it. The dispossession order must be quashed. G

The Attorney-General suggested that, if the present order is quashed, the Minister could make a new order for the 151 acres the very next day and would, indeed, be bound to make it. I make no comment on this suggestion except to say that it is now more than a year since the tribunal made its report and during that year the second applicant may have improved the production of the farm so much that it would be unfair to turn him out. If he has done so, I should be surprised if the Minister was under an overriding compulsion to make a new dispossession order. I should have thought that, after this lapse of time, it was open to the Minister to reconsider the matter. H

My conclusion, therefore, is that, in the second applicant's case, the proceedings of the husbandry sub-committee and of the tribunal were valid but that the dispossession order made by the Minister was invalid. The appeal of the Crown, therefore, must be allowed in part and dismissed in part so as to give effect to this conclusion. I

PARKER, L.J.: Three main points fall to be considered in these appeals: (i) whether s. 104 (5) of the Agriculture Act, 1947, on its true construction, debars

- A a sub-committee of a county agricultural executive committee from being appointed to hear representations relating to land in the area of that committee; (ii) whether, apart from this provision, the person appointed to hear representations must be someone other than a person to whom the functions of the Minister have been delegated, or, as DEVLIN, J., put it, someone other than the alter ego of the Minister; (iii) whether in any event the appointment of a husbandry sub-committee as such is a good appointment of a person to hear representations.
- B Turning to the first point, s. 104 (5) reads as follows:

“No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing sub-section to receive representations relating to land in the area of the committee.”

- C In my opinion, it is impossible as a matter of English to read this as meaning that no sub-committee or district committee should be appointed to receive representations. The use of the word “any” prevents the negative “no” at the beginning of the sentence being carried through. In order to have this meaning a further negative would be necessary, e.g., “and no sub-committee” or “nor any sub-committee . . .” No doubt the matter could have been put beyond doubt by the insertion of the word “of” before “any”, but even without it the meaning is, I think, clear.
- D Further, any other view would lead to the absurdity that an officer or servant of a sub-committee or district committee could hear representations, whereas an officer or servant of the county agricultural executive committee could not; and also that, whereas a sub-committee or district committee could not, the county agricultural executive committee could, hear representations.

- E It is to be observed that, by para. 22 (2) of Sch. 9:

“The Minister shall attach to county agricultural executive committees and sub-committees thereof and to district committees and agricultural land tribunals such officers and servants of the Ministry as he may with the approval of the Treasury determine to be required for providing the committees and tribunals with the necessary officers and servants.”

- F The plain object, as it seems to me, of s. 104 (5) is to provide that no paid officers and servants attached to the county agricultural executive committee and to its sub-committees, and to district committees, shall receive representations relating to land in the area of that committee.

- G We were also referred to s. 80 of the corresponding Act for Scotland, the Agriculture (Scotland) Act, 1948, where by sub-s. (5) it is provided that:

“No officer or servant of an agricultural executive committee or of any sub-committee thereof shall be appointed . . . to receive representations . . .”

- H For myself, I very much doubt whether it is permissible to construe an English Act by reference to different wording in a Scottish Act. This assistance can be gained, however, namely, that Parliament, in relation to para. 9 of Sch. 8 to the Scottish Act, which, except in regard to district committees which do not exist in Scotland, is the same as para. 22 (2) of Sch. 9 to the English Act, recognised that officers and servants could be attached to sub-committees as well as to executive committees.

- I In order to decide the second point it is, I think, vital to consider the scheme of the Act. In something like fifteen different cases it is provided that, before the Minister takes action, the person concerned, be he owner or occupier or landlord or tenant, is to have

“an opportunity of making representations to the Minister, whether in writing or on being heard by a person appointed by the Minister.”

Section 104 (1) then provides that, wherever in the Act that formula is used, it shall be construed as a provision that the Minister shall comply with the

requirements set out in the other sub-sections to that section. Sub-section (4) A provides, so far as is material, as follows:

"If, whether or not representations are made to the Minister in writing, the said person within the prescribed time and in the prescribed manner requires that an opportunity be afforded to him of being heard by a person appointed by the Minister for the purpose, such an opportunity shall be B afforded to him . . . and the Minister shall not take the action in question until he has considered any representations made at the hearing."

Sub-section (5), to which I have already referred, debars certain persons being appointed to "receive" representations, and by sub-s. (6) the person concerned is entitled to choose a person "to represent his views to the Minister". All C these provisions, be it observed, are equally applicable whether the action proposed is one initiated by the Minister, e.g., supervision orders (s. 12) or dispossession orders (s. 17), or by someone else, e.g., applications by landlord or tenant (s. 19).

It seems to me perfectly clear, from the wording of these provisions, that the representations, whether oral or in writing, are representations to the Minister. D Reference to s. 74 (2) and (5) emphasises this if emphasis be needed. In other words, the scheme of the Act, before delegation takes place, is that the person who is proposing action, the Minister, is the very person to whom representations can be made. In this respect the scheme differs from what is often found in current legislation, where, before action, a Minister has to appoint some person to hear objections or to conduct an inquiry, and to report to him. In such a case it is provided that, before taking final action, the Minister shall consider that E report. Section 84 of the Act in question affords an illustration of that type. Under the scheme now under consideration, however, there is no inquiry or hearing in the ordinary sense of the word, nor is any report interposed between the proposal of action and final action. The Minister who is considering taking action and who, therefore, has already gone into the matter, and feels that a prima facie case for action is made out, is not to decide on final action until he F has considered any representations made to him.

Viewed in this light, it becomes clear that the appointment of a person to hear the representations is for the protection of the Minister and not for the benefit of the objector. The latter would no doubt prefer that the Minister proposing to G take action should hear the representations at first hand. The Minister on the other hand desires protection against demands that he shall personally hear all representations. In these circumstances I can see nothing wrong in the Minister, if he so chooses, appointing himself to hear the representations, or, what comes to the same thing, waiving the provision inserted for his protection and hearing the representations himself.

So far I have been considering the matter apart from delegation which derives H its authority from s. 72 and s. 73. It is unnecessary to refer to these sections in detail. By the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948 No. 187) the Minister, while reserving power in himself to act if he chooses, delegated to the executive committees, so far as is material to these two appeals, all his functions in regard to supervision orders and also in regard to dispossession orders other than the making of the dispossession order itself. He also delegated the power to appoint persons to I hear representations. By resolution both executive committees concerned, while in turn reserving rights in themselves to act should they choose to do so, with the approval of the Minister, delegated certain functions to their husbandry sub-committee. These again included the functions in regard to supervision orders and dispossession orders in so far as such functions had been delegated to the executive committees, and they went on to appoint the husbandry sub-committees to hear representations.

- A In the ordinary way, therefore, a sub-committee would perform all the functions itself, except the making of the final dispossession order, which would be done by the Minister. In such a case it would not only consider any representations but actually hear them. It would consider them as delegate of the Minister, and hear them either as an appointed person or by waiving the protection afforded to the Minister, which had become quite unnecessary in its case.
- B The third main point only arises in a case where, as in the first applicant's case, the husbandry sub-committee, after hearing the representations, refers the consideration thereof and action, if any, to the executive committee. In such a case it can only hear and pass on the representations as an appointed person. In these circumstances, it is urged that, even if the sub-committee is not prohibited by s. 104 (5) from receiving the representations, yet it is not a "person" who can be appointed in the context in which that word is used. There is much to be said for this contention, bearing in mind that in such a case the "person" is in general a mere rapporteur, and that it is imperative that the representation should reach the other person who is going to take action in an accurate form. Even so, there is nothing impossible in two or more persons performing that task, and, even if a clerk assists and takes the representation down in a written report, the responsibility for its accuracy remains theirs. Accordingly I see nothing in the context which compels me to depart from the general principle that the singular includes the plural. (See s. 1 (1) of the Interpretation Act, 1889.)
- D Finally, it is said that, if two or more persons are to be appointed, they must be appointed by name and that it is not a good appointment merely to appoint a sub-committee as such, a body which fixes its own quorum and all the members of which, as in the first applicant's case, may not attend. Speaking for myself, this argument should not, I think, succeed. Assuming the sub-committee to consist of eight persons, and that five constitutes a quorum, I can see no reason why the appointment should not take the form of any five of eight named persons forming the sub-committee, and, that being so, why the sub-committee should not be appointed as such. It would be an odd result if the delegation to a sub-committee as such of the Minister's powers to take action were valid, and yet that its appointment to hear representations was invalid.

- E So far I have been dealing with points common to both appeals, and I will now deal with certain further points peculiar to the individual cases. In the second applicant's case the supervision order was made on Dec. 31, 1951. It was made in respect of the agricultural unit, known as Tucoyse. Pursuant to s. 12 (6) of the Agriculture Act, 1947, it was registered as a land charge and, ignoring decimal points, the unit was, so we are told, described as 151 acres. When the matter ultimately came before the agricultural land tribunal, a map and schedule were duly delivered, pursuant to S.I. 1948 No. 186*, which again showed the unit as 151 acres. On Mar. 4, 1954, the agricultural land tribunal dismissed the appeal in respect of that unit, and it thereupon became the Minister's duty, pursuant to s. 74 (4), to make a dispossession order in respect of that unit of 151 acres. On Apr. 30, 1954, he duly made a dispossession order, but in respect of 155 acres.
- G What had happened was this. At the hearing before the agricultural land tribunal, the second applicant or his representative pointed out that certain small parcels of land on the boundaries, amounting in all to 3.8 acres, had been omitted from the plan and schedule, and the agricultural land tribunal quite rightly, I think, ruled that it could only deal with a proposed dispossession order of the land included in the plan and schedule, which alone had been the subject of the supervision order.
- H

* I.e., the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948, as amended by the Agriculture (Procedure of Agricultural Land Tribunals) (No. 2) Order, 1948, S.I. 1948 No. 2751; these orders have since been replaced by the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954, S.I. 1954 No. 1138.

In these circumstances the Minister, no doubt thinking that he was relieving the second applicant of a burden, made the order in respect of 155 acres. However that may be, it is clear that he had no jurisdiction to do so. He was required to act in accordance with the tribunal's report "and not otherwise". I do not think that this court can quash that order merely in so far as it relates to the 3.8 acres: it must quash the whole order. A

Accordingly, on this limited ground I think an order of certiorari should go to quash the dispossession order. The decision of the agricultural land tribunal stands and the appeal should, I think, be allowed in so far as the Divisional Court quashed that decision. B

The first applicant's case was the case of a supervision order. What happened was this. On Nov. 26, 1953, the first applicant's farm was inspected by two members of the husbandry sub-committee, accompanied by Mr. Stroh, the land agent of the executive committee. On Jan. 7, 1954, the husbandry sub-committee, consisting of seven out of its eight members, met to hear the report of the inspection and the representations of the first applicant, and to decide thereafter whether a supervision order should be made. Mr. Stroh attended the meeting and he sat on the left hand of the chairman. C

When the representations were heard, Mr. Twizell, an estate agent appearing for the first applicant, took the point that, by reason of s. 104 (5) the sub-committee could not hear the representations, and Mr. Stroh apparently referred to the relevant statutory provisions and took part in the discussion. Ultimately the chairman ruled that the sub-committee had jurisdiction. After considering the representations, however, the sub-committee for some reason or other resolved that the decision whether a supervision order should be made should be referred to the executive committee. This was done and that committee, after considering a report of the sub-committee, made a supervision order. D

In these circumstances two further points are taken. (i) It is contended that Mr. Stroh, being an officer of the executive committee and therefore a person who could not be appointed to receive representations, in fact sat to hear them, took part in the debate and refuted a representation of law which was put forward. It is, however, important to bear in mind that the Act does not say that the person hearing the representation is to have no assistance, whether in the form of a clerk, shorthand writer or otherwise, or that the hearing is to be in camera. Every person present will in fact hear the representations, but it does not follow that such a person is receiving the representations from the point of view of being responsible for their consideration, or for passing them on to the person who is to consider them. E F G

The evidence is that Mr. Stroh was present to record any decision ultimately arrived at and that he did not take part in any way in the deliberations or decision of the sub-committee. Any part he took during the hearing of the representations was taken at the request of the sub-committee, which alone was receiving the representations. No doubt it is only right that care should be taken that those putting forward the representations are not misled into thinking that the officer present is receiving the representations in the sense indicated, but I am quite satisfied that Mr. Twizell, despite his somewhat cryptic affidavit, fully understood the position. He knew who Mr. Stroh was, he knew who the members of the sub-committee were, and he knew that the latter were the persons receiving the representations. In my view this contention fails. H

(ii) It was also urged that, if Mr. Stroh was not present to receive the representations, then he must have been present to pass on the representations to the executive committee, and that this is at any rate impliedly contrary to s. 104 (5). I am far from satisfied that this point is open to the first applicant, and there is no evidence whether Mr. Stroh in fact made out a written report, or whether the report was even in writing. He certainly was not present at the meeting of the executive committee, and it may well be that the members of the husbandry I

A sub-committee who heard the representations attended that meeting. But, even if the point is open, and he did prepare the report, it is not his report; it is the report of the sub-committee who must take full responsibility for it. To say that it will not accurately state the representations made is to assume that the members of the sub-committee are heedless as to their responsibilities, an assumption for which there is no warrant. I would allow the appeal in the first applicant's case.

UPJOHN, J.: I agree with the orders proposed in both these cases and with the reasons given by my Lords, but as we are differing from the Divisional Court, I desire, out of respect for them, to state very briefly my reasons in my own language. I agree that, in s. 104 (5) of the Agriculture Act, 1947, the word "of" must be inserted before the word "any". I come to this conclusion on the short ground that para. 22 (2) of Sch. 9 makes it plain that sub-committees and district committees may have servants as well as county committees; that construction is necessary to avoid manifest absurdity.

On the true construction of the relevant sections empowering the Minister or his duly appointed delegates to appoint a person to hear representations, I see no ground for supposing that an independent person other than the Minister must be appointed. Outside the statutory prohibition in s. 104, the Minister can, in my view, appoint anyone, including himself. However, I prefer the view that, if a person has a statutory right to make representations to a Minister, that necessarily implies that the Minister can hear those representations. He is the best person to hear them, for he has to consider them and make the decision, and, in my judgment, it is only if he desires to relieve himself of the burden of hearing the representations that he may appoint a person to do so. I see no reason for the Minister (or delegated body) to go through the formality of appointing himself to hear the representations.

The point that has occasioned me the greatest difficulty in this case is whether, when a person is appointed to hear representations for the Minister to consider, that person may be a committee. A person appointed to hear representations is in general no more than a mere recording instrument, but it may be that the Minister or delegated body who has to consider the representations will want to hear his views as to the truth or sincerity of the representations, and in such a case the person must be entitled to give the Minister or delegated body the benefit of his views.

This may easily give rise to practical difficulties if a committee is so appointed. For example, if a committee of five is hearing representations it is doing so as a person, and the Minister or delegated body which has to consider those representations may, so it seems to me, want to hear the views of the committee; and if so he cannot merely consider a majority view. A manifest injustice would be done if a majority of three reported in one sense, leaving the views of their two colleagues, who might have taken a much more favourable view of the representations, unexpressed. Thus, in the absence of complete unanimity, in my judgment all persons who heard the representations must attend the Minister or delegated body who has to consider them, if an expression of their views is required.

By s. 19 of the Interpretation Act, 1889, "person" includes a body of persons (such, e.g., as a committee) unless a contrary intention appears. The question that has exercised my mind is whether the difficulty of operation where a committee is appointed to hear representations is an indication of a sufficient contrary intention within the meaning of that section. On the whole I think not.

Finally, it is essential that the clerk to the committee hearing representations should take no part in the hearing except to record the representations or to give advice in response to the request of the chairman and members of the committee, and it is desirable that, by his position in the room, he be seen to

be only the clerk, though for my part I am not satisfied that the first applicant or his advisers were misled as to the capacity in which Mr. Stroh was present when the husbandry sub-committee heard the first applicant's representations. In my judgment, the clerk will normally be required to retire with the committee if it is merely a committee to hear and not acting as a delegated body to hear, consider and determine. In such a case the clerk's functions are very different from those of a clerk to the magistrates. Magistrates retire and consider their verdict and return to court to announce it, but a hearing committee is appointed to hear and not to decide. Not only must the committee report the representations fully: there may be two or more views as to the effect of those representations, and they may have to be expressed. If the report is going to be in writing, the clerk is the one to draft it. These busy unpaid gentlemen cannot be expected to undertake that work, though it is their duty to give instructions as to the lines on which the report is to be drafted and then to peruse and alter the draft so that it is their report and not that of the clerk.

These difficulties that I have pointed out arise in practice when a husbandry committee, which normally has delegated to it power to consider and decide, as well as to hear representations, feels that the matter is too difficult for it and refers it back to the county agricultural executive committee. All difficulty is overcome if, in such cases, the county agricultural executive committee re-hears the representations.

No point was taken by the first applicant, assuming, contrary to his contention, that the husbandry sub-committee was a properly constituted person to hear representations, that they failed in their duty of reporting the representations to the county committee. It follows that, in my judgment, the first applicant's case was wrongly decided and the Crown's appeal must be allowed.

In the second applicant's case the Minister's order must be quashed only on the narrow ground that it was a breach of s. 74 (4) of the Act, for the Minister included in his order four acres not included in the report of the agricultural land tribunal. In my judgment the proceedings in that case were otherwise entirely regular.

Appeal in the case of the first applicant allowed; in the case of the second applicant dismissed in part and allowed in part: Leave to appeal to the House of Lords granted to both applicants.

Solicitors: *Solicitor for the Minister of Agriculture and Fisheries* (for the Minister of Agriculture and Fisheries and the agricultural land tribunal); *Gregory, Rowcliffe & Co.*, agents for *Clayhills, Lucas & Co.*, Darlington (for the first applicant); *Lucien Fior*, agent for *Thrall, Llewellyn & Spooner*, Truro (for the second applicant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

COLLINS v. JONES.

[COURT OF APPEAL (Denning and Parker, L.J.J.), March 14, 1955.]

Practice—Particulars—Libel action—Letters alleged to be defamatory—Plaintiff ignorant of contents—Whether particulars to be delivered.

A children's officer of a local authority brought an action for libel against a medical practitioner, who she alleged had libelled her in two letters sent to the authority's medical officer of health. The plaintiff's statement of claim purported to set out the actual words of the libel. Her sole knowledge of the letters was derived from a statement made by the defendant at an inquiry by a sub-committee of the authority when he said that "two letters passed" between him and the medical officer of health. The defendant applied for particulars, including particulars of the date, time and place of publication of the letters and of the precise words alleged to have been set out in each of the letters.

Held: a plaintiff in a libel action not only must set out with reasonable certainty in his pleading the words complained of, but also must be prepared to give such particulars as ensure that he has a proper case to put before the court, and is not merely fishing for one; accordingly the defendant was entitled to the particulars for which he asked.

Harris v. Warre (1879) (4 C.P.D. 125) applied.

Appeal allowed.

[For Particulars of a Statement of Claim in an Action for Defamation, see 25 HALSBURY'S LAWS (2nd Edn.) 278, 279, para. 467n.; for cases on the subject, see 32 DIGEST 68, 69, 187, 964-978, 2298; and for forms of application for particulars, see 10 ENCY. COURT FORMS 533 et seq.]

Cases referred to:

(1) *Harris v. Warre*, (1879), 4 C.P.D. 125; 48 L.J.Q.B. 310; 40 L.T. 429; 43 J.P. 544; 32 Digest 69, 971.

(2) *Guest v. Iraq Petroleum Co., Ltd.*, (May 7, 1954), unreported.

(3) *Saunders v. Bate*, (1856), 1 H. & N. 402; 156 E.R. 1259; Digest (Pleading) 109, 948.

Appeal.

The plaintiff, who was the children's officer employed by the Swansea County Borough Council, brought an action for damages for slander and for libel against the defendant, Dr. Gwent Jones, who was a medical practitioner practising at Swansea. The plaintiff alleged that the defendant wrote to the chairman of the council's children's committee a letter which was a libel on her as it imputed that her treatment of the matrons of a children's home and a nursery within the council's area had injured their health. As result of that letter an inquiry was held before a sub-committee at which the defendant mentioned that he had written two letters to the medical officer of health before he wrote to the chairman. The plaintiff's statement of claim contained a paragraph (para. 7) alleging that in these letters the defendant wrote the words that are quoted in the judgment in the present case. The defendant applied for particulars under para. 7 specifying the date, time and place of publication of each letter, and specifying which of the words complained of were alleged to have been published or contained in each of the said letters and setting out the precise words complained of in each of the said letters. The application was refused by Mr. Registrar CHARLES on Dec. 7, 1954, and on Feb. 21, 1955, DONOVAN, J., dismissed an appeal from his decision. The defendant appealed.

H. V. Lloyd-Jones, Q.C., and *N. G. L. Richards* for the defendant.

Elwyn Jones, Q.C., and *E. P. Wallis-Jones* for the plaintiff.

DENNING, L.J., stated the facts and continued: We are concerned with an allegation in para. 7 of the statement of claim, in which the plaintiff says

that the defendant in September and October, 1952, before he wrote to the chairman of the committee, wrote two letters to Dr. Meyrick, the medical officer of health. The plaintiff says that in those letters the defendant wrote and published the following words, which the plaintiff sets out in inverted commas:

"The children's officer (meaning thereby the plaintiff) has persecuted the matron of the West Cross nursery and thereby retarded her recovery to health and systematically persecuted the master and matron of the cottage homes with the result that they left their employment and retired prematurely."

The defendant, through his legal advisers, asks for particulars of the letters. He wants the plaintiff to specify the date, time and place of publication, and how these words occur in them. The question is whether the defendant ought to have those particulars. The plaintiff has not seen those letters at all, and her advisers have not seen them. They do not know what they contain. They are guessing. They only got to know of the letters because at the inquiry the defendant let fall that he had written to the medical officer of health. He said at the inquiry:

"Before I wrote to the chairman I was torn between two things. I took counsel with some people who are familiar with the way these things work. I was torn between going to see the town clerk and to see Mrs. Cross [the chairman of the committee] but, before deciding, I went to see Dr. Meyrick, the medical officer of health. Two letters passed. He advised me to get into contact with the department. I sent this letter to Mrs. Cross and the vice-chairman."

It is because the defendant said to the committee that two letters passed between him and Dr. Meyrick that this allegation of libel is brought against him. The plaintiff has no more knowledge of what the letters contained than what the defendant himself told the committee. The question for our consideration is whether a plaintiff is to be permitted to bring a libel action on speculation, knowing so little of what is in the letters of which he complains.

In a libel action it is essential to know the very words on which the plaintiff founds his claim. As LORD COLERIDGE, C.J., said in *Harris v. Warre* (1) (4 C.P.D. at p. 128):

"In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them . . . In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends."

Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty: and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge. That is what was done in the recent case in this court of *Guest v. Iraq*

A *Petroleum Co., Ltd.* (2), decided on May 7, 1954, and I think we should make a similar order here.

If the plaintiff can give proper particulars, she can of course go on with the action: and she can prove her case by subpoenaing the holder of the letter to produce it, as was done in *Saunders v. Bate* (3), and the case referred to in *Harris v. Warre* (1) (4 C.P.D. at p. 127); but before she can do this, she must
B first be able to launch a case with sufficient certainty. She must give the required particulars.

In my judgment, therefore, the appeal should be allowed and an order made in the terms asked in para. (1) of the application.

C **PARKER, L.J.:** I agree, and despite the fact that we are differing from the learned judge, I do not think there is anything that I can usefully add.

Appeal allowed. Order for delivery of particulars. Leave to appeal to the House of Lords refused.

Solicitors: *Hempsons* (for the defendant); *Theodore Goddard & Co.*, agents for *D. W. Peter Williams & Co.*, Swansea (for the plaintiff).

D [Reported by F. A. AMES, Esq., Barrister-at-Law.]

WHITMORE AND ANOTHER v. LAMBERT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.), March 18, 21, 1955.]

E *Rent Restriction—Tenant—“Dying intestate”—Death of tenant in 1922—Widow sole executrix—No probate taken out—Death of widow—Right of occupation of member of the family—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (1) (g).*

Landlord and Tenant—Tenancy by estoppel—Transmission of statutory tenancy on death of tenant—Vesting of legal estate in President of Probate, Divorce and Admiralty Division—Member of family residing with tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (1) (g).

F *Will—Evidence—Executor dies without taking out probate—Admissibility of evidence to prove that testator had not died intestate—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 5.*

G The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), as originally enacted, provided “. . . the expression ‘tenant’ includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant’s family so residing as aforesaid as may be decided in default of agreement by the county court”. By the
H Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1, the words “dying intestate” were deleted from s. 12 (1) (g) of the Act of 1920 as from Mar. 28, 1935.

I In 1920 one I. became a monthly tenant of a dwelling-house. The Act of 1920 applied to the premises. In 1922 I. died having, by his will, appointed his widow sole executrix and given to her all his property. After his death his widow continued in occupation of the premises and her name was inserted in rent books as tenant, and rent continued to be paid at the contractual rate for some years. In 1924 the widow adopted de facto the defendant, who thereafter resided with the widow as a member of her family. Subsequent increases of rent showed that the contractual tenancy must have been determined in or after 1928. The widow never took out probate of I.’s will. She died in 1953 having made a will under which the defendant was sole executrix and beneficiary and of which the defendant obtained probate. After the widow’s death the defendant continued in occupation

of the dwelling-house. The plaintiffs, who were the defendant's landlords, having served notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, sued the defendant for possession on the ground that her occupation was not protected by the rent restriction legislation, because the widow must be regarded as having been in occupation after I.'s death as a statutory tenant by virtue of s. 12 (1) (g) of the Act of 1920 and her right of occupation could not be transmitted to the defendant. The plaintiffs' evidence of I.'s having made a will could not be admitted by reason of legislation now replaced by s. 5 of the Administration of Estates Act, 1925.

Held: (i) evidence that I. had made a will appointing his widow sole executrix was properly admissible, notwithstanding the provisions of legislation now replaced by s. 5 of the Administration of Estates Act, 1925; on the facts, the proper inference was that the widow's occupation on I.'s death was referable to a contractual right transmitted to her as executrix of I. and, alternatively, the plaintiffs were estopped from denying that her occupation on I.'s death was by virtue of contractual right; and accordingly on the widow's death the defendant became a tenant within s. 12 (1) (g) of the Act of 1920 and the plaintiffs were not entitled to an order for possession.

(ii) the fact that any legal estate of the tenant was outstanding in the President of the Probate, Divorce and Admiralty Division of the High Court of Justice did not prevent the defendant from maintaining a defence based on s. 12 (1) (g) of the Act of 1920 (observations of COHEN, L.J., in *Mackley v. Nutting* ([1949] 1 All E.R. at p. 417) applied).

Appeal allowed.

[**Editorial Note.** The definition of "tenant" in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, has been further amended by s. 42 of the Housing Repairs and Rents Act, 1954, but in a manner not material to the point decided in the present case.

In Scotland the position of a widow to whom her husband's contractual tenancy is bequeathed but who does not intimate the bequest to the landlord is different, and if she continues in occupation her occupation will be referred, it seems, to the statutory tenancy under the Rent Acts rather than to the contractual tenancy which has vested in her; see *Grant's Trustees v. Arrol* (1954 S.C. 306).

As to the right of a statutory tenant passing on his death, see 20 HALSBURY'S LAWS (2nd Edn.) 335, para. 401, note (r); and for cases on the question who is a tenant within the Act of 1920, see 31 DIGEST (Repl.) 665, 666, 7646-7649.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (f), (g), see 13 HALSBURY'S STATUTES (2nd Edn.) 999, and Supplement.

For the Administration of Estates Act, 1925, s. 5, see 9 HALSBURY'S STATUTES (2nd Edn.) 724; for the Supreme Court of Judicature (Consolidation) Act, 1925, s. 150, see 9 HALSBURY'S STATUTES (2nd Edn.) 771; and for the County Courts Act, 1934, s. 60, see 5 HALSBURY'S STATUTES (2nd Edn.) 57.]

Cases referred to:

- (1) *Moodie v. Hosegood*, [1951] 2 All E.R. 582; [1952] A.C. 61; 3rd Digest Supp.
- (2) *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603; 114 L.T. 1002; sub nom. *Chetty v. Chetty*, 85 L.J.P.C. 179; 23 Digest 84, 721.
- (3) *Mackley v. Nutting*, [1949] 1 All E.R. 413; [1949] 2 K.B. 55; [1949] L.J.R. 803; 31 Digest (Repl.) 663, 7634.

Appeal.

Appeal by the defendant against an order of His Honour JUDGE WRANGHAM, at Bedford County Court, dated Oct. 27, 1954, granting to the plaintiffs possession of a dwelling-house situate at No. 14, George Street, Bedford, on the ground that

A the defendant was not a tenant within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

A. C. Goodall for the defendant.

T. H. K. Berry for the plaintiffs.

B SIR RAYMOND EVERSHERD, M.R.: The present case appears to raise (though not in the end to turn on) the scope of the words "dying intestate" in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The point is not likely to recur, save very infrequently, for the words "dying intestate" were excluded from s. 12 (1) (g) by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. It may have been thought that the words "dying intestate" were in any case not well chosen since the question might arise whether a person died intestate for the purpose of the paragraph, if he had made a will which was duly proved but which did not deal with the premises which were the subject of the claim to possession. It is, however, not necessary to consider the reason. The fact is that the words I have mentioned are now no part of the Act of Parliament.

D The relevant facts are these: one George Ingram went into occupation of the premises in question known as 14, George Street, Bedford, in or about the year 1920 and he paid a rent of £1 6s. 8d. per month. Mr. Ingram died on Mar. 29, 1922, and thereupon his widow, Mrs. Ingram, continued in occupation of the premises for over thirty years, until she died on June 14, 1953. In the year 1924 she "adopted" the defendant, Miss Mary Ann Lambert, who was then a young girl aged ten years, that is, she assumed towards the defendant the obligations as to maintenance and upbringing of a parent to a child, but the case was not one of an adoption under adoption legislation. After Mrs. Ingram's death in 1953 the defendant has in turn remained in occupation of the house and she is now over forty years of age. The defendant is also the legal personal representative of Mrs. Ingram whose will she proved. That might well have a bearing on the conclusion of the present case. Thus, if Mrs. Ingram had been found to be a contractual tenant at her death then the right of the defendant would have been qua personal representative as successor to Mrs. Ingram's contractual right. I think (and there has been no argument to the contrary) that if Mrs. Ingram became, after her husband's death, a contractual tenant, a series of increases of rent made her a statutory tenant at the date of her death. At any rate, counsel's argument for the defendant has rested solely on rights which he seeks to derive for her under s. 12 (1) (g) of the Act of 1920. We have, accordingly, confined ourselves to that submission. The present proceedings for possession of the premises were brought by the plaintiffs who appear to have acquired the premises subject to Mrs. Ingram's occupation in 1935. Prior to bringing the proceedings they duly served notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court. No grounds have been suggested whereby the plaintiffs could obtain an order for possession—that is, for example, under one or other of the provisions of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933—if the defendant is in truth now a tenant within the meaning of the Act. The plaintiffs say that she is not. The question is whether they are correct in so asserting.

I If the defendant is to succeed on the case submitted on her behalf she must bring herself within the terms of s. 12 (1) (g). Although one often speaks of "claiming under s. 12 (1) (g)", such a claim is in fact one made by virtue of the extended definition which that paragraph gives to the word "tenant". In its original form s. 12 (1) (g) read:

"... the expression 'tenant' includes the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

The defendant claims under the latter part of the paragraph. When Mrs. Ingram died the words "dying intestate" had been excluded so that such a qualification was no longer necessary in the defendant's case. It may be taken as well settled, as regards any premises and any family, that the paragraph can only operate once. Thus, if A be the tenant, whether contractual or statutory (*Moodie v. Hosegood* (1)) then on A's death his widow may claim the benefit of the definition under s. 12 (1) (g). If she does, then on Mrs. A's death no member of her family can invoke the paragraph unless, as I have said, a new start has been made by the grant of a new contractual tenancy to Mrs. A. It follows that the defendant has in the present case two obstacles to surmount. She has to show, first, that Mrs. Ingram was not a mere s. 12 (1) (g) tenant at the date of her death or at any other relevant time, and, secondly, that she herself qualifies as a "member of the tenant's family so residing as aforesaid". The second point has been conceded in her favour and that obstacle is, therefore, removed.

At the trial the defendant sought to show on the first matter that Mr. Ingram was never a tenant at all. He was, it appears, a meek military musician and Mrs. Ingram was the more dominating character, from which it was to be inferred that she herself had always been the tenant. The defendant failed on that matter of fact. It was held by the learned judge that Mr. Ingram was a contractual tenant of the premises at the date of his death. That finding cannot be disturbed. It follows, therefore, that unless a new contractual tenancy in favour of Mrs. Ingram came into existence, or something equivalent thereto, she was either a mere licensee or owed her rights to the operation of the paragraph. The learned judge's conclusion was: "Mrs. Ingram was no more than a tenant under s. 12 (1) (g)". If that is right it is, of course, an end of the defendant's case. In this court, however, a new point has been raised on her behalf to the effect that she could not be a s. 12 (1) (g) tenant for the simple reason that Mr. Ingram did not in fact die intestate. It should be remembered that at the time when he died, it was required of a widow who was claiming under s. 12 (1) (g) that her husband, the tenant, should have died intestate. It is not in doubt that no representation to the estate of Mr. Ingram was ever taken out either by way of grant of letters of administration or by way of probate of a will. Evidence was, however, given before the county court judge that Mr. Ingram had in fact made a will in accordance with the terms of the Wills Act, 1837. That evidence was objected to by counsel for the plaintiffs and he maintained his objection in this court. It does not appear that the objection was noted by the judge at the time but what the learned judge says on that matter is as follows:

"John Ingram made a will. In that will his widow was named as sole beneficiary and executrix. Now if Mrs. Ingram had taken out probate of the will, she would have been entitled, on taking the proper steps, to succeed to her husband's [contractual] tenancy, and would then have been a tenant within the words of s. 12 (1) (f) of the Act. But she never did. Probate of that will has never been taken out. Mrs. Ingram never acted as executrix. In these circumstances it seems to me that s. 5 of the Administration of Estates Act, 1925, affords a complete answer to any contention that Mrs. Ingram derived any title to the tenancy of 14 George Street under the will of her husband; nor, as I understood him, was Mr. Bairstow [who then appeared for the defendant] able to argue to the contrary."

Section 5 of the Administration of Estates Act, 1925, provides:

"Where a person appointed executor by a will—(i) survives the testator but dies without having taken out probate of the will . . . his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor."

Although that section was not in operation when Mr. Ingram died, it reproduces the terms of the Court of Probate Act, 1857, s. 79, and the Court of Probate

A Act, 1858, s. 16. The new point raised by counsel for the defendant in this court challenges the validity of the judge's conclusion, particularly his view that s. 5 of the Administration of Estates Act, 1925, or its predecessor, the Court of Probate Act, 1858, s. 16, afforded an answer to the point. Although the point is new, the present is a Rent Act case and in any event counsel for the plaintiffs has conceded that counsel for the defendant ought to be entitled to submit his
B argument in this court whether or not it was involved in the court below.

Counsel for the plaintiffs' argument in support of the judge's conclusion is of a general character. He says that no evidence of any will or of its contents, when the will has not been proved, can ever be received except for purely collateral purposes. For example, you may prove that A.B. was alive at a certain date by proof of his signature being on a document which was executed on that
C date. But, he says, one cannot prove that an instrument is a will properly within the terms of the Wills Act, 1837, unless that will has already been proved or unless proceedings have been instituted for obtaining probate or letters of administration cum testamento annexo.

Counsel for the plaintiffs referred us to s. 60 of the County Courts Act, 1934, and s. 150 of the Supreme Court of Judicature (Consolidation) Act, 1925, and
D claimed that to admit the evidence in the present case would involve the county court exercising a probate jurisdiction as a matter of procedure which it was not entitled, and did not intend, in any way to do. I do not think that that broad proposition can be sustained in its wide form. It is no doubt perfectly true that you cannot finally make good your title to any property, formerly belonging to a deceased person, by virtue of his testamentary disposition unless that disposition
E has been admitted to probate. In my judgment, it is no less clear that a person appointed executor or executrix by will can justifiably do a number of things in regard to the property that was in the possession of the deceased, by virtue of the will before that will is proved, even though, because the executor or executrix dies, it never in fact is proved or capable of being proved by virtue
F of s. 5 of the Administration of Estates Act, 1925. For example, he may enter on property which was in the ownership and occupation, or in the occupation only, of the deceased. In support of that a reference may be usefully made to WILLIAMS ON EXECUTORS AND ADMINISTRATORS (11th Edn.), vol. 1, at p. 213, which is as follows:

G "Upon the principles stated in the course of the preceding section, it has been held that the executor, before he proves the will, may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus, he may seize and take into his hands any of the testator's effects, and he may enter peaceably into the house of the heir, for that purpose, and to take specialties and other securities for the debts due to the deceased. He may pay, or take release of, debts owing from the estate; and he may receive or release debts which are owing to it; and distrain
H for rent due to the testator . . . So he may sell, give away, or otherwise dispose, at his discretion, of the goods and chattels of the testator before probate; he may assent to, or pay, legacies; he may enter on the testator's term for years . . ."

I Those general propositions represented the state of the law when Mr. Ingram died and have not been qualified by the subsequent changes in the law. We were also referred by counsel for the plaintiffs to a passage from the judgment of the Judicial Committee of the Privy Council delivered by LORD PARKER OF WADDINGTON in *Meyappa Chetty v. Supramaniam Chetty* (2). The facts of that case are not material for present purposes but in the course of the judgment LORD PARKER said ([1916] 1 A.C. at p. 608):

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal

property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title."

As regards s. 5 of the Administration of Estates Act, 1925, it will be observed that, in the case of a sole executor dying before he has taken out probate, that executor's personal representatives cannot take out probate of the original will so as to relate their title back to the death. In that event, they would have to apply for a grant of letters of administration. That, however, is not the point which is involved in the present case. I do not for my part conceive it necessary or indeed desirable to attempt any exhaustive statement of the purposes for which evidence may be given of an unproved will; nor do I think it necessary to express any concluded view on the question whether the words "dying intestate" in the original s. 12 (1) (g) of the Act of 1920 mean, and mean only, dying without a will which has been admitted to probate or its equivalent. I think it sufficient to say that, in my view, the fact of Mr. Ingram having made, in accordance with the requirement of the Wills Act, 1837, a will appointing his widow sole executrix, was properly admissible in evidence in the present case; and I think that that having been admitted, the fact has a strong bearing on the question which the court is called on to answer. For, whatever be the answer as to the true meaning of s. 12 (1) (g), Mrs. Ingram clearly after her husband's death could have justified her entry on the premises by reference to the fact that she had been appointed by her husband as his sole executrix and she could thereafter at any time, if necessary, have proved the will. It was suggested that Mrs. Ingram may not have known or perhaps did not know of the existence of the will. I cannot myself draw any such inference. Where the will came from at the trial appears to be a mystery, but having regard to the facts known of the circumstances affecting Mr. and Mrs. Ingram's relations together as man and wife I think it highly improbable that she did not know of the making of the will and I should myself, in the absence of something to the contrary, infer that she did. It follows, therefore, that it cannot be said in my judgment that Mrs. Ingram's continued occupation after her husband's death could only have been referable to a statutory claim on her part under s. 12 (1) (g). Once that stage is reached what thenceforward is the proper inference to be drawn from the whole matter?

The court has been supplied with two rent books. The first begins in October, 1923, and on the outside against the printed phrase "Tenant's name" there is inserted "Mrs. Ingram", and it appears that rent at the contractual rate of £1 6s. 8d. was paid until, at any rate, March, 1928. The second rent book, which was not a printed form but was created out of an ordinary little note book, states on the left-hand inside cover: "Mrs. Ingram, 14 George Street, tenant of F. C. Whitmore", who is one of the plaintiffs. It is opened on the right-hand side under the general heading "Rent due and paid Nov. 1", and then the date is repeated in figures "1/11/35, F. Whitmore". On the inside cover again I find "Two guineas per month including rates". Then lower down "From Mar. 1, 1940, £2 3s. 4d." and "From July 1, £2 5s. 7d." The book shows that the rents at varying rates were regularly paid right up to the close of the entries in 1953. Mrs. Ingram remained in possession on the terms recorded in these books for some thirty odd years. There is no evidence that the landlord, either the plaintiffs or their predecessors, made any inquiry whether Mrs. Ingram continued in occupation by virtue of a will left by her husband or how otherwise. In my judgment, therefore, the plaintiffs cannot successfully say that all that occurred during Mrs. Ingram's occupancy after her husband's death should be attributed to a right which she had by virtue of s. 12 (1) (g) of the Act of 1920, which left to her landlords no course open other than to act as they did. I

A think that the proper inference is that her situation as occupant of the house after her husband's death ought now to be treated as having been on a contractual basis until the increases of rent brought into operation the effect of the Act to determine the contractual tenancy and substitute therefor a statutory tenancy. Alternatively, I think that on these facts the plaintiffs are estopped from denying that Mrs. Ingram's early occupation until the increase of rent was
B on a contractual and not on a statutory basis. It follows, therefore, that in my judgment the defendant should have succeeded and that s. 5 of the Administration of Estates Act, 1925, did not provide any answer to her contention.

One final point was suggested. It was said that since no representation was taken out to the estate of Mr. Ingram, the legal estate in the tenancy had been outstanding in the President of the Probate Court or his predecessor from 1923
C until it was determined by the notice to quit in 1954; so that when Mrs. Ingram died it was impossible for anything to pass on to the defendant, Mrs. Ingram at most having a merely contractual right enforceable in a court of equity. In my judgment, that objection cannot be sustained. I think that it is covered by certain observations of COHEN, L.J., who delivered the leading judgment of this court in *Mackley v. Nutting* (3). That case, indeed, bears in many
D respects a strong resemblance on its facts to the present case. On this point it was similarly suggested that the defendant in that case could not rely on s. 12 (1) (g). COHEN, L.J., said ([1949] 1 All E.R. at p. 417):

"Mrs. Nutting [she corresponds for the present purpose with Mrs. Ingram] had she been alive could, therefore, clearly have relied on estoppel as against the landlords. Does that right pass to the tenant [corresponding
E with Miss Lambert] as her legal personal representative? In my opinion, it does: see SPENCER BOWER ON ESTOPPEL BY REPRESENTATION, p. 151. I will read the first two sentences of para. 176: 'Speaking generally, on the death or disability of the representee the persons who in right of him or his estate would be entitled to enforce any contract made with him are the persons who can take advantage of any rule of evidence, and, therefore, of
F any estoppel, which would be available to the representee if alive, or free from disability'."

From that language, and the earlier part of the judgment which I do not read, it is clear that in the present case, as in *Mackley v. Nutting* (3), the answer is that the somewhat artificial situation created by the circumstance of Mrs. Ingram's death, namely, that the legal estate, if any estate was then involved, was out-
G standing in the President, does not prevent the defendant from alleging and relying on s. 12 (1) (g) of the Act of 1920.

For these reasons, which involve matters which were not before the judge and which he did not have an opportunity of considering, I think this appeal should be allowed and that the claim by the plaintiffs for possession should have
H been dismissed.

JENKINS, L.J. : I agree and have nothing to add.

ROMER, L.J. : I also agree.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Bird & Bird*, agents for *J. Garrard & Allen*, Bedford (for the defendant); *Field, Roscoe & Co.*, agents for *C. C. Bell & Son*, Bedford (for the plaintiffs).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CASTLE LAUNDRY (LONDON), LTD. v. READ.

[QUEEN'S BENCH DIVISION (Sellers, J.), March 28, 29, 1955.]

Landlord and Tenant—Notice to quit—Business premises—Notice given before operation of Landlord and Tenant Act, 1954—Notice expiring after Act in operation—Notice under Landlord and Tenant Act, 1954, served after expiry of first notice—Validity of second notice—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25.

By the terms of a lease of business premises for twenty-one years from Dec. 25, 1947, either party could terminate the demise at the end of seven or fourteen years by giving the other party six months' notice. On June 11, 1954, the landlord gave the tenants six months' notice to quit, expiring on Dec. 25, 1954, i.e., at the expiration of seven years. The Landlord and Tenant Act, 1954, having come into operation on Oct. 1, 1954, the landlord, on Jan. 19, 1955, gave the tenants a further six months' notice to quit under s. 25 of that Act, expiring on July 22, 1955. The tenants contended that the second notice to quit was invalid as not being in accordance with the provisions of s. 25 (3) and (4) of the Act.

Held: the notice to quit dated Jan. 19, 1955, was effective under s. 25 (3) and (4) of the Act of 1954 and would determine the tenancy subsisting by virtue of the Act of 1954 on July 22, 1955, because this date was not earlier than that at which the contractual term created by the lease would have determined by virtue of the notice dated June 11, 1954.

Per CURIAM: although the contractual demise created by the lease came to an end on Dec. 25, 1954, the tenancy did not come to an end because of the operation of s. 24 (1) of the Act of 1954; it may rightly be said to have continued as a business statutory tenancy until terminated in accordance with the Act (see p. 156, letter E, post).

[**Editorial Note.** In *Orman Brothers, Ltd. v. Greenbaum*, [1954] 3 All E.R. 731, *affd.* C.A., [1955] 1 All E.R. 610, it was held that a notice to quit premises to which the Landlord and Tenant Act, 1954, subsequently applied, did not cause the tenancy to end, even though the notice was given before the Act of 1954, if the notice was not in the prescribed form. In the present case a distinction is drawn between the contractual tenancy and the tenancy continued by the Act of 1954; the former may be regarded, it seems, as ended by a notice to quit, although the latter would not be ended unless the notice were in the prescribed form.]

Originating Summons.

By a lease dated Mar. 20, 1947, Arnold Francis Steele and Geoffrey Thomas Smyth, the lessors, demised business premises at 61, Bedford Hill, Balham, London, to Carnwath Laundry, Ltd., the lessee, for a period of twenty-one years from Dec. 25, 1947. By cl. 3 (b) of the lease, the demise could be terminated at the end of seven or fourteen years by either party giving the other six months' notice. The plaintiffs were the successors in title of the lessee and the defendant was the successor in title of the lessors under the lease. On June 11, 1954, the landlord gave the tenants six months' notice to quit expiring on Dec. 25, 1954, i.e., at the end of the seven years' period. On Jan. 19, 1955, the landlord gave the tenants a further notice to quit under the Landlord and Tenant Act, 1954, s. 25, expiring on July 22, 1955. By originating summons dated Feb. 21, 1955, the tenants asked for the determination of two questions in respect of the lease of Mar. 20, 1947, namely:

"(a) whether, having regard to the term of the said lease and of the Landlord and Tenant Act, 1954, the term of years created by the said lease will determine on July 22, 1955, by virtue of a notice in writing dated Jan. 19, 1955, and served by the [landlord] on the [tenants]; (b) whether, having

- A regard as aforesaid, the [landlord] has power to determine the said term by notice served to expire on any date prior to Dec. 25, 1961.”

C. Lawson for the tenants.

J. P. Widgery for the landlord.

- B **SELLERS, J. :** By this originating summons the plaintiffs seek two declarations in respect of a lease dated Mar. 20, 1947, of business premises, no. 61 Bedford Hill, Balham, London, of which the plaintiffs are the tenants and the defendant is the landlord, the plaintiffs and the defendant being the successors in title of the original lessee and lessors. The lease is for a term of twenty-one years from Dec. 25, 1947, but cl. 3 (b) of the lease permits, in certain circumstances, an earlier termination. That clause reads as follows:

- C “If either the lessors or the lessee shall desire to determine the present demise at the expiration of the seventh or fourteenth years of the said term and shall give to the other of them six months’ previous notice in writing of such desire and shall in the case of the lessee up to the time of such determination pay the rent and up to the date of such notice perform and observe the covenants on its part hereinbefore contained then immediately on the expiration of such seventh or fourteenth year as the case may be this present demise and everything herein contained shall cease and be void but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant.”
- D

- E The landlord desired to invoke that clause and to terminate the lease at the end of the seven years’ period, and he gave notice on June 11, 1954, expressing his desire, and giving the tenants, the plaintiffs in this action, notice to quit and to deliver up possession on Dec. 25, 1954. It is agreed that that was a proper notice under the lease and one which, as far as the contractual relationship between the parties was concerned, would have brought this lease to an end on Dec. 25, 1954, that the other provisions in the lease which were available for its
- F further performance would, in accordance with the clause I have read, have ceased to have any effect, and everything else would have been void.

- G Intervening, however, between the date of that notice and the period of its expiration on Dec. 25, 1954, there came the Landlord and Tenant Act, 1954, which received the royal assent on July 30, 1954, and, by s. 70, came into force on Oct. 1 of that year. The Act empowered* the Lord Chancellor to make regulations with regard to the form of a notice to quit under the Act, and those regulations† were, in fact, made on Aug. 27, 1954. Part 2 of the Act makes special provision for the purpose of giving security of tenure to a tenant of what might be termed a business tenancy, and s. 23 (1) provides:

- H “Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.”

Then, by sub-s. (2), it is provided:

- I “In this Part of this Act the expression ‘business’ includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate.”

Quite clearly, the Act applies to these premises, because, at the time when the Act came into operation on Oct. 1, 1954, this lease was still subsisting; the notice had been given, but it did not expire until December of that year, and there was that residue of the term still subsisting and the Act had its effect on it.

* By s. 66 (1).

† The Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107).

The provisions relating to such premises are set out, as far as this case is concerned, in s. 24 and s. 25. Section 24 (1) provides: A

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy B

Having regard to that provision, the landlord did give a notice, which he contends is a notice determining the tenancy "in accordance with the provisions of this Part of the Act." Those provisions are set out in s. 25 (1) and (2):

"(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination'): Provided that this sub-section has effect subject to the provisions of Part 4 of this Act as to the interim continuation of tenancies pending the disposal of applications to the court. (2) Subject to the provisions of the next following sub-section, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein." C D

The notice which the landlord gave was a notice dated Jan. 19, 1955, and was a notice terminating the tenancy on July 22, 1955, which complies with s. 25 (2) as regards duration. I think that it is rightly said on behalf of the landlord, that, having regard to the fact that Oct. 1, 1954, has passed, the Act makes it impossible to terminate a tenancy unless it is terminated in accordance with the provisions of the Act. The Act, through the regulations, has specified the appropriate form of notice terminating the tenancy, and that notice must be given. The contractual tenancy, so it is said on behalf of the landlord, came to an end on Dec. 25, 1954, but, because of the operation of s. 24 of the Act, the tenancy did not come to an end. I think it may rightly be said to continue as a business statutory tenancy which, so the landlord contends, has been terminated by the notice which the Act requires. E F

On behalf of the tenants, it is said that, although notice has been given and complies with the prescribed form, nevertheless it is ineffective by reason of the provisions of s. 25 (3) and (4) of the Act. Section 25 (3) provides: G

"In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—(a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section . . ." H

Then sub-s. (4) provides:

"In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time." I

Those two provisions seem to me to operate so that, if there is a tenancy which has its own specified terms as to termination, then the Act gives no earlier date on which the tenancy can be brought to an end. The earliest date, whether it be the breaking date provided by cl. 3 (b) of the lease, or the final date under cl. 4, on which the tenancy could be determined by a notice under the Act of 1954, can be no earlier than that which the contract itself specifies. As applied to this case, that presents no difficulty for the landlord at all, because the contractual tenancy has been brought to an end as far as the lease is concerned by valid notice given in June, 1954; the date of Dec. 25, 1954, is just as final as if it had

A been the original date for the termination of the tenancy, so that it would operate as if it were a date arising from effluxion of time. In my opinion, the contention that, because the notice under the Act is dated Jan. 19, 1955, and the date of the first break after seven years had passed, it is ineffective, and that the earliest date which could be named is the next one after fourteen years, in December, 1961, is erroneous. That is viewing the position as if the notice of June 11, 1954, had
B never been given. If that notice had never been given, then I think the contention by counsel for the tenants would have been right; but, that notice having operated to bring the lease, that is to say, the contractual obligation between the parties, to an end in December, 1954, and the notice under the Act of 1954 not having been given for any earlier date, s. 25 (3) (4) so operate that this notice establishes the proper date for the determination of the tenancy.

C If the landlord had had the foresight and the inclination, he might have given his notice earlier than he did. It seems to me that, on the proper construction of this Act and the provisions made for the regulations under Sch. 9, the notice under the Act, as distinct from the notice of June 11, 1954, under the lease, might have been given at any time after Aug. 26, 1954. Schedule 9 provides:

D "1. The power under s. 66 of this Act to make regulations prescribing forms of notices for the purposes of this Act may be exercised at any time after the passing and before the commencement of this Act so as to bring the regulations into operation at any time after they are made . . ."

and that was invoked in the regulations made on Aug. 27, 1954. Then it is provided:

E ". . . where the date, or the end of a period, specified by a notice which is given in a form so prescribed falls after the time at which this Act comes into operation the notice shall not be invalid by reason only that it was served before that time."

F That seems to me to recognise that, when a form of notice had been prescribed, notice in the prescribed form could have been given at any time between then and Oct. 1, 1954, provided it did not seek to terminate the tenancy earlier than it could have been terminated under the terms of the lease.

Therefore, the answer which I give to the two questions asked in the summons is "Yes" in each case.

Declaration accordingly in terms to be agreed.

Solicitors: *Sydney Morse & Co.* (for the tenants); *Moon, Gilks & Moon* (for the landlord).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

B. v. B.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), April 5, 1955.]

Divorce—Appeal—Appeal to House of Lords—Religious upbringing of child—No question of law—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 27 (2).

House of Lords—Appeal to—Leave to appeal—Matrimonial cause—Religious upbringing of child—Reversal of direction of judge of first instance—No question of law—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 27 (2).

On Dec. 14, 1954, the Court of Appeal reversed an order of a divorce judge relating to the religious upbringing of the child of the marriage of the parties. The mother's application for leave to appeal to the House of Lords was refused by the Court of Appeal, but granted by the House of Lords. At the hearing of the appeal in the House a preliminary point was taken on behalf of the father that no appeal lay by virtue of the provisions of s. 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides: "The decision of the Court of Appeal on any question arising under the provisions of this Act relating to matrimonial causes and matters . . . shall be final, except . . . on a question of law on which the Court of Appeal gives leave to appeal". The objection was upheld by the House, and the mother now applied again to the Court of Appeal for leave to appeal against the decision of Dec. 14, 1954.

Held: assuming that the court could entertain the application notwithstanding the fact that an order had been drawn up, passed and entered refusing leave to appeal, the question whether the court was justified in reversing the order of the judge of first instance on a matter in his discretion was not a question of law within the meaning of s. 27 (2) of the Act of 1925, and, therefore, the application failed.

[**Editorial Note.** Jurisdiction as to custody of children in divorce proceedings was conferred by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which was one of the provisions of that Act relating to matrimonial causes and matters to which s. 27 (2) refers. Section 193 (1) of the Act of 1925 is repealed, and was replaced by s. 26 (1) of the Matrimonial Causes Act, 1950, 29 HALSBURY'S STATUTES (2nd Edn.) 413, to which it seems that s. 27 (2) now refers (see s. 34 (2) (c) of the Matrimonial Causes Act, 1950, and, by analogy, s. 38 (1) of the Interpretation Act, 1889, 24 HALSBURY'S STATUTES (2nd Edn.) 229).

As to appeal to the House of Lords on a point of law, see 9 HALSBURY'S LAWS (3rd Edn.) 364, para. 847; 10 HALSBURY'S LAWS (2nd Edn.) 776, para. 1227; and for cases on the subject, see 27 DIGEST (Repl.) 593, 5549-5552.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (2), see 5 HALSBURY'S STATUTES (2nd Edn.) 355.]

Application.

Application by the mother of an infant for leave to appeal from a decision of the Court of Appeal, dated Dec. 14, 1954, reversing an order of DAVIES, J., and directing that the infant should be brought up in the Roman Catholic faith. The mother and the father were married on June 6, 1942, the mother being a member of the Church of England and the father being a Roman Catholic. There were two children of the marriage, a boy, H.E.B., born on Dec. 7, 1943, and a girl, A.W.M.B., born on Sept. 3, 1947. On June 17, 1952, the mother presented a petition for divorce on the ground of the father's adultery, and on July 31, 1952, a decree nisi was granted in her favour and it was ordered that she should have custody of the two children of the marriage. On May 1, 1953, WALLINGTON, J., ordered that the child H.E.B. should attend a Roman Catholic school. On June 24, 1953, the mother married one R.D.N. who was, like

A herself, a member of the Church of England. On June 16, 1954, the father caused a summons to be issued in the divorce proceedings calling on the mother to show cause why the child A.W.M.B. should not be brought up in the Roman Catholic faith. On Nov. 5, 1954, DAVIES, J., dismissed the summons. The father appealed and on Dec. 14, 1954, the Court of Appeal (JENKINS and HODSON, L.J.J., and VAISEY, J.) allowed the appeal, set aside the order of DAVIES, J., and refused leave to appeal to the House of Lords. On Feb. 23, 1955, the House of Lords granted the mother leave to appeal. On Apr. 4, 1955, the House of Lords dismissed the appeal on the ground that, by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (2), the decision of the Court of Appeal was final except on a question of law on which the Court of Appeal had given leave to appeal. The mother now applied again to the Court of Appeal for leave to appeal to the House of Lords.

J. E. S. Simon, Q.C., and A. R. Ellis for the mother.

Charles Russell, Q.C., and R. F. G. Ormrod for the father.

D JENKINS, L.J. : This matter came before this court, consisting of HODSON, L.J., VAISEY, J., and myself, on Dec. 14, 1954, and on that date we gave directions to the effect that the daughter (A.W.M.B.) should be brought up in the Roman Catholic faith, reversing an order of DAVIES, J., to the contrary effect. On our stating our decision on Dec. 14, 1954, counsel for the mother applied for leave to appeal to the House of Lords. That leave was refused; but it is fair to say that at the time neither the court nor counsel appearing had in mind the special provisions of s. 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. That sub-section provides:

E "The decision of the Court of Appeal on any question arising under the provisions of this Act relating to matrimonial causes and matters and to declarations of legitimacy and of validity of marriage shall be final, except where the decision is either on the grant or refusal of a decree on a petition for dissolution or nullity of marriage or for such a declaration as aforesaid, or on a question of law on which the Court of Appeal gives leave to appeal."

F The mother applied to the House of Lords for, and obtained, leave to appeal to the House of Lords. On the occasion when that leave was given s. 27 (2) was again overlooked. In due course the case came into the list for hearing in the House of Lords. Before it came on, the existence of s. 27 (2) had been noticed by the solicitors or counsel for the father, and they advised those on the mother's side that the point would be taken on the hearing of the appeal, that this was a matrimonial cause or matter, and that, accordingly, under s. 27 (2) there was no appeal from the decision of this court except on a question of law with the leave of this court. That preliminary point was fully argued in the House of Lords, and was upheld. It then occurred to the mother's advisers that it might be possible to remove this procedural obstacle by a further application to this court for the purpose of obtaining the leave of this court, notwithstanding the previous order refusing leave, to appeal to the House of Lords, on the ground that there was here a question of law which would be a proper subject of leave under s. 27 (2). Their Lordships, as I understand it, expressed no view whether such a further application to this court ought to be made, or could be entertained, or, if entertained, should be acceded to; but I understand them to have intimated that in the event of such an application being made and succeeding, they would be prepared to consider allowing the appeal to go forward on the existing printed documents without putting the mother to the necessity of starting all over again with a fresh appeal to the House.

I That is the background of the present application on behalf of the mother for leave to appeal to the House of Lords on a question of law arising in the case. To my mind it is open to grave doubt whether this court can entertain such an application at all, inasmuch as there is here an order drawn up, passed and

entered, on the face of which it appears that leave to appeal to the House of Lords was refused. Assuming that this objection can be answered on the ground that when leave was refused in this court the court had not present to their minds s. 27 (2), and regarding the matter as if it was now being raised for the first time, it remains to consider whether there is here any question of law in respect of which leave to appeal to the House of Lords could properly be given by this court. Counsel for the mother said all that could possibly be said in support of the mother's application, but he failed to persuade me that there was here any question of law at all of the kind contemplated by s. 27 (2). He says in effect (I hope it is not an injustice to his argument if I put it in this way) that there is here a question of law, the question being whether as a matter of law in all the circumstances of the case the Court of Appeal was justified in reversing the decision of DAVIES, J., on a matter decided in the discretion of the learned judge. That is a question of law in a sense, but, in my view, it is not such a question of law as would warrant this court in giving leave having regard to the terms of s. 27 (2). If this amounts to a question of law for the present purpose, then it follows that in every case within the purview of s. 27 (2) in which this court reverses an order made by the judge of first instance in the exercise of his discretion there would be a question of law on the strength of which it would be proper for this court to grant leave to appeal to the House of Lords. It seems to me that this would in effect nullify the restriction imposed by s. 27 (2).

Accordingly, in my view, the present is not a case in which it would have been right to give leave to appeal under s. 27 (2) if an application had been made under that sub-section, or if that sub-section had been brought to the notice of the court at the proper time. In refusing leave we were guided by no different considerations from those which govern the question on the footing that s. 27 (2) applies, as it does apply, as is now recognised, to the present case. Accordingly, in my view this application fails and must be dismissed.

HODSON, L.J. : I agree. I am not satisfied that this court can entertain the present application, leave to appeal having been asked for and having been refused and the order having been drawn up. Looking at the matter as if the application could be entertained, I am of opinion that there is no question of law within the meaning of s. 27 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, which would justify this court in granting the application. I have said this on the understanding that the House of Lords has in no way encouraged the present application or expressed any view whether the application to this court could be entertained at all, and also on the understanding that no concession has been made by the father to this appeal as to any points, save that if the appeal did go forward no point would be taken on his side as to the defect in the printed record.

Application refused.

Solicitors: *Theodore Goddard & Co.* (for the mother); *Charles Russell & Co.* (for the father).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A COMBER AND ANOTHER v. FLEET ELECTRICS, LTD.
AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), March 31, 1955.]

B *Landlord and Tenant—Covenant against change of use without consent—Under-taking by tenants to assign debt in consideration of consent—Whether a fine or sum in nature of a fine—Whether undertaking enforceable—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 19 (3).*

Landlord and Tenant—Covenant against assignment without consent—Under-taking by tenants to assign debt in consideration of consent—Whether a fine or sum in nature of a fine—Whether undertaking enforceable—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 144.

C By a lease of a shop, dated Jan. 25, 1949, the lessees covenanted not, without the landlords' consent, to use the demised premises for any purpose other than the carrying on of the business of retail sellers of electrical appliances, and not to assign, underlet or part with possession of the demised premises without the written consent of the lessors. The lease contained no express provision for the payment of a fine in respect of the landlords' consenting to assignment of the lease or underletting. After the date of the lease the local authority, pursuant to a road improvement scheme, set back the front of the shop, and compensation for this, amounting to £2,000, became payable by the local authority and divisible between the landlords and the lessees in equal shares. The lessees desired to assign the lease and the assignee desired to underlet part of the shop premises for use for purposes other than that permitted under the lease. By a document dated May 22, 1951, in consideration of the landlords' consenting to the assignment, underletting and change of user, the lessees agreed to assign to the landlords the lessees' half share of the compensation. By a document dated May 23, 1951, in reliance on this undertaking, the landlords granted the necessary licences under the lease. The landlords sought to enforce the undertaking of May 22, 1951.

E **Held:** the lessees' undertaking to assign to the landlords the lessees' half share in the compensation was given for no consideration, since it was an agreement to pay a fine or a sum of money in the nature of a fine for a licence or consent within the Law of Property Act, 1925, s. 144, and the Landlord and Tenant Act, 1927, s. 19 (3), and by those enactments payment of such a fine or sum was prohibited; accordingly the lessees' undertaking would not be enforced against them, although, if the lessees had paid the money to the landlords so that the transaction was no longer executory on their part, it seemed that the lessees would not have been able to recover what they had paid.

G **[Editorial Note.** In the present case the pecuniary compensation receivable from the local authority had not in fact been paid to the landlords nor legally assigned to them in such a way that theirs would be the hands to receive it from the local authority. VAISEY, J., indicates that, if the money had been paid to the landlords, probably the lessees could not have recovered it from them. On this point the present case may be compared with *Twyford v. Manchester Corp'n.* ([1946] 1 All E.R. 621) where a plaintiff who had paid sums which could not lawfully have been recovered from him (and thus were paid for no consideration) was held not to be entitled to enforce repayment, although he had himself paid under protest; and see 8 HALSBURY'S LAWS (3rd Edn.) 240. In such cases potior est conditio possidentis.

I For the Law of Property Act, 1925, s. 144, see 20 HALSBURY'S STATUTES (2nd Edn.) 737.

For the Landlord and Tenant Act, 1927, s. 19 (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 904.]

Cases referred to:

- (1) *Waite v. Jennings*, [1906] 2 K.B. 11; 75 L.J.K.B. 542; 95 L.T. 1; 31 Digest (Repl.) 428, 5538.
- (2) *Andrew v. Bridgman*, [1907] 2 K.B. 494; 97 L.T. 432; *affd.* C.A., [1908] 1 K.B. 596; 77 L.J.K.B. 272; 98 L.T. 656; 31 Digest (Repl.) 428, 5543.
- (3) *Haigh v. Brooks*, (1839), 10 Ad. & El. 309; 9 L.J.Q.B. 99; 113 E.R. 119; *affd.* Ex.Ch. sub nom. *Brooks v. Haigh*, (1840), 10 Ad. & El. 323; 113 E.R. 124; 12 Digest (Repl.) 232, 1746.

Action.

The plaintiffs, as owners in fee simple of a shop known as 32 Gallowtree Gate, Leicester, claimed against the defendants, Fleet Electrics, Ltd., lessees of the, said shop, specific performance of an undertaking in writing dated May 22, 1951, signed on behalf of the company by the defendant Greaves, a director of the company, to assign to the plaintiffs the proportion due to the company of compensation moneys recoverable from the Leicester Corporation in respect of the compulsory acquisition by the corporation of the front part of the shop.

Before the hearing proceedings against the defendant Greaves were stayed.

E. M. Winterbotham for the landlords.

D. J. Stinson for the tenants, Fleet Electrics, Ltd.

VAISEY, J.: In this action the plaintiffs, Mr. and Mrs. Comber, are the freeholders of a shop in the city of Leicester known as No. 32 Gallowtree Gate. There are two defendants, Fleet Electrics, Ltd., and Mr. Greaves. Mr. Greaves is one of the directors of the company and all proceedings against him have been stayed. Fleet Electrics, Ltd., are the lessees of the shop under a lease dated Jan. 25, 1949, for a term of twenty-one years from Christmas, 1948, at a rental of £1,000 per year. The lease is in common form and contains a number of covenants on the part of the lessees, of which only two are relevant. First, by cl. 12, the lessees covenant not, without the landlords' consent, to use the demised premises for any purpose other than the carrying on of the business of retail sellers of electrical appliances. Secondly, by cl. 13 the lessees covenant not to assign, underlet or part with possession of the demised premises without the written consent of the lessors. There is no difference for present purposes, in my judgment, between the landlords' consent under cl. 12 and the written consent of the lessors under cl. 13.

Some time after the granting of the lease an improvement to the highway was effected by the corporation of the city of Leicester which involved setting back the front part of the shop some feet. For that setting back, compensation was payable to the extent of £2,000, which was divisible between the landlords and the tenants, Fleet Electrics, Ltd., in equal shares, each being entitled to £1,000.

The tenants were anxious to assign this property to a Mr. Lennard who, if he could obtain an assignment of the lease, wanted to underlet part of the property to a company known as Ward's Hollywood Film Star Shoes, Ltd. It was therefore necessary for the tenants to get the leave of the landlords for two purposes: first, to get their permission to the required assignment; and, secondly, to get their permission for the intended change of user of the property, so that the shop which, under the lease, could only be used for the sale of electrical appliances could be used for the sale of shoes.

The law which governs this matter has, I think, to be considered first from the point of view of the covenant not to assign and, secondly, from the point of view of the covenant which provided for an exclusive kind of user of the property.

The covenant not to assign is dealt with in the Law of Property Act, 1925, s. 144, in these words:

"In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the

A land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

That section replaced an earlier section, s. 3 of the Conveyancing and Law of Property Act, 1892. Its terms are well known and do not give rise to any difficulty of construction or interpretation. That is supplemented by the Landlord and Tenant Act, 1927, s. 19 (1), which provides:

C "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, under-letting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent; . . . "

E Under the Act of 1925, therefore, there is incorporated in the lease a proviso to the effect that no fine shall be payable in respect of the licence and the Act of 1927 provides that the licence is not to be unreasonably withheld. The other enactment which is material in the present case is that which concerns the proposed change of user of the property. That is s. 19 (3) of the Landlord and Tenant Act, 1927. I am bound to say that I find this sub-section extremely difficult to understand. It provides:

F "In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent . . . "

H Under that sub-section, as it seems to me, a landlord, if asked for a licence or consent to the alteration of the user of premises, is perfectly entitled to refuse it. There is no question of a licence not being unreasonably withheld in such a case; but if the landlord gives his licence or consent, then the statute says that no fine shall be payable in respect of such licence or consent. Therefore the landlord must either refuse it or grant it gratuitously. That, apparently, is the case

I "notwithstanding any express provision to the contrary", which may mean provision to the contrary in the lease or may mean express provision to the contrary in some other document. In my judgment that does not allow the landlord and the tenant to put their heads together and agree that, if the tenant pays something, the landlord will give the required licence. It is a provision which interferes fundamentally with the ordinary rights of the subjects of Her Majesty in this country to make contracts in this respect, according to their wishes and inclinations. It is a prohibitory provision which says that no money must pass.

The other view is that the landlord and tenant could ignore the law and agree on a payment. Up to a point, I think that may be right. If money did pass under such a bargain I am very doubtful whether the landlord would be subject to any penalty for having received it, or could be obliged to pay back or account for it in any way; but in this case that is not what happened. What happened was that on May 22, 1951, the lessees signed a document undertaking, in consideration of the landlords' granting, first, the licence to assign, and, second, the licence to underlet and to change the user of the premises, to assign to the landlords their half of the compensation recoverable from the Leicester Corporation. It was in reliance on that undertaking that the landlords, by a document dated May 23, 1951, granted to the lessees the necessary licence, first, to assign the lease to Mr. Lennard, second, to underlet part of the premises to be used as a shoe shop, and, third, to use the shop for the purpose of a ladies' outfitter.

This action is brought by the landlords to enforce the undertaking in question. By this action they call on the lessees to assign their proportion of the compensation pursuant to that undertaking. The lessees refused to do so, originally alleging, first, that the defendant Greaves had no authority to contract on their behalf (that defence being later withdrawn), and, secondly, that the undertaking was unenforceable, however much the lessees had pledged themselves to carry it out.

There is no real dispute about the facts of this case. The lessees plead in effect that they, being entitled to their half of the compensation money, had attempted to assign it to the landlords for no consideration or for a consideration which is void. They claim the benefit of the licence. They say: "We can assign to Mr. Lennard; we can use the property as a shoe shop or ladies' outfitters; but there is no consideration for the undertaking to assign this compensation, and the assignment in that respect is void." There is plenty of authority to show that, if the money had been paid, it could not have been recovered. The matter lies, however, entirely in contract and the question is whether there was consideration to support a contract on which this action could be founded.

I have been referred to several cases. First I would mention *Waite v. Jennings* (1), in which there was an attempt to recover money, and that attempt did not succeed. In *Andrew v. Bridgman* (2), the headnote reads as follows ([1907] 2 K.B. 494):

"Section 3 of the Conveyancing Act, 1892, does not make illegal the demanding of a fine as a condition of giving a licence or consent to the assignment of a lease which contains a covenant against assignment without consent; it merely makes the payment of a fine something not contracted for. The parties to the lease may therefore agree that a fine shall be paid for the granting of the licence."

That case was decided by CHANNELL, J., and his decision was upheld in the Court of Appeal.

The merits of this case on the lessees' side are rather far to seek. These parties were negotiating at arm's length and the lessees were perfectly ready to allow the landlords to receive this money in exchange for the licence which the landlords gave. I was rather tempted to follow the guidance of *Haigh v. Brooks* (3), where there was a promise by the defendant to see certain bills paid at maturity in return for the surrender of a guarantee. There LORD DENMAN, C.J., said (10 Ad. & El. at p. 320):

"... the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise."

I have made up my mind that I ought not to decide the case on that ground and I am afraid that this action fails because this undertaking to assign this money was a nudum pactum; there was no consideration for it. If the document had

- A been executed under seal, the matter would have been different. The lessees' undertaking would, however, have to be implemented by their collecting this money and handing it over to the landlords or by the lessees' releasing their right to the compensation and so permitting Leicester Corporation to hand it over to the landlords, and that seems to me to be as plainly as possible the payment of a fine, or, if it is not a fine, it is money in the nature of a fine. Inas-
- B much as s. 19 (3) of the Act of 1927 and s. 144 of the Act of 1925 prohibit the payment of a fine or anything in the nature of a fine, I do not see how the landlords can succeed in the particular circumstances of this case. I think that it is possible, in spite of the best intentions of the legislature, to circumvent those provisions in many cases, but I do not think that it has been done in this case. If money had passed, I think that it would not be recoverable, but where the
- C landlord, as here, has to come to the court to enforce an agreement which lies at the moment entirely in contract, then I do not see my way to give him the relief which he seeks.

- It may be said that, the lessees having obtained the licence, it is very inequitable that the landlords should not be paid what the tenants had agreed to pay. That is one of the results of s. 19 (3), which was undoubtedly passed with the
- D idea that it is the tenant who has to be protected and the landlord who has to suffer. In any case, I construe it in the way which I have indicated. The landlords could either refuse their consent or they could grant it, but, if they grant it and if they stipulate for the payment of money or money's worth, i.e., for a fine or anything in the nature of a fine, they are contravening what the law says must be implied in the terms of the lease, viz., that no fine or sum of money
- E in the nature of a fine shall be paid for or in respect of any such licence or consent. It does not matter how solemnly the parties engage themselves not to abide by this provision, this provision binds them and must be enforced whatever the consequences be. Therefore the action fails.

Judgment for the defendants.

Solicitors: *Janson, Cobb, Pearson & Co.*, agents for *F. H. Nye & Murdoch*, Brighton (for the landlords); *Kimbers, Williams, Sweetland & Stinson* (for the tenants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

DOLBEY v. GOODWIN. A

[COURT OF APPEAL (Lord Goddard, C.J., Hodson and Romer, L.JJ.), November 8, 1954.]

Fatal Accident—Damages—Assessment—Claim by mother for death of son—Possibility of son's marriage to be taken into account.

In an action under the Fatal Accidents Act, 1846, £3,100 was awarded to the deceased's mother, who was a widow of about fifty-three years of age. At the time of his death the son was living with his mother and was contributing to her support a net weekly amount, after allowing for the cost to her of feeding him, of about £4. He was twenty-nine years old, steady, unmarried and without matrimonial intentions. He was likely to recognise throughout his life his obligations towards his mother. On appeal by the defendant on the ground that the damages were excessive, B

Held: although, if the relationship between the plaintiff and the deceased had been that of husband and wife instead of mother and son, £3,100 would have been a proper sum to award, yet in the circumstances the award would be reduced to £1,500, since there was a strong probability that the son would eventually have married and this and the consequent expectation of reduction in his contribution to his mother's support had not been given sufficient weight. C

Appeal allowed. D

[As to damages under the Fatal Accidents Acts for loss of expectation of pecuniary benefit, see 23 HALSBURY'S LAWS (2nd Edn.) 696, para. 984; and for cases on the subject, see 36 DIGEST (Repl.) 213, 214, 1122-1132. E

For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4.]

Case referred to:

- (1) *Flint v. Lovell*, [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; 36 Digest (Repl.) 200, 1055.

Appeal. F

This was an appeal by the defendant, Frederick Goodwin, from a judgment of CASSELS, J., dated June 18, 1954, in an action brought against the defendant by Edith Maud Dolbey suing as administratrix of the estate of her son, Frederick Charles Dolbey, under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her son. She was awarded £3,100 as damages under the Fatal Accidents Act, 1846, £200 under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, and £37 10s. under s. 2 (3) of the Act of 1934, for funeral expenses. The defendant appealed on the ground that the damages under the Fatal Accidents Act, 1846, were excessive. The facts appear in the first judgment. G

F. W. Beney, Q.C., and R. E. Hopkins for the defendant.

Marven Everett, Q.C., and Sir Shirley Worthington-Evans for the plaintiff, the mother. H

LORD GODDARD, C.J.: This is an appeal from an award of CASSELS, J., who, having found that the plaintiff in the action, the mother of the deceased, was entitled to recover damages under the Fatal Accidents Act, 1846, assessed the damages at £3,100, and gave in addition £237 10s., which was £200 for loss of expectation of life, and £37 10s. for the funeral expenses. I

No objection is raised to the learned judge's assessment of the damages under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, viz., £237 10s., but it is submitted on behalf of the defendant that the award of £3,100 is so excessive that this court ought to interfere.

It has been established in *Flint v. Lovell* (1) and other cases that, where a learned judge has not given precise reasons, or where one cannot see from his judgment exactly what he took into account, so that this court does not know

A whether he took into account something which he ought not to have taken into account or omitted to take something into account which he should have taken into account, this court can only look at the total amount which has been awarded, and from that must come to a conclusion whether the amount awarded is so excessively high or so unreasonably low that it amounts to an erroneous estimate.

B The son seems to have been a very steady fellow, a non-smoker and a non-drinker; he always went home to his mother, and was supporting her. He was twenty-nine years of age, and she was some twenty-five years older. He seems to have been a young man who took a long view, because he gave up some work at which he was earning more money than he was earning at the time of his death in order to qualify himself to take a more responsible position and, no doubt, a better paid one than he had at the time of his death.

C As I have said, the learned judge assessed the damages at £3,100 in the case of this comparatively young man of twenty-nine who was living with his mother, and who, as the other members of the family had left, was paying the rent of the house. Allowing for the cost to her of keeping her son the mother was getting from him the benefit of something like £4 or £4 5s. a week at the time of his death. The moral obligation of the son to keep his mother was very strong, and

D we give full effect to that, but there was no legal obligation on him because, although a woman is bound to support her husband and her children if she can, children are no longer bound to support their parents. That, however, is not a matter which weighs very heavily in the scale, because the son had been, and no doubt would have remained, a good son. This court thinks that if it had been the case of a wife the sum of £3,100 would have been a very proper sum to

E have given, or, at any rate, it would not have been too small a sum to have awarded.

Can we support the award of £3,100 in the case of a mother? Although the son had not married up to this time, there must have been at any rate a very strong chance that he would marry. The more prosperous he became the more probable it would be that he would marry, and, if he had married, no doubt he

F would have given something to the mother, but I expect it would have been very much less than he had given in the past.

This court feels that the learned judge considered this case on exactly the same footing as if he were awarding damages to a widow, and we feel that the sum awarded was excessive in the case of a mother, and is higher than one's experience shows would be awarded in the case of a parent, especially in view

G of the fact that the son might very soon have married, although it appears that he had not any matrimonial intentions at the time of his death.

The court is always reluctant to interfere in these cases, because we know the difficulty that all judges have in coming to a decision. I think it is one of the most difficult tasks that any judge can have. I have often felt that in really serious cases of this kind it is better to have a jury, because the opinion of twelve people

H is probably more satisfactory than the opinion of one.

The court has come to the conclusion in this case that the right sum to have awarded would have been the sum of £1,500 added to the sum of £237 10s., making a total award of £1,737 10s.

HODSON, L.J.: I agree. I share the reluctance expressed by LORD

I GODDARD, C.J., in interfering with an award of damages which has been made by a learned judge who obviously has considered the matter very carefully. The gross figure awarded to the mother of this young man was £3,300 under the Fatal Accidents Act, 1846; that figure was reduced by £200 which was awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, making the net sum awarded £3,100. In addition £37 10s. was awarded for the funeral expenses.

The son was twenty-nine years of age in April, 1952, when he was killed, and the mother was then, I think, fifty-two or fifty-three years old. He was, as

counsel for the respondent emphasised (and I have no doubt the learned judge regarded it as a very important matter), an exceedingly good son who was likely during the rest of his life to recognise the moral obligation to maintain his mother if and so far as she needed it; but the fact remains that he was her son and not her husband. The contribution that he was making at the time of his death was £5 a week, out of which the mother was feeding him, and it is difficult to imagine that the cost of his food can have been as little as £1 a week. The prospect of marriage was, of course, considered by the learned judge. He seems to have discounted that prospect because, according to the evidence, in the past the deceased had not taken much interest in the opposite sex; but I am bound to say I cannot see any reason to discount the prospect of this young man's marriage at all. It seems to me exceedingly likely that he would marry, and when he married, however much the moral claims of his mother might pull on him, yet the claims of his wife, who would be the principal person to share in his prosperity, must come first. If he had succeeded in life, as appears likely, he would, no doubt, have required money for other purposes, to invest in the future as well as for his wife's maintenance, and the mother, in those circumstances, might have received less.

Taking all the circumstances into consideration, I agree with what the Lord Chief Justice has said, that the figure of £3,100 should be reduced to the sum of £1,500, and to that extent I think this appeal must be allowed.

ROMER, L.J.: I agree, and for the same reasons. It appears to me that the learned judge approached this problem rather on the footing that the son was the husband instead of the son of the mother. There is a fundamental distinction between the two. Apart from the point to which my Lord has referred as to the legal liability to maintain, there is, of course, the very real possibility of a son marrying, and I think that, in concluding that at the time of the accident, the son apparently had no intention of ever marrying, the learned judge paid a little too much attention to the fact that this son had arrived at the age of twenty-nine without marrying. It seems to me, nowadays at all events and in the case especially of an ambitious and serious-minded young man, as the son obviously was, one can really attach very little weight to the fact that he was not married at the age of twenty-nine. The son was going through an apprenticeship in the hope of getting a very much better job later, and it may well have been that when that time came he would have decided to marry; and it is to be observed that if the son had in fact married instead of having died, the mother would have received nothing whatever by way of a capital sum, and the expectation of her future pecuniary benefit would, I should think, have been very much less than £4 a week.

Appeal allowed.

Solicitors: *F. J. Stewart & Co.* (for the defendant); *G. Howard & Co.* (for the plaintiff, the mother).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A Re AN INTENDED ACTION, TRUSTEE OF ROUSOU (a
bankrupt) v. ROUSOU AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), March 30, 1955.]

B *Practice—Service—Service out of jurisdiction—Action by trustee in bankruptcy—Quasi-contractual right—Recovery of money given by bankrupt to his children less than three months before date of presentation of petition in bankruptcy—R.S.C., Ord. 11, r. 1 (e).*

Bankruptcy—Property available for distribution—Gift by bankrupt to children within three months before petition—Claim by trustee in bankruptcy to recover property given—Quasi-contractual right—Service of writ out of jurisdiction.

C Less than three months before a petition in bankruptcy was presented against R. by a creditor, R., through his attorney, withdrew a sum of £1,107 which was standing to his credit in a savings account and deposited the sum with a co-operative society in the joint names of his two children. Later, the children withdrew the money from the co-operative society. R. having been adjudicated bankrupt, his trustee in bankruptcy applied under R.S.C., Ord. 11, r. 1, for leave to serve a writ out of the jurisdiction in an intended action against the children, who were living in Cyprus, for recovery of the money on the grounds (a) that the transaction was an act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914, and, therefore, by virtue of s. 37 (1) and s. 38 (a) of the Act, the money was part of the bankrupt's property and vested in his trustee on his bankruptcy; (b) alternatively, that the transaction was a voluntary settlement and, therefore, under s. 42 (1) of the Act of 1914, was void against the trustee in bankruptcy; and (c) that the transaction was a fraudulent conveyance which was voidable by the trustee under s. 172 of the Law of Property Act, 1925.

E **Held:** the present case came within R.S.C., Ord. 11, r. 1 (e), because the trustee in bankruptcy had, prima facie, a quasi-contractual right to repayment of the sum deposited by the bankrupt in the children's names, although the origin of the rights of the trustee in bankruptcy rested on statute; in the circumstances service out of the jurisdiction would be allowed.

F *Bowling v. Cox* ([1926] A.C. 751) applied.

G [As to Service out of the Jurisdiction, see 26 HALSBURY'S LAWS (2nd Edn.) 31, para. 44; and for cases on the subject, see DIGEST (Practice) 343-351, 605-666.

For the Bankruptcy Act, 1914, s. 1, s. 37, s. 38, and s. 42, see 2 HALSBURY'S STATUTES (2nd Edn.) 324, 372, 373, and 379.

For the Law of Property Act, 1925, s. 172, see 20 HALSBURY'S STATUTES (2nd Edn.) 785.]

Cases referred to:

H (1) *Bowling v. Cox*, [1926] A.C. 751; 95 L.J.P.C. 160; 135 L.T. 644; Digest (Practice) 309, 354.

(2) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 35 Digest 167, 8.

Application.

I The trustee in bankruptcy of Panayis Kyriacou Rousou applied under R.S.C., Ord. 11, r. 1, for leave to serve a writ out of the jurisdiction in an intended action against a daughter and son of the bankrupt (both of whom were minors).

The action was intended to be brought for the purpose of obtaining (a) a declaration that the transfer by the bankrupt to the intended defendants on or about June 17, 1951, of the sum of £1,107, or alternatively, the sum of £484 7s. 6d., was void; (b) alternatively, a declaration that the intended defendants held the said sum of £1,107, or, alternatively, the sum of £484 7s. 6d., and the interest accrued thereon in trust for the trustee; and (c) an order that the intended

defendants should pay to the trustee the said sum of £1,107 or, alternatively, A
the said sum of £484 7s. 6d., together with the interest accrued thereon.

In the affidavit in support of the application the trustee said, among other things, that the bankrupt was born in Cyprus and became domiciled in this country in 1935; that the intended defendants were born in England and were domiciled and resident in this country at all material times, and, in particular, were so domiciled and resident on June 17, 1951; that on June 17, 1951, there B
was standing to the credit of the bankrupt and his wife in the book of the church committee funds of the church of Agios Chrissosdiros, Akanthou, Cyprus, sums amounting to £1,107 ls. 6d., being as to £484 7s. 6d. in the name of the bankrupt, and as to £622 14s. in the name of the bankrupt's wife; that, on that date, the bankrupt's attorney, acting on the bankrupt's instructions, withdrew the sum of £1,107 ls. 6d., from the said church funds and deposited a sum of £1,107 with C
the Akanthou Co-operative Credit Society, in the joint names of the intended defendants; that the second intended defendant left England about August, 1951; that the bankrupt was adjudicated bankrupt by an order dated Dec. 5, 1951; that the bankrupt left England about August, 1952, and the first intended defendant left England about September, 1953; and that between June 3 and 6, 1954, the said sum of £1,107 with interest was withdrawn from the Akanthou D
Co-operative Credit Society by the intended defendants, who were accompanied by the bankrupt.

It was submitted by the trustee (a) that the second intended defendant,* being a natural-born British subject, was domiciled within the jurisdiction; (b) that the intended action was founded on a tort committed within the jurisdiction; (c) that the intended action was for the execution (as to property situate within E
the jurisdiction, namely, personal property being part of the property of the bankrupt which, although physically out of the jurisdiction, was deemed to be within the jurisdiction) of the trusts of a written instrument or instruments (namely, s. 42 of the Bankruptcy Act, 1914; further, or in the alternative, s. 172 of the Law of Property Act, 1925), of which the intended defendants were deemed to be trustees for the trustee in bankruptcy, and which trusts ought to be executed F
according to the law of England.

Muir Hunter for the trustee in bankruptcy.

DANCKWERTS, J.: This case is of a rather unusual kind. It is an application by the trustee in bankruptcy of one Panayis Kyriacou Rousou, a bankrupt, for leave to serve a writ out of the jurisdiction. The material dates G
are these. On Aug. 10, 1951, an act of bankruptcy was committed by the bankrupt who carried on some catering business in this country. On Sept. 7, 1951, the petition in bankruptcy was presented by a creditor, and Rousou was adjudicated bankrupt on Dec. 5, 1951. The particular transaction which the trustee desires to attack was carried out by the bankrupt through an attorney, or a person in that position, on June 17, 1951. The bankrupt had a sum of H
£1,107 ls. 6d. in certain church funds which acted like a savings bank. He paid £1,107 of that sum into a co-operative society in the name of his two children. Thereafter the fund in question was withdrawn by the bankrupt's children and, no doubt, has been disposed of by them.

It was submitted on behalf of the trustee in bankruptcy that that transaction, being for the purpose of defrauding the creditors, was an act of bankruptcy I
within the meaning of s. 1 (1) of the Bankruptcy Act, 1914, being "a fraudulent . . . gift, delivery, or transfer of his property, or of any part thereof" within s. 1 (1) (b): that, by virtue of s. 37 (1) of the Bankruptcy Act, 1914, the bankruptcy related back to the earliest act of bankruptcy within three months before the date of the presentation of the petition and, therefore, included this transaction of June 17, 1951; and that by s. 38 (a), the property which belonged to

* The first intended defendant had, apparently, married.

A the bankrupt included "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy . . .". Therefore, so it was submitted, the £1,107 ls. 6d. was part of the property which belonged to the bankrupt and vested in his trustee on his bankruptcy. Alternatively, it was contended on behalf of the trustee that the transaction was a voluntary settlement, and that, therefore, under s. 42 of the Bankruptcy Act, 1914, it was void

B against the trustee in bankruptcy. The trustee has also a third point, namely, that the transaction was a fraudulent conveyance under s. 172 of the Law of Property Act, 1925; that is to say, that it was a conveyance of property with intent to defraud creditors and, therefore, became voidable at the instance of any person thereby prejudiced.

C When the application for leave to serve a writ out of the jurisdiction was made, the case was put forward in the affidavit in support, principally as being either a case of tort, under R.S.C., Ord. 11, r. 1 (ee), or a case of breach of trust under R.S.C., Ord. 11, r. 1 (d). It appeared to me not to come within either of those descriptions and I, therefore, refused leave. Counsel for the trustee, however, persisted in his request for leave to serve out of the jurisdiction and, accordingly, I directed the case to be set down in court for the purposes of

D argument. That has resulted in a very helpful and useful argument from counsel for the trustee on the law relating to this subject.

Counsel puts his case under three of the sub-rules contained in R.S.C., Ord. 11, r. 1, namely, sub-rr. (d), (e) and (ee). Sub-rule (ee) provides for the case where the action is founded on a tort committed within the jurisdiction. Sub-rule (d) applies where:

E "The action is . . . for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England."

F Sub-rule (e) provides for the case where:

"The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—(i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal

G trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law . . ."

It seems to me that the claim of the trustee is one which is entirely statutory in its origin, whichever of the three ways the trustee puts it. It is either a claim under s. 1 (1) (b) of the Bankruptcy Act, 1914, and the accompanying provisions of s. 37 and s. 38 of that Act; or it is a claim under s. 42 of the Bankruptcy Act, 1914, which requires a settlement to be set aside; or it is a claim under the Law of Property Act, 1925, s. 172, which follows and re-enacts the position as stated in the Statute 13 Eliz. 1 c. 5, which gave persons who were injured by fraudulent transactions on behalf of another person the right to have the transaction set aside. Therefore, it seemed to me at first sight that this had very little, if any-

H thing, to do with the law of contract. The rights given to the trustee were in each case rights arising under some statute. Counsel for the trustee has, however, satisfied me by reference to the authorities that, by reason of the nature of the transaction which was carried out, the trustee in bankruptcy became and is entitled, subject to anything which may arise in the action, to have the sum of £1,107 paid over to him. It is a claim which appears to be recognised by the courts as a right of a quasi-contractual nature. For that purpose, counsel referred me to *Bowling v. Cox* (1) and *Sinclair v. Brougham* (2) ([1914] A.C.

I

at pp. 414, 415, 417, per VISCOUNT HALDANE, L.C.; at p. 433, per LORD DUNEDIN; and at pp. 452, 454, per LORD SUMNER). It appears from those cases that the court has evolved a right which enables a claimant to sue in an action of contract when a sum of money which really ought to be paid to him is in the hands of another person. Counsel has quoted, as an analogous case with regard to the bankruptcy law, the very common case where a payment is set aside as a fraudulent preference. Although the Bankruptcy Act refers merely to a fraudulent preference* and says nothing about repayment, orders for payment to the trustee of any sum so paid are frequently made.

I am satisfied, at any rate for the purposes of a prima facie case, that this case may be brought within that principle, so that there may well be some quasi-contractual right in the trustee in bankruptcy to recover this sum of money from the persons who have acquired it from the bankrupt. *Bowling v. Cox* (1) is of particular interest because that was a case where leave to serve out of the jurisdiction was given in a bankruptcy case on such a quasi-contract. In that case, the bankruptcy was much earlier than the transaction in question, the money having been received by an attorney of the executor of the bankrupt and paid away by him. It was claimed that the creditors had not been fully satisfied and that there had been a receipt of the money by the executor outside the jurisdiction of the court which would otherwise have been concerned with the matter. It seems to me, therefore, that the present case is one in which the trustee has brought himself within the terms of R.S.C., Ord. 11, r. 1 (e), and I may properly allow service out of the jurisdiction of the writ in question. An order, accordingly, will be made giving leave to serve out of the jurisdiction.

Order accordingly.

Solicitor: *Sidney Pearlman* (for the trustee in bankruptcy).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

* See, for example, s. 1 (1) (c) and s. 44 of the Bankruptcy Act, 1914; 2 HALSBURY'S STATUTES (2nd Edn.) 324, 381; and, as regards the power to order repayment, 2 HALSBURY'S LAWS (3rd Edn.) 560, para. 1109.

A
SCHNEIDER v. LEIGH.

[COURT OF APPEAL (Singleton, Hodson and Romer, L.JJ.), March 15, 30, 1955.]

B
Discovery—Privilege—Production of documents—Medical report—Report prepared for action for personal injuries—Report alleged by plaintiff to be libellous of him—Action for libel—Whether report privileged in libel action.

On Dec. 22, 1952, the plaintiff was injured by a motor car driven by an employee of the P. Co. and subsequently issued a writ against the P. Co. claiming damages for personal injuries.

C
On Jan. 1, 1954, the defendant, who was a doctor, made a medical examination of the plaintiff on behalf of the P. Co. in connection with the company's defence in the action and duly made a report of the examination. On Feb. 4, 1954, the solicitors of the P. Co. wrote to the plaintiff's solicitors including in their letter two paragraphs of the defendant's medical report. On Mar. 11, 1954, while the action against the P. Co. was still pending, the plaintiff brought an action against the defendant claiming damages for libel alleged to be contained in the medical report. The plaintiff applied in his libel action against the defendant for production and inspection of the defendant's report, and the defendant claimed privilege from disclosure on the ground that the medical report came into existence in respect of the plaintiff's claim for damages against the P. Co. and in contemplation of litigation on that claim. It was conceded that the medical report was privileged from production by the P. Co. in the plaintiff's action against that company. DE
Held (SINGLETON, L.J., dissenting): the privilege from production attaching to the medical report was that of the P. Co.; and, although the privilege extended to successors in title of a litigant entitled to the privilege (*Minet v. Morgan* (1873) (8 Ch. App. 361), and *Calcraft v. Guest* ([1898] 1 Q.B. 759) considered), it did not extend so as to protect the defendant, who was not a successor in title of the P. Co., against giving discovery in a separate action brought against him and founded on a different cause of action. FObservations of SIR GEORGE JESSEL, M.R., in *Wheeler v. Le Marchant* (1881) (17 Ch.D. at p. 682) applied.

Appeal allowed.

G
[As to privilege against production in respect of medical reports prepared for the purpose of advice in connection with pending litigation, see 10 HALSBURY'S LAWS (2nd Edn.) 390, para. 471 text and note (q); and for cases on the subject, see 18 DIGEST 140, 894 et seq.]H
As to privilege against production extending to subsequent actions, see 10 HALSBURY'S LAWS (2nd Edn.) 393, para. 474 text and note (d); and for cases on the subject, see 18 DIGEST 122, 718 et seq.]

Cases referred to:

- I
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- (1)
- Wheeler v. Le Marchant*
- , (1881), 17 Ch.D. 675; 50 L.J.Ch. 793; 44 L.T. 632; 45 J.P. 728; 22 Digest (Repl.) 412, 4438.
-
- (2)
- Calcraft v. Guest*
- , [1898] 1 Q.B. 759; 67 L.J.Q.B. 505; 78 L.T. 283; 22 Digest (Repl.) 211, 1976.
-
- (3)
- Minet v. Morgan*
- , (1871), L.R. 11 Eq. 284; 23 L.T. 280; 24 L.T. 120; subsequent proceedings, (1873), 8 Ch. App. 361; 13 Digest 37, 417.

Appeal.

The plaintiff appealed from an order of DONOVAN, J., in chambers dated Feb. 22, 1955, whereby he refused to the plaintiff discovery and inspection of documents for which the defendant claimed legal professional privilege.

The facts appear in the first judgment.

C. L. Hawser for the plaintiff.

E. B. McLellan (with him *N. G. L. Richards*) for the defendant.

Cur. adv. vult.

Mar. 30. The following judgments were read.

SINGLETON, L.J.: This appeal raises questions on discovery and inspection of documents in an action in which the plaintiff claims damages for libel against the defendant, Dr. Leigh. The defamatory matter is alleged to be contained in a report from Dr. Leigh to the solicitors for the defendants in another action. The report is said to have been written and published in January or February of 1954.

The plaintiff, Mr. Schneider, was injured in an accident on Dec. 22, 1952, and he claimed damages against the employers of the driver of the motor car, namely, Pedigree Stock Farm Developments Co., Ltd. The solicitors for the defendants in that action were Messrs. William Charles Crocker, acting, no doubt, for an insurance company. Some time towards the end of the year 1953 Messrs. Crocker instructed Dr. Leigh to make a further examination of Mr. Schneider. The examination was made on Jan. 1, 1954, and it is said that in his report to Messrs. Crocker, or to the insurance company, Dr. Leigh published matter defamatory of the plaintiff. For some reason which I do not understand, Messrs. Crocker, in their letter to the plaintiff's solicitors of Feb. 4, 1954, set out two paragraphs of Dr. Leigh's report. I will read the letter in full. It is addressed to Messrs. Israel, Joslin & Co. and dated Feb. 4, 1954. The reference number is given, and the letter reads as follows:

"As you know, Dr. Denis Leigh made a further examination of your client Mr. Abraham (Alfred) Schneider at St. Ann's Hospital, Canford Cliffs, Bournemouth on Jan. 1, 1954, in the presence of Doctors Taylor and Parfitt, and his report thereon has been shown to our clients who have instructed us forthwith to bring this matter to a head. We quote, for your information, part of this report: 'I then asked Schneider what he would do if I recommended that he go back to work at once. He replied that he would do, but that he would need three secretaries, a chauffeur and sundry other bodies to do the work he formerly carried out single handed, because he would be unable to do the work himself. I then asked him how long he thought it would be before he recovered, and he stated that he could wait fifty or sixty years if necessary. His demeanour during this interview was almost a caricature—lying in bed smoking a cigar in his private single room, the picture of comfort, with his radio and photographs. He was cocksure, arrogant and self-opiniated.' It is our medical evidence that if your client had gone back to work within a few days of receiving the slight bump on the head in the accident of December, 1952, he would have forgotten all about the matter forthwith and would have suffered only a few pounds worth of damage. Instead he has chosen for many months to live in luxurious idleness at St. Ann's Hospital and he still shows no sign whatsoever of making any attempt to diminish his damages. From this interview of Jan. 1, 1954, and from earlier interviews with doctors examining him on behalf of our clients, it is abundantly clear that he has every expectation of living in luxury at the expense of our clients for many years to come. We have let the matter go this far because it has been stated that his own medical advisers have agreed to and advised the course he has taken. We must now inform you that such advice will be strongly contested, and that our clients have no intention whatever of paying one penny piece to your client for any reputed loss caused by further idleness. Our clients have endeavoured to put aside their indignation at his behaviour and to view the measure of damage in an impartial way and though they dislike doing so, they are prepared to offer and do offer now a total sum of £2,500 (two thousand five hundred pounds) to your client in full and final settlement of

A any claim he may have against our clients. If this offer is not accepted within fourteen days, we hope you will understand that any proceedings brought in the future by your client will be strongly contested, for it is their view on the medical evidence that your client should at least have attempted to work many many months ago."

B Messrs. Crocker were the solicitors on the record for the defendants, Pedigree Stock Farm Developments Co., Ltd. It may be that their instructions, whatever they were, came from the insurance company. The plaintiff's solicitors, Messrs. Israel, Joslin & Co., showed the letter to their client. In the result, the plaintiff's solicitors on his behalf commenced this action against Dr. Leigh, claiming damages for libel in Dr. Leigh's report. It is alleged that the two paragraphs
C are defamatory of the plaintiff, and that Dr. Leigh was guilty of malice. The material allegations are set out in paras. 3 and 4 of the statement of claim, and I do not think it is necessary that I should read them.

By his defence Dr. Leigh claims privilege, while not admitting that he wrote or published that of which complaint was made. The claim of privilege arises in the litigation between the plaintiff and Pedigree Stock Farm Developments Co., Ltd. The solicitors for that company asked Dr. Leigh to examine the
D plaintiff and to report to them. Dr. Leigh did so. The document which came into existence was something obtained by the solicitors for a party to litigation, or to anticipated litigation, for the purpose of meeting or resisting the claim, and, prima facie, the occasion of publishing it was a privileged occasion and the document is privileged. The privilege is the privilege of the defendants in that litigation, namely, the company.

E The plaintiff now seeks discovery and inspection of the whole of the report of Dr. Leigh and of other documents which have passed between him and the solicitors for the company. This action was commenced on Mar. 11, 1954. We were not informed as to what the position is in regard to the plaintiff's claim for damages for personal injuries, although a writ had been issued in September, 1953.
F It is obvious that the defendants to that claim may be put into considerable difficulty if, as the result of the letter of Feb. 4, 1954, the report, or reports, of the witness have to be disclosed in this action.

On behalf of the plaintiff it is submitted that the letter of Feb. 4 amounts to a withdrawal of privilege in respect of the report of Dr. Leigh. I am unable to see that this is so. There is no statement to that effect; the mere recital by
G solicitors to the solicitors on the other side of a part of a report does not mean that their clients had authorised them to waive the question of privilege—entirely apart from the question whether the letter was written on behalf of the defendant company or of the insurance company, by whom, presumably, the making of an offer was authorised. Dr. Leigh, in his list of documents, disclosed, under Sch. 1, part 2, letters and copies of letters passing between himself and
H Messrs. William Charles Crocker and his notes and reports of his examinations of the plaintiff, and he claims that those documents are privileged on the grounds set out in para. 2. This is the basis of the claim:

"The said defendant objects to produce the documents set forth in the second part of first schedule hereto on the grounds that those numbered 1, 2 and 3 are, as appears from their nature and description, privileged from
I production, and as to those numbered 4, these consist of instructions by Messrs. William Charles Crocker, solicitors, to the defendant to carry out examinations of the plaintiff on behalf of their clients Pedigree Stock Farm Developments Co., Ltd., and/or the Alliance Assurance Co., Ltd. with whom the said Pedigree Stock Farm Developments Co., Ltd. were insured, and the defendant's replies thereto and the defendant's notes and reports on his examinations of the plaintiff, and which letters, notes and reports came into existence and were made in respect of a claim for damages by the plaintiff against the said Pedigree Stock Farm Developments Co., Ltd. and in

contemplation of litigation therein, for the purposes of obtaining for and furnishing to the solicitors to the said Pedigree Stock Farm Developments Co., Ltd. evidence and information for the use of the said solicitors to enable them to conduct the defence to the said action and to advise the defendants and their insurers therein."

The plaintiff claims that all those documents should be produced for inspection as the privilege does not exist for Dr. Leigh, but is the privilege of Pedigree Stock Farm Developments Co., Ltd. Both the master and DONOVAN, J., declined to make an order for inspection. The plaintiff appeals to this court.

This branch of the law of privilege is for the purpose of enabling a litigant, or a party to an impending litigation, to prepare his case. Statements must be taken, and sometimes reports must be obtained. Prima facie they are the subject-matter of privilege. The privilege is that of the litigant, but it enures for the benefit of the one who makes the statement or report. If it did not, the difficulties in litigation would be almost impossible. Who would make a statement to a solicitor if he was faced with the risk of an action for libel by the opposite party? It is not so much the fear of the result, but the worry of proceedings, which would deter potential witnesses from giving statements. A statement so given should, generally speaking, be regarded for this purpose in the same light as if it was given in court. In *Wheeler v. Le Marchant* (1) SIR GEORGE JESSEL, M.R., said (17 Ch.D. at p. 681):

"The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently."

There has been no waiver of the privilege which is claimed, and the court is not concerned with what might happen if it had been waived. SIR NATHANIEL LINDLEY, M.R., said in *Calcraft v. Guest* (2) ([1898] 1 Q.B. at p. 761):

"I take it that, as a general rule, one may say once privileged always privileged."

It was suggested by counsel for the plaintiff that the court might make an order for discovery and inspection to take place after the action for damages for personal injuries had ended. I do not know that any such suggestion was made to DONOVAN, J., against whose order this appeal is made. In any event, I do not consider that any such order should be made in this unusual case. So far as I know, there is no precedent for it. It would be a kind of threat hanging over one who is expected to be a witness in the action for damages for personal injuries. The plaintiff commenced this action, and appears to have let the other action lie. To make an order of the kind now suggested would be a departure from the recognised practice, and would have the effect of deterring potential witnesses from giving statements to solicitors whose clients were concerned in, or faced with, litigation. I would dismiss the appeal.

HODSON, L.J. : This is an appeal from an order of DONOVAN, J., made in chambers on Feb. 22, 1955, by which he refused the plaintiff inspection of certain documents disclosed in part 2 of the defendant's list of documents, and gave leave to appeal. [HIS LORDSHIP briefly reviewed the facts leading to the claim of privilege and read the claim of privilege as to the documents numbered 4 which is set out at p. 175 ante, and continued:] The claim to privilege from production is thus based on what is called "legal professional privilege", the

A scope of which is stated by SIR GEORGE JESSEL, M.R., in *Wheeler v. Le Marchant* (1) (17 Ch.D. at p. 681):

B “The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently.”

C It is conceded by the defendant that the medical reports which form the basis of the libel action were brought into existence in contemplation of the action brought by the plaintiff against the company, and that privilege from production accordingly attaches to the company in the proceedings taken by the plaintiff against it. The question is whether the privilege from production extends beyond the company so as to protect the defendant in separate proceedings brought against him, although the privilege is not his, but that of the company.

D It is essential to bear in mind that the privilege is the privilege of the litigant, accorded to him in order that he may be protected in preparing his case, and not the privilege of his witnesses as such. The litigant can waive the privilege if he chooses, and if he does so the proofs of his witnesses can be shown to the opposing party without the witnesses having any ground for complaint. What is being sought here is in effect to extend the umbrella of the protection which the privilege gives the company to the defendant, who is, on the hypothesis that he is the author of the libel, to be looked at for the purpose of this application as a proposed witness on behalf of the company. In this capacity not only has he no privilege of his own, but he is under no duty to assert the right of the company to resist the production of any documents.

E I have emphasised that the privilege is the privilege of the company. This statement is subject to the qualification that the privilege enures for the benefit of successors in title to the party to an action, at any rate, where the relevant interest subsists (see *Minet v. Morgan* (3)). It has been argued for the defendant, however, that the privilege is not limited to the original litigant, that is to say, the company and its successors in title, reliance being placed on a passage in the notes to R.S.C., Ord. 31, r. 1, in the ANNUAL PRACTICE (1955), at p. 498, which reads as follows:

G “This (the litigation) need not be the litigation in which the discovery is being sought, but may be other litigation, either with the same or other persons, and either involving the same or different subject-matter or questions, for as a general rule ‘once privileged always privileged’.”

H Authority for this note is that of SIR NATHANIEL LINDLEY, M.R., in *Calcraft v. Guest* (2) ([1898] 1 Q.B. at p. 761) who said:

I “Now, as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of *Minet v. Morgan* (3), and that if there are any documents which were protected by the privilege to which I am alluding that privilege has not been lost. I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are held and have not been destroyed does not amount to a waiver of the privilege.”

I think that the note in the ANNUAL PRACTICE (supra) states the proposition too widely. SIR NATHANIEL LINDLEY, M.R., was dealing with documents which had attached to them professional privilege in previous proceedings in which the predecessor in title to the plaintiffs in the action then before the court was

involved. The headnote to the case correctly summarises the facts and the decision on this point ([1898] 1 Q.B. 759):

“The defendant in an action to try a right of fishery, after judgment had been given for the plaintiff, accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter, which action was defended at the cost of a predecessor in title of the plaintiff’s. The plaintiff obtained possession of the documents after copies of them had been taken by the defendant. The defendant having appealed:—*Held* (1) following *Minet v. Morgan* (3) (1873) (8 Ch. App. 361), that the documents remained privileged.”

SIR NATHANIEL LINDLEY, M.R., was, I think, intending to do no more than follow the decision in *Minet v. Morgan* (3), which also dealt with privilege from production in a case of a successor in title. His language must be read in the light of the facts with which he was then dealing, and does not, when properly understood, lend support to the wide proposition contended for by the defendant, Dr. Leigh, in this action.

This view is not, in my opinion, open to the objection that it exposes witnesses in legal proceedings to an undue risk of proceedings for libel. The law already provides the protection necessary to a witness whose proof is taken for the purpose of litigation, since the occasions on which statements are made in such cases are privileged. Whether the privilege is absolute or qualified is one of the matters raised in the action. Accordingly, I express no opinion on it. Counsel for the plaintiff has stated on behalf of his client that if the appeal is allowed he consents to an order for inspection to take effect only when the action against the company has been disposed of, so that there will be no question of interference with the company’s privilege. I would allow the appeal and make an order in terms giving effect to the consent given by counsel for the plaintiff.

ROMER, L.J. : The facts which are relevant to our decision on this appeal have been stated in the judgments which my brethren have delivered, and I will not repeat them.

There is no doubt but that the report which, as the plaintiff alleges, was made by the defendant was (if in fact made) brought into being for the purposes of Pedigree Stock Farm Developments Co., Ltd., in connection with actual or anticipated litigation between that company and the plaintiff. The report was, accordingly, a privileged document, and the company could not be compelled to produce it for the plaintiff’s inspection; nor could they be compelled to produce correspondence or other communications between the company or its solicitors and the defendant which resulted in, or were consequent on, the making of the report. The defendant, however, seeks to say that because of the privilege which exists in that action (which, we were told, is now pending) he cannot be compelled to produce the documents for the plaintiff’s inspection in the present proceedings. In order to establish this claim the defendant must show, as it seems to me, either that the privilege in the first action is one which he as well as the company can assert, or that he at least has such an individual right to share in the protection which the privilege affords to the company that the latter cannot waive the privilege without his consent. In my judgment, however, neither of these views is capable of being sustained. The privilege which exists in the first action is, in my opinion, that of the company and of no one else; and the company can at any time waive the privilege without the defendant’s consent and, indeed, without any reference to him at all.

Counsel for the defendant did not shrink from contending before us (and he was logically bound so to contend) that in any action brought against the defendant at any future time by any plaintiff he could not be compelled to produce the documents in question because of the privilege which exists in relation to them in the action against the company—and even though that action had long since

A been brought to a conclusion. In support of this submission counsel founded himself primarily on the observations of SIR NATHANIEL LINDLEY, M.R., in *Calcraft v. Guest* (2). Those observations, however, cannot be legitimately divorced from the issue to which the Master of the Rolls was addressing his mind, namely, whether or not the privilege of a litigant extends to his successor in title. This court, following *Minet v. Morgan* (3), held that it does, but I am
B unable to attribute to the Master of the Rolls' observations the wide effect for which counsel contends; and I respectfully agree with HODSON, L.J., in thinking that the note on this subject which appears in the ANNUAL PRACTICE (1955), at p. 498, goes further than is warranted by *Calcraft's* case (2) or any other decision.

C The protection of privilege in relation to discovery extends only to a litigant and his successors, and, in my opinion, it would be both dangerous and unwarranted to extend it so far beyond the limits which have been established by previous authority as the defendant invites us to do. In *Wheeler v. Le Marchant* (1) the defendants sought to protect from production letters which had passed between their solicitor and their surveyors before the dispute which led to the litigation arose. The Court of Appeal rejected this attempt, and in the course of his judgment SIR GEORGE JESSEL, M.R., said (17 Ch.D. at p. 682):

D "It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants . . . It seems to me we ought not to carry the rule any further than it has been carried. It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety. That
E rule does not, in my opinion, require to be carried further . . ."

F The defendant asks us in the present case to carry the rule which has been evolved for the protection of litigants further than it has ever, so far as I am aware, been carried before by bringing within its scope not only the litigant himself, but also his prospective witnesses; so that any witness who has been approached by the litigant for a report, and has given it, can claim protection in respect of the contents of the report if he himself becomes a party to subsequent and wholly independent proceedings. For my part I feel quite unable to accept the invitation and (subject to giving effect to the concession which counsel for the plaintiff offered for the benefit of Pedigree Stock Farm Developments Co., Ltd. and to which HODSON, L.J., has referred) I would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Israel, Joslin & Co.* (for the plaintiff); *Le Brasseur & Oakley* (for the defendant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

LONDON COUNTY COUNCIL *v.* WILKINS (VALUATION OFFICER).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.),
March 29, 30, 1955.]

Rates—Rateable occupation—Temporary structures—Builders' huts assembled and used on building site—Whether chattels or part of rateable hereditament.

The London County Council owned land on which, under a written contract with the council dated March, 1950, a firm of building contractors agreed to erect a school. The contract provided for the completion of the work within twelve months of the date of the order to commence given by the architect, who was given rights of access to the site and to the contractors' workshops. In January, 1950, temporary structures for the use of persons connected with the builders and for storage purposes were erected on the site, comprising the following: (i) A general foreman's and timekeeper's office, which was a sectional hut, with a wood roof covered by tarred felt, and a wood floor standing on sleepers, having an area of 114 square feet. This was used only for work in connection with the building of the school. (ii) A cement store, having corrugated iron sides and roof, resting on a concrete floor. Its area was 126 square feet and it was used solely for the storage of cement. (iii) Canteen and store, which was a wooden sectional hut with wood roof, covered with tarred felt, and a wood floor, standing on the site of an old roadway or playground. Its area was 445 square feet. It contained forms and a table. Electric light was laid on, and there was a stove, for heating water, fixed in one corner, with a pipe through the roof. (iv) Plumbers' store, made of corrugated iron, also standing on the site of a roadway or playground. It had an area of ninety-six square feet, and was used solely for the storage of plumbers' goods. All the huts were locked each night by the contractors, who kept the keys. None of the huts was fixed to the ground but all rested on the ground only by their own weight. The structures were assembled from component parts brought to the site which did not have the character of huts and were not capable of being occupied until they were assembled; when the time came for their removal the structures were dismantled into their component parts. Three huts were removed in June, 1951, and the fourth in September, 1951. A proposal was made to add the four structures to the rating valuation list. On the question of their rateability,

Held: (i) the structures were in the rateable occupation of the building contractors because (a) the contractors were in actual possession of them; (b) that possession was exclusive for the particular purposes of the contractors; (c) the possession or occupation of the structures was of benefit and value to the contractors; and (d) the contractors' possession was of a sufficient degree of permanence.

John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee ([1949] 1 All E.R. 224) followed. *Westminster Corpn. v. Southern Ry. Co.* ([1936] 2 All E.R. 322), *R. v. St. Pancras Assessment Committee* (1877) (2 Q.B.D. 581), and *Mitchell Brothers v. Worksop Union Assessment Committee* (1904) (92 L.T. 62) considered.

(ii) the structures, when assembled, lost the character of chattels that the component parts from which the structures were assembled had borne, and became and while assembled remained part of the hereditament for rating purposes.

Assessor for the City of Glasgow v. Gilmartin (1920 S.C. 488), and dictum of LORD WRIGHT, M.R., in *Westminster Corpn. v. Southern Ry. Co.* ([1936] 2 All E.R. at p. 348) applied.

Appeal dismissed.

A [As to the elements of rateable occupation, see 27 HALSBURY'S LAWS (2nd Edn.) 351, para. 782; and for cases on the subject, see 38 DIGEST 426-430, 440, 450, 451, 10-17, 27-46, 113-117, 174-181.]

Cases referred to:

- B (1) *Laing (John) & Son, Ltd. v. Kingswood Assessment Area Assessment Committee*, [1948] 1 All E.R. 943; [1948] 2 K.B. 116; *affd.* C.A., [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 2nd Digest Supp.
- (2) *R. v. St. Pancras Assessment Committee*, (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; sub nom. *Willing v. St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; 38 Digest 423, 5.
- C (3) *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.
- (4) *Electric Telegraph Co. v. Salford Overseers*, (1855), 11 Exch. 181; 24 L.J.M.C. 146; 25 L.T.O.S. 166; 19 J.P. 375; 156 E.R. 795; 42 Digest 897, 73.
- D (5) *Mitchell Brothers v. Worksoop Union Assessment Committee*, (1904), 1 Konst. Rat. App. 181; 92 L.T. 62; 69 J.P. 53; 38 Digest 424, 6.
- (6) *Holland v. Hodgson*, (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 31 Digest (Repl.) 206, 3376.
- (7) *Wiltshier v. Cottrell*, (1853), 1 E. & B. 674; 22 L.J.Q.B. 177; 20 L.T.O.S. 259; 118 E.R. 589; 31 Digest (Repl.) 202, 3333.
- E (8) *D'Eyncourt v. Gregory*, (1866), L.R. 3 Eq. 382; 36 L.J.Ch. 107; 31 Digest (Repl.) 201, 3322.
- (9) *Assessor for the City of Glasgow v. Gilmartin*, 1920 S.C. 488; 57 S.C.R. 224; 1 S.L.T. 191.
- (10) *Woodward (V. O.) v. Brading & Blundell, Ltd.*, (1951), 44 R. & I.T. 758.

Case Stated.

F Case Stated by the Lands Tribunal (SIR WILLIAM FITZGERALD, President, and C. H. BAILEY, Esq.) by which the London County Council appealed against a decision of the tribunal made on Nov. 1, 1954, dismissing an appeal by the London County Council against the decision of the local valuation court for North East London by which it was directed that a hereditament consisting of contractors' huts should be added to the valuation list for the Stepney Metropolitan Borough Rating Area. The facts are fully stated in the judgment of JENKINS, L.J.

G. D. Squibb and Lord Croft for the London County Council.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

SIR RAYMOND EVERSHED, M.R. : I will ask JENKINS, L.J., to deliver the first judgment.

H JENKINS, L.J. : This is an appeal by the London County Council, on a Case Stated by the Lands Tribunal, from a decision of the tribunal to the effect that a hereditament described as "offices, stores and canteen, etc." situate at Walker Street school site in the occupation of F. R. Hipperson & Son, Ltd. (referred to in the Case as "the contractors") should be added to the valuation list for the Stepney Metropolitan Borough Rating Area at a gross value of £35 and rateable value of £24.

I The structures to which I have referred were temporary wooden or corrugated iron buildings of the kind commonly found on building sites where work is in progress and used by the building contractors for the convenience of their men and the storage of their materials while the work is in progress. The contract under which the building operations here in question were carried out was dated Mar. 30, 1950, and the contract was for erecting a school on the Walker Street school site.

The matters in dispute in the present appeal are somewhat ancient history. As I have said, the contract was dated as long ago as Mar. 30, 1950. In pursuance or in anticipation of that contract, the site was handed over to the contractors on Dec. 12, 1949, and the disputed structures (if I may so call them) were brought on the site in or about January, 1950. The building has long since been completed. I understand that the operations took approximately a year, and the temporary structures have long since been dismantled and removed, their removal having taken place in three of the material cases in June, 1951, and in the fourth material case in September, 1951. Nevertheless, the question is no doubt one of some general importance to building owners and to contractors—probably of more importance to the former, for presumably any liability to rates that the contractor might be under would as a rule be passed on to the building owner **as part of the cost of the work.**

It is necessary to refer in some detail to the description in the Case of these various structures. The first one listed is:

“A. General foreman’s and timekeeper’s office. Wooden sectional hut with wood roof covered by tarred felt, wood floor on sleepers. Dimensions, nine feet by twelve feet nine inches, area 114 square feet. Dismantled early in September, 1951. If assessed separately gross value attributable was £4.”

The next item, “B”, I need not trouble with: that was an office provided, in the form of one of these temporary buildings, for the London County Council’s clerk of works, and it has been agreed that this office should not in any case be included. The next items are:

“C. Cement store. Corrugated iron sides and roof with concrete floor. Dimensions: nine feet by fourteen feet, area 126 square feet. Dismantled on June 30, 1951. If assessed separately gross value attributable was £5.

D. Canteen and store. Wooden sectional hut with wood roof covered by tarred felt, wooden floor, standing on old roadway or playground site. Dimensions fourteen feet ten inches by thirty feet, area 445 square feet. Dismantled on June 30, 1951. If assessed separately the gross value attributable was £17.

E. Plumbers’ store. Corrugated iron sides and roof, standing on old roadway or playground site. Dimensions eight feet by twelve feet, area ninety-six square feet. Dismantled on June 30, 1951. If assessed separately the gross value attributable was £3.”

The effect of excluding the London County Council’s clerk of works’ office was to reduce the gross and net values referred to earlier in the Case to £29 and £20 respectively. The Case amplifies the description I have given of these various temporary structures in this way. As to the general foreman’s and timekeeper’s office,

“This was where the general foreman kept his drawings and the timekeeper his books. One or two implements, a theodolite and various odds and ends of builders’ materials, were stored here. The office was not used for anything except work in connection with building the school. It was moved once during the course of building operations from one position to another on the building site.”

The cement store: “This was used solely for the storage of cement”. The canteen and store:

“This contained forms and a table; electric light was laid on; and there was a stove fixed in the corner, with a pipe through the roof, for heating water and for tea. There were no other cooking facilities, and no food was provided there.”

The plumbers’ store: “This was used solely for the storage of plumbers’ goods”. The implements, builders’ materials and cement to which I have

A referred "were brought on to the building site solely for the purposes of the said contract." Earlier in the Case it is stated that the huts

"were erected on the actual building site, no particular area of which was set aside for that purpose. The contractors chose where to erect each of the said huts on the building site."

B The final matter of fact to which I should refer is that according to the Case the huts

"were locked by the contractors each night and the keys were kept by the contractors' foreman. The clerk of works could demand admission to the said huts at any time but as the keys were in the possession of the contractors he could only enter the said huts when admitted by the foreman or other employee of the contractors."

D The points to notice as to the character of these structures are that two of the four were huts of the kind known as "wooden sectional huts", while the two others had corrugated iron sides and roofs. The general foreman's and time-keeper's office had a wood floor on sleepers, the sleepers resting on the ground so that the building stood on the ground by its own weight. The cement store had a "concrete floor", and I understand that to mean that it was standing on the concrete floor and not actually attached to it. The canteen and store was "standing on an old roadway or playground". That again, I think, means standing by its own weight; and the standing of the plumbers' store is similarly described.

E I should next refer to some of the provisions of the contract of Mar. 30, 1950, as these were relied on by counsel for the London County Council. Paragraph 2 provides for the carrying out of the work in accordance with the specifications and so on, at a price of £83,000 odd. Paragraph 10 (to put it shortly) gives the architect various rights of entry and access to the site and to the contractor's workshops and so forth. Under para. 11 the contractor, except as otherwise stipulated, has to "provide and bear the expense of all materials, plant, labour"

F and so forth, required "for properly executing the works". Paragraph 14 provides:

G "The council expressly reserves to itself the right to occupy for its own purposes at any time, and for so long a time, as the architect may (by notice in writing to the contractor) require, any part or parts of the site of the works, whether work is in progress or not, and to employ thereon agents and workmen in the execution of matters not the subject of this contract."

By the same paragraph it is provided that the contractor shall not obstruct such agents and workmen and shall provide them with reasonable access, and so on.

H Then by para. 18:

"Unless otherwise directed, the contractor shall commence the works within three days after the date of the order to commence given in writing by the architect, and shall complete the same within the period limited in that behalf in the said specification."

I Paragraph 20 includes this provision:

"The council will, with the architect's written order to commence the works, give to the contractor the use of so much of the site as may, in the opinion of the architect, be required in order to enable the contractor to commence and continue the execution of the works, and will from time to time, as the works proceed (but subject as aforesaid) give the contractor the use of such further parts of such site as the architect may from time to time consider proper in that behalf."

There are a number of paragraphs in the attached specification to which reference should be made, these paragraphs being in a part of that document called "Preliminary" which seems to set out again in different language, and sometimes apparently with a rather different effect, several of the matters already provided for in the body of the contract itself. Paragraph 6 provides:

"The contractor will be allowed to use for the execution of the works and for the storage of materials, etc., the area shown by pink colour on the said site plan."

The "said site plan" appears to show coloured pink the entire site for the erection of the school. Paragraph 8:

"The whole of the site (indicated by pink colour on the said site plan) will be made available for the contractor's use immediately upon the issue of the order to commence provided for in para. 16 hereof."

Then the contractor is to provide, amongst other things, all plant, material, sheds, mess-rooms "and whatever else may be required for the proper and efficient execution and completion of the works". Under para. 16,

"Unless otherwise directed, the contractor shall commence the works within three days after the date of the order to commence given in writing by the architect and shall complete the same within a period of twelve calendar months from the date of such order."

Then under para. 37 the contractor has to

"provide for receiving and for the requisite storage and safe keeping during and after delivery on the works of all stores and articles supplied by the council."

Paragraph 39 requires the contractor to provide an office for the use of the clerk of works: nothing now turns on that. Paragraph 39A contains certain provisions in the event of there being an assessment to rates in respect of temporary buildings on the site. So far as I understand it, nothing turns on that provision for the purposes of anything we have to decide in this case. Then para. 68 provides:

"The architect and any person or persons authorised by him shall be at liberty to enter upon the site of the works at all reasonable times, whether during working hours or not, and the contractor shall give the necessary instructions for the admission of the architect or any person or persons authorised by him. The contractor is to give every facility to the architect or his representative for the inspection of material and work in progress at his workshops and elsewhere and on the site."

Now the question that we have to decide is whether, on those facts, the contractors were in rateable occupation of the four temporary structures which I have described. It is, as I understand it, common ground that the four pre-requisites of rateable occupation are these, which were stated by Mr. Rowe, K.C., in *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (1) and approved by the Court of Appeal in that case ([1949] 1 All E.R. at p. 228): first, there must be actual possession by the alleged occupier; secondly, possession must be exclusive for the particular purposes of the occupier; thirdly, the possession must be of some use or value or benefit to the possessor; and fourthly, the possession must not be for too transient a period.

Counsel for the valuation officer submits that these four conditions have been satisfied in the present case. Counsel for the London County Council disputes that, and he says, as I understand his argument, that the quality of the use to

A which a builder puts structures of this nature is not such as to amount to rateable occupation: it is of too special and transient a character. Then he says that the occupation is not exclusive, that the true position of the contractors is that they are mere licensees of the building owners to come on the site and carry out the work they have contracted to carry out, and that these temporary erections, whether for the convenience of their staff or for the protection of their
B stores from the weather, are mere incidents of the carrying out of the contracted work. Further, he says that, in any case, these temporary structures are not part of the hereditament so as to make the occupation of them rateable occupation, inasmuch as they are (as I have termed them several times) temporary structures, having no permanent attachment to the soil, brought on the site in sections as and when some contract secured by the contractors makes their use
C necessary or desirable, and allowed to stand there so long as they are wanted for the purpose of that particular contract and then taken to pieces and removed to another site. The question is whether, on any of these grounds, counsel for the London County Council's objection to the effect that the disputed structures fail to satisfy the four requisites of rateability formulated by Mr. Rowe, and the further requisite that the occupation, to be rateable, must be occupation of a
D hereditament as distinct from a chattel, has been established.

We were referred to a number of cases on the general principles of rating applicable to this case, and also to cases in which those principles have been applied in relation to transactions more or less similar or analogous to this transaction in the present case, i.e., cases in which contractors have erected temporary buildings for the convenience of their workmen or the storage of their
E goods in the carrying out of building or constructional work. For the general principles we were first of all referred to *R. v. St. Pancras Assessment Committee* (2) and we were referred to that case for certain observations of LUSH, J., who said (2 Q.B.D. at p. 588):

“ It is not easy to give an accurate and exhaustive definition of the word ‘occupier’. Occupation includes possession as its primary element, but it
F also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier,
G though he may not reside in it one day in a year. . . . Another element, however, besides actual possession of the land, is necessary to constitute the kind of occupation which the Act contemplates, and that is permanence. An itinerant showman who erects a temporary structure for his performances, may be in exclusive actual possession, and may, with strict grammatical propriety, be said to occupy the ground on which his structure is placed, but it is clear that he is not such an occupier as the statute intends.
H As the poor-rate is not made day by day or week by week, but for months in advance, it would be absurd to hold that a person, who comes into a parish with the intention to remain there a few days or a week only, incurs a liability to maintain the poor for the next six months. Thus a transient, temporary holding of land is not enough to make the holding rateable. It must be an occupation which has in it the character of permanence; a
I holding as a settler not as a wayfarer.”

The actual decision in that case concerned the rateability of an advertiser who, under licence, had erected an advertisement hoarding on a hereditament, and it was held that there was no rateability, on the ground that the alleged occupier only had a licence to make this use of the premises and that this was not sufficient to create rateability. So far as the case proceeded on that ground it cannot now be regarded as good law, in view, in particular, of *Westminster Corpn. v. Southern Ry. Co.* (3), to which I am about to refer. It is interesting to note,

before I leave *R. v. St. Pancras Assessment Committee* (2), that LUSH, J., seems also to have based his decision on the further ground that nothing had been so annexed to the soil as to become a fixture. A

We were referred to *Westminster Corpn. v. Southern Ry. Co.* (3) and other allied cases. The question in that group of cases was whether bookstalls, a chemist's shop, kiosks, hairdressing saloons and other tenements within the area of the railway station had been "so let out as to be capable of separate assessment" within the proviso to the Railways (Valuation for Rating) Act, 1930, s. 1 (3), and therefore not to be "railway hereditaments" within s. 1 (3), but to be rateable under the general law of rating. We were referred to passages from the speech of LORD RUSSELL OF KILLOWEN. He said ([1936] 2 All E.R. at p. 326): B

"In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, people are rated as occupiers of land, land being understood as including not only the surface of the earth but all strata above or below. The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to the occupancy, no difficulty can arise; but in certain cases there may be a rival occupancy in some person who, to some extent, may have occupancy rights over the premises. The question in every such case must be one of fact, viz., whose position in relation to occupation is paramount, and whose position in relation to occupation is subordinate; but, in my opinion, the question must be considered and answered in regard to the position and rights of the parties in the premises in question, and in regard to the purpose of the occupation of those premises. In other words, in the present case, the question must be, not who is in paramount occupation of the station, within whose confines the premises in question are situate; but who is in paramount occupation of the particular premises in question." C

LORD RUSSELL referred to certain powers of control exercised by the railway company over the activities of the various occupants of kiosks and so forth in the station precinct, and he said (*ibid.*, at p. 328): D

"In truth the effect of the alleged control upon the question of rateable occupation must depend upon the facts in every case; and in my opinion in each case the degree of the control must be examined, and the examination must be directed to the extent to which its exercise would interfere with the enjoyment by the occupant of the premises in his possession for the purposes for which he occupies them, or would be inconsistent with his enjoyment of them to the substantial exclusion of all other persons." E

LORD RUSSELL also said (*ibid.*, at p. 329): F

"In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement." G

Before I leave this case there is a passage in the speech of LORD WRIGHT, M.R., to which I should refer. The premises with respect to which the question was whether they had been "so let out as to be capable of separate assessment" included in particular bookstalls and kiosks or small shops apparently resting on the floor of the station by their own weight, but connected by pipes and the H

I

A electrical connection provided by the company with parts of the station, and the observations of LORD WRIGHT to which I am about to refer are, I think, relevant in the present case to the argument of counsel for the London County Council to the effect that the temporary structures here, inasmuch as they were merely resting on the ground by their own weight and in no way permanently attached to it, were chattels and not part of the hereditament. LORD WRIGHT, B M.R., who described the bookstalls in the same sense as the description I have read from the statement of facts in the case, said ([1936] 2 All E.R. at p. 348):

C “On the description of the facts and the agreement in reference to Smiths’ bookstalls which I have given earlier in this opinion, I think that on principle they are so let out as to be capable of separate assessment and ought to be excluded from the roll as not being railway hereditaments. They are premises of considerable size, occupying definite areas which they have occupied for a long time without being moved. It is true that the railway company reserve power to change the sites, but the evidence is that they do not ever, or only at very rare intervals, exercise that power: while the stalls remain in a particular site, the site is occupied by Smiths. In *Electric Telegraph Co. v. Salford Overseers* (4), where the subject of assessment consisted of telegraph posts of which the landowners could direct removal at will, it was held that there was exclusive occupation of the soil by the posts so long as they were not required to be moved. There was sufficient permanence to constitute rateability. That principle applies in my opinion to the bookstalls. They and the sites on which they stand are in fact beneficially occupied, like any of the other shops or premises in the station: it would be unfair that they should escape being rated while the other premises are.” D

E Next we were referred to the first of the cases which have been discussed in which the alleged hereditament consisted of a temporary structure erected by a contractor for his convenience in carrying out works. That is *Mitchell Brothers, v. Workshop Union Assessment Committee* (5), in which the headnote is (1 Konst. Rat. App. 181): F

G “Contractors for the construction of a railway had placed upon certain lands, by agreement with the owners or occupiers of those lands, certain temporary structures or huts for the accommodation of their workmen. The structures were capable of being readily removed without damage to the ground; they had been in their present position for more than a year when a rate was made upon them. It was admitted that if the structures were rateable the contractors were in occupation of them. Held, that the contractors had been rightly rated in respect of the structures.”

H The Case Stated showed that

“It was contended by the appellants [the contractors] that the premises were not rateable; first, because the said structures were chattels”, with other reasons to which I need not refer. Counsel for the committee said in argument (*ibid.*, 184):

I “These structures are rateable. They are not in the nature of chattels; but even if they were chattels, they must be taken into account in fixing the value of the hereditament on which they stand.”

LORD ALVERSTONE, C.J., who delivered in effect the judgment of the court, as the other two judges merely concurred, said (*ibid.*, at p. 185):

“There is a distinct admission in the Case by the appellants at quarter sessions that, if the premises were rateable, they were in occupation of them;

therefore it is clear that the only point they intended to raise was that, by reason of the removability of the structures, they were not liable to be rated. The law of the matter is clear: If there is no exclusive occupation, but a mere licence to use, there is no liability to pay rates."

He referred to some authorities for that proposition, which, if it means that actual exclusive occupation is not rateable if it arises from a mere licence to use, can no longer be regarded as sound. The Lord Chief Justice continued (*ibid.*):

"But if there is exclusive occupation, however it may be described, there is rateability . . . A man is none the less an occupier of premises because he has a right to pull down a structure that is upon them. The quarter sessions should have decided that Messrs. Mitchell Brothers were rateable in respect of these premises; and I am of opinion that the appeal should be allowed . . ."

The structures there in question were made of wood and were supported, apparently, by wooden stakes driven into the ground, on which cross-pieces were nailed, and that foundation having been made, wooden uprights were nailed to it and the structure was then boarded in by fastening boards to those uprights. They were capable of being readily removed by the contractors during the progress of works or on the completion of works, without damage to the ground. It is, however, fair to say that they seem to have been premises of a more elaborate and permanent character than those in the present case, and that they were in fact designed for persons working for the contractors on a railway to live in. One of the structures had brick chimney breasts, which is an added feature tending to show a permanent character. However, that case does go this length, that where a contractor erects a building supported on posts in the ground and of a kind that can readily be removed and uses it for housing his workpeople on a particular site, so long as it is necessary or desirable to do so having regard to the state of his operations, then he is in rateable occupation of such structure notwithstanding the fact that it is his intention not to keep it permanently erected on that particular site but to take it down and remove it when it is no longer needed or the exigencies of the work or of other contracts require its erection elsewhere.

I come next to the more recent case of *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (1). In that case, building contractors had entered into a contract with the Secretary of State for Air to carry out very extensive works involving the strengthening, widening and lengthening of a runway on a certain aerodrome, the preparation of landing grounds, and the demolition of buildings. The work was carried out under a contract dated June 21, 1946, and the period originally contemplated for its completion was eleven months, but in fact it was not completed for more than two years. For the purposes of this work, John Laing & Son, Ltd., erected, on a part of the site handed over to them for that purpose, a large number of buildings and erections. I think that the main office building was already in existence and was handed over to them for use during the period of the contract, but they did erect

"offices for the technical staff, the clerk of works, and the field engineers, a central time office, changing rooms and first aid room, a foreman's office, garages, two weighbridge huts, a workmen's canteen, a carpenters' shop, a transport hut, batching and mixing plants, bases for concrete mixers, loading sheds for concrete mixers, and loading ramps and platforms for concrete mixers."

I have read that list of items because it shows, and in considering the effect of this case one must remember, that the works there in question were of a very much more extensive and complicated character, and the necessary preparations for them were on a far larger scale than anything that occurred in the present case. One should also note from that enumeration that the structures included a number of items which were not in themselves capable of "occupation" in the

A ordinary sense at all—such things as bases for concrete mixers, loading ramps, and platforms. The Divisional Court held that John Laing & Son, Ltd., were in rateable occupation of the temporary structures in question. In the course of his judgment, LORD GODDARD, C.J., said ([1948] 1 All E.R. at p. 946; [1948] 2 K.B. at p. 122):

B “It seems to me that the contractor is occupying that land as a licensee to carry on his business, and so has a beneficial occupation. He is enabled, by reason of his occupation, to carry out the contract which he has undertaken . . . If this case goes on appeal and our decision is upheld, it may be that rating authorities will claim to include in their valuation lists hereditaments which hitherto have not been included, on the ground that there is
C an occupation by building contractors, or builders, of the land on which buildings are being constructed, but it must always be borne in mind that the occupation must be something more than a mere transient or purely temporary occupation. An illustration was given of the showman’s van which comes on land for a short period of a day or two, or a week, and it was said that it would be absurd to make the showman responsible for maintaining
D the poor in the parish for six months when he only entertains the poor in the parish for, perhaps, two nights . . . Each case must depend on its own facts, but in this case the building is occupying a considerable period. I do not know whether it is yet finished, but, at any rate, the building seems to have been going on for two years.”

E I should next refer to the same case of *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (1) in the Court of Appeal. TUCKER, L.J., after stating some of the facts, said ([1949] 1 All E.R. at p. 227):

F “The whole case, as I read it, is stated on the assumption that these hereditaments are rateable hereditaments. There is nothing in it which would entitle us to draw any distinction between any one of them and another, except in so far as any distinction can be obtained from the contract. It may be open in other similar cases to argue that some of the hereditaments are of such a nature that, whatever their occupation, they are not capable of being rated, but no point is taken in the present case with regard to that. Nothing that I am deciding can be quoted as an authority for the proposition that anything which answers the description of some of the places or erections . . . is, as a matter of law, rateable in all circumstances.”
G

H The learned lord justice then stated the four necessary ingredients of rateable occupation submitted by Mr. Rowe, to which I have already referred. He then referred in detail to the terms of the particular contract and for present purposes the material feature of that part of the case consists in the extensive and stringent powers of supervision given to a superintending officer who was the representative of the Air Ministry. Those powers were certainly no less stringent and extensive than the powers conferred on the London County Council or the architect in the present case. Then TUCKER, L.J., said (*ibid.*, at p. 230):

I “It is said by counsel for the contractors that the very extensive powers conferred on the superintending officer are such that the contractors cannot be regarded as being in exclusive occupation of this hereditament. He seeks to distinguish this case on its facts from the *Southern Railway* case (3).”

Then he cited at some length from the *Southern Railway* case (3) and he said (*ibid.*, at p. 231):

“Those are the general principles which we have to endeavour to apply to the facts of this case. We have to ascertain what is the quality of the occupation. If the contractors are occupying these hereditaments for the sole purposes of their business and if the measure of control retained by the

authority is not such as to alter the character and quality of their occupation, then, in my view, they are in rateable occupation. The measure of control by the authority in carrying out the contract is a different thing from a control interfering with the exclusive occupation of the hereditament. On reading the conditions in this contract and comparing this case with the *Southern Railway* case (3) and the principles there enunciated, the conclusion I have arrived at is that in this case the authority had not such control as to render the occupation of the contractors an occupation which is not rateable. In other words, I think the real control exercised by the authority was a control with regard to the performance of the contract and not a control which interfered with the exclusive occupation of the hereditament by the contractors for the purposes of their work."

ASQUITH, L.J., expressed his agreement, I myself delivered a short concurring judgment, and in the result the appeal was dismissed. Leaving on one side for the moment further authorities bearing on the question whether the temporary structures in this case were chattels and not part of the hereditament, those are all the authorities to which it is necessary to refer.

In the light of them I now return to the four requisites of rateable occupation as stated by Mr. Rowe and approved by this court in the *Laing* case (1). First, there must be actual possession by the alleged occupier. On the facts of this case it seems to me that this condition is clearly satisfied. Quoad each of these temporary structures I have no doubt that the contractors did have actual possession of them. The general foreman's and timekeeper's office was used for storing papers and for carrying out such paper work as it was necessary to do on the site. The cement store was not used for accommodating people, but was used for storing the contractors' cement and, inasmuch as they did store cement there, in my judgment they were in actual occupation of that structure as well. The canteen and store, as I understand the facts, was also in the exclusive occupation of the contractors and was used, I take it, as a place in which the men could eat their meals if so minded and could obtain hot water. The plumbers' store, like the cement store, was in the actual possession of the contractors inasmuch as they used it for storing plumbers' materials.

Next, was the possession exclusive for the particular purposes of the contractors? In my judgment the answer to that question again must be yes. It is true that the architect had certain rights of access and it is also true according to the Case, though we have not been referred to any express warrant for it in the contract, that the clerk of works could demand admittance to the huts at any time, but the huts were kept locked by the contractors and he could only enter by obtaining admittance from the foreman or some other employee who had the keys. In my view, the rights of access which were reserved to the London County Council or the architect or the clerk of works were certainly no more extensive than those which existed in the *Laing* case (1) and were held by this court not to be sufficient to prevent the occupation from being exclusive. I should add that it is immaterial that the form of the contract here was that the contractors should be given the use of the site for the purpose of erecting the buildings as distinct from being put in occupation or possession of the site. The form of words here used suggests a mere licence, but, as is shown from the passages I have quoted from the speech of LORD RUSSELL OF KILLOWEN in the *Southern Railway* case (3), the determining factor is actual de facto occupation and it matters not whether that occupation is the result of a licence or of a tenancy or other form of agreement.

Next, the possession must be of some use or value or benefit to the possessor. That condition seems to me, on the authority of the *Laing* case (1), also to be satisfied here, as the possession or occupation of these temporary structures was of undoubted benefit and undoubted value to the contractors for the purposes of the contract on which they were engaged.

A Finally, possession must not be for too transient a period. In my view, there was in this case a sufficient degree of permanence. In the *Laing* case (1) the period originally contemplated for the performance of the contract was eleven months and by the time that the case came to these courts the period had been extended to a matter of two years or more. In the present case, twelve months was the anticipated period and the structures in question remained on the site for a matter of eighteen months (and in one case a little more) from the date when they were originally put up. In my view it is not possible to distinguish the *Laing* case (1) on the ground that here the structures were on the premises for a shorter period. I think a period of a year, as originally contemplated, which in the end extended to some eighteen months, provides the necessary degree of permanence. In any case I agree with the submission of counsel for the valuation officer that the question whether the necessary element of permanence exists must be one of fact and degree, and, the Lands Tribunal having found that a sufficient degree of permanence did exist, that, *prima facie* at all events, is not a decision with which this court should interfere.

Counsel for the London County Council submitted in effect that these structures are of too trifling and transitory a character to be proper subjects of rateable occupation. He has also relied on the passage which I have read from TUCKER, L.J.'s judgment in the *Laing* case (1) in which he pointed out that the court had not been invited to draw any distinction between the various buildings as regards their rateable character. He said, and rightly, that this leaves it open to him to contend that the buildings in this case were not capable of rateable occupation; but it must be borne in mind that, as appears from my citations from the report of the *Laing* case (1) in the King's Bench Division, the structures there included things which could not in the ordinary literal sense be "occupied" at all, such things as ramps and platforms for machinery. I do not think the learned lord justice, in saying what he did about no distinction being drawn between the various kinds of erections in that case, should be taken as saying that such erections as huts designed for actual occupation, either by people or by goods, would not be in their nature rateable, or that one such hut could be distinguished from another merely on the ground of its size. I think that would be introducing an undesirable refinement into this branch of the law. It is true, as I have said, that the buildings with which the *Laing* case (1) was concerned were of a more elaborate and extensive character; but they did include some huts or temporary buildings of a general character and use resembling the simpler and perhaps rather smaller erections in the present case. In my view, apart from the question (with which the *Laing* case (1) did not deal) whether these huts were in the nature of chattels as distinct from being part of the hereditament consisting of the structure itself and the area of land supporting it, this case is really governed by the *Laing* case (1).

H Finally, I turn to the submission of counsel for the London County Council that the erections here are in their nature chattels. It will be remembered that the general foreman's and timekeeper's office was erected on sleepers laid on the ground to which a wooden floor was nailed or otherwise secured. It therefore may be said to have rested on the ground or on the sleepers between itself and the ground by its own weight as distinct from having foundations or other members embedded in the ground to which it was attached. The cement store I had a concrete floor and I am prepared to assume that it was simply standing on that floor as distinct from being bolted or otherwise attached to it. The canteen and store and the plumbers' store are both described in the Case as standing on an old roadway or playground site. It would appear, therefore, that they also were resting on the ground simply by their own weight. It is therefore necessary to consider whether, having regard to the absence of any physical attachment of those erections to the ground, they should be regarded after erection on the site as having the character of chattels unconnected with

the land, in which case I understand counsel for the valuation officer to admit that their occupation would not be a rateable occupation. On this part of the case counsel for the valuation officer referred us to *Holland v. Hodgson* (6). The question there was whether certain machinery formed part of the freehold in a contest between the mortgagees of the premises in which the machinery was installed and the trustee of a deed of arrangement entered into by the owner for the benefit of his creditor. I think that should be mentioned because in my view the degree of attachment to the land necessary to make a structure such as those here under consideration part of a rateable hereditament is not necessarily the same as the degree of attachment necessary to make some object or erection part of the freehold in a contest between a mortgagee of the premises and a trustee in bankruptcy, or trustee for the benefit of creditors, or the mortgagor. Counsel referred us to this case for certain general observations made by BLACKBURN, J., where he said (L.R. 7 C.P. at p. 334):

"There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see *Wiltshire v. Cottrell* (7) and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory* (8). Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped . . . Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

According to that general statement of the law, the circumstance here that the various erections rested on the land only by their own weight would not be conclusive in favour of the view that they retained the character of chattels; but it would be a circumstance tending to support that view which, as the learned judge thought, would have to be displaced by the parties asserting the contrary. To that limited extent this case is an authority in favour of the London County Council. I am not satisfied, however, that precisely the same considerations necessarily apply in determining whether something on land is included in the security of a mortgagee of land and the question, which is the question here material, whether something on land forms part of a hereditament for the purposes of rateable occupation.

A The case most nearly in point to which we were referred on that actual question is the Scottish case of *Assessor for the City of Glasgow v. Gilmartin* (9). I say it is most nearly in point because it dealt with the very question which we have to decide, although being a Scottish case it decided that question with reference to the Scottish law as to what constitutes a heritable subject. Therefore, it cannot be regarded as an actual authority in the present case. Nevertheless it seems to me to be of considerable persuasive force. According to the headnote the facts were these (1920 S.C. 488):

C “The tenant of a piece of ground placed on it two sheds as bothies for his employees and as storehouses. The sheds consisted of frames to which were bolted sheets of corrugated iron. One shed rested against the brick wall of an adjoining tenement, which formed one side of it; the other shed was entirely detached. The framework of one shed rested by its own weight upon bricks which were slightly sunk into the ground; the framework of the other rested upon wooden sleepers lying upon the surface of the soil. Both sheds were so constructed that they could be taken to pieces and re-erected, and one had in fact formerly been erected elsewhere. The tenant had also placed upon the ground a wooden shed which he used as his office. It was constructed to move on wheels, and had been brought to the ground on its wheels, but the wheels had then been removed and it rested on sleepers placed on the ground. The wheels however were preserved, and could be replaced at any moment, if it was desired to move the shed elsewhere. Held (1) that the corrugated iron sheds were heritable subjects and fell to be entered in the valuation-roll under s. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, as ‘erections’ made by the lessee; (2) that the wooden shed was not a heritable subject, and, accordingly, did not fall to be entered in the valuation-roll.”

D LORD SALVESEN in the course of his judgment said (*ibid.*, at p. 494):

F “The truth is that, while the two structures in question can be taken to pieces and re-erected, they certainly cannot be removed as whole subjects. It is just in that respect that they differ from the structure C [that which was equipped with wheels] which was brought on its own wheels to the site . . . In my opinion, a structure which is designed for removal from place to place, and which can be removed as a whole from place to place, is not a heritable subject. The structure in question is simply a glorified or enlarged roadman’s hut, which we know is expressly designed for the purpose of being moved along the road from place to place while operations are going on. Such a movable structure seems to me to partake of the nature of movable property and not of heritable property. I do not think it makes any difference that here, for the purposes of convenience, the wheels have been removed from the structure since 1913, for we are told that they remain upon the premises and could be fixed to the structure, with a view to its removal, if circumstances so required. On these grounds I am of opinion that, quoad structure C, the committee have reached a right conclusion, and that, as regards structures A and B, they have reached an erroneous conclusion, and that the valuation-roll must be corrected accordingly.”

H I LORD MACKENZIE said (*ibid.*, at p. 495):

“As regards the structure A, I think there is sufficient to bring that within the law as it has been explained in previous cases. The corrugated sheets are placed on only three sides of a framework, and the brick wall of the adjacent tenement is used as the fourth side—the structure in fact is adapted so as to be built into the house next it. Each upright frame sits on brick, and the bricks are embedded in the earth. There is no doubt that there is a coating of cement upon the floor, although I do not attach

much importance to that. As regards the structure B, what influences me is that it is apparent, from the finding of the committee, that the building would have to be dissolved before it could be removed. In order to erect it in its present site a firm of joiners were employed. It had previously occupied another site, and they took the roof off in two pieces and the sides in four pieces, and the parts so taken to pieces were bolted up again on the present site. I think that a building of that character is properly described as heritable in its nature."

LORD CULLEN said towards the end of his judgment (1920 S.C., at p. 496):

"It is a building [building B] of the kind to which the rule *accessorium sequitur principale* is generally applied. The ordinary type of house rests in situ mainly by its own weight, although it is quite true that for greater security the foundations go below the surface. Where, however, such a building can and does rest on the ground securely by its own weight, without foundations penetrating the surface, and the ground on which it stands is more or less permanently dedicated to the purpose of a site for it, the absence of such foundations does not appear to me materially to affect the question."

That case turned on the law of Scotland as to the nature of heritable subjects, but it would seem that, for the purpose of making a structure a heritable subject, a degree of attachment to the land comparable to that necessary under English law to make such a structure part of the freehold would be required. The learned Lords of Session were all of opinion that structures without actual attachment to the land and closely comparable to those in the present case, were nevertheless heritable subjects. In my view that decision, the reasoning of which, if I may respectfully say so, appeals to me as sound, is of great persuasive force in the present case. One must add to that the passage to which I have already referred from the speech of LORD WRIGHT, M.R., in the *Southern Railway* case (3) ([1936] 2 All E.R. at p. 348). The structures here in question although resting on the soil simply by their own weight were not independent chattels in the sense that they could be brought on the site in the condition in which they were then erected and removed from the site at will still in that condition. As I understand the facts, these structures were brought on the site in pieces, which pieces no doubt while they remained separate from each other were chattels. They were then built up or erected on the site, thus for the first time assuming the form of huts or sheds capable of occupation on the site in the ordinary sense, i.e., capable of accommodating people or stores. To remove them from the site it would be necessary to dismantle the structures so that they would lose the essential character which they bore when erected on the site, i.e., the character of huts or sheds, and return to their previous form of *disiecta membra*, pieces of board or planks and corrugated iron and so forth which nobody could occupy in the ordinary sense at all. Each of them was thus a structure which could only exist as such for so long as it remained assembled on the site and resting by its own weight on the site. Having regard to the reasoning in *Assessor for the City of Glasgow v. Gilmartin* (9), and also to the observations of LORD WRIGHT, M.R., in the *Southern Railway* case (3), in my opinion this was enough to make these structures for rating purposes part of the hereditament. They were set up on the hereditament in the way I have described with a view to the better enjoyment of the hereditament, i.e., the area of land on which they were erected. Their presence on the land was not merely transient as the presence might be of some chattel, such as a caravan on wheels, which could be removed in one piece at any time. In intention they were to remain on the site for a period of some twelve months during the performance of the contract, and in fact they remained on the site for six months longer than that. In my view there was nothing to distinguish them in principle from such things as the bookstalls:

A and kiosks in the *Southern Railway* case (3) which, though resting on the land only by their own weight, were nevertheless clearly regarded by LORD WRIGHT, M.R., and I think by the other learned law lords, as constituting with the land on which they rested a hereditament the occupation of which, if it fulfilled other requirements, was rateable occupation. Accordingly, I cannot accept the submission of counsel for the London County Council to the effect that the occupation of these structures is not rateable because it is the occupation merely of chattels. These, in my view, were not chattels standing on the land; they were structures which, while they remained on the land, were for purposes of rating—and what I am saying applies simply to rating and nothing else—properly regarded as part of the hereditament. The requisites of rateable occupation deducible from the authorities have been in my judgment fulfilled in all other respects.

C In my view, this appeal fails, and should be dismissed.

ROMER, L.J. : I am entirely of the same opinion and am in agreement with the conclusions which JENKINS, L.J., has expressed and with the grounds on which those conclusions are based. There is, therefore, very little which I wish to add myself. The first contention of the London County Council before the Lands Tribunal was that the huts were chattels of such a nature that they were not capable of being rated. That contention was indeed the primary contention which was urged on their behalf before us. It seems to me that unless they can make that contention good this appeal inevitably fails. I say that because, in my opinion, every one of the four ingredients which Mr. Rowe, K.C., formulated in his argument in the *Laing* case (1) and which were accepted as correct by this court ([1949] 1 All E.R. at p. 228) militates against the view that the contractors are free from liability to rates in respect of these hereditaments. The first ingredient is that there must be actual occupation. As to that counsel for the London County Council submitted that having regard to the nature of this property it cannot be occupied in a rateable sense by anybody at all. I think the answer to that is that the huts and structures were clearly being occupied by the contractors and they were occupying them for the purposes that they had in view. That occupation was tantamount to an occupation of the land on which the structures rested. The second ingredient, as Mr. Rowe, K.C., described it, was that the occupation must be exclusive for the particular purposes of the possessor. Assuming that there was occupation so as to satisfy the first ingredient, I think it cannot be doubted, having regard to the whole circumstances, that the occupation of the contractors was exclusive. Then thirdly, the possession must be of some value or benefit to the possessor. In *Laing's* case (1) which was in many respects similar, as JENKINS, L.J., has pointed out, LORD GODDARD, C.J. ([1948] 1 All E.R. at p. 946), said that the contractors in that case were occupying the structures for their benefit in the sense that their occupation facilitated the execution of the contract on which they were engaged. I think that consideration applies precisely to the present case. Fourthly, and finally, the possession must not be too transient. As to that the relevant paragraph, which is para. 16 in the conditions which are contained in the specification, provided for completion within twelve months from the day of commencement of work. As may well be imagined, the work was not in fact completed within that twelve months. The structures continued to exist on the site for some eighteen to twenty months in all. When one finds that the period of eleven months, which was the relevant period in *Laing's* case (1), was regarded as not lending the character of transience to the structures which were erected in that case, then it would follow that the twelve months which was contemplated here leads to the same result. Further than that, as JENKINS, L.J., has already pointed out, the question of transience is primarily one of fact and the tribunal here obviously accepted the contention of the valuation officer that the occupation of the hereditament was sufficiently permanent to give rise to rateable occupation. It cannot be doubted that there was evidence from which they

could arrive at that conclusion, and in my view that conclusion should therefore be maintained. A

Finally comes the question which was debated more than any other before us, viz., whether these structures are mere chattels or form part of the land for rating purposes. It is clear that in their component parts and before they are put together they may be regarded as chattels. But that is not the point: the point is whether after they have been assembled and turned into complete structures they remain chattels or whether their character is then changed. In my judgment, agreeing as I do with all that my Lord has said on this subject, the character was changed and the structures, having regard to the manner in which they were put together, the time it was intended that they should remain there and all other relevant factors, lost their character of mere chattels and became sufficiently adherent to the land. Counsel for the London County Council said (and rightly said) that the onus was on the valuation officer to show that notwithstanding that they were originally chattels they had been converted into something else. In my opinion, the respondent has successfully discharged that onus. I would only add on this point that I think the judgment of LORD SALVESEN in *Gilmartin's* case (9) carries the greatest conviction to one's mind and in substance covers the question which arises so far as this aspect of the appeal is concerned. I agree entirely, if I may respectfully say so, with what LORD SALVESEN said on this subject; and applying his observations to the facts of this case one is undoubtedly led to the conclusion, as I think, that the complete structures cannot be regarded as mere chattels. I accordingly agree that the appeal should be dismissed. B C D

SIR RAYMOND EVERSHED, M.R.: I am also of the same opinion. Out of respect for the argument of counsel for the London County Council I add a few sentences of my own to what has fallen from my brothers. At the end of his reply, counsel contended (and I think rightly) that the proper conclusion on all the points which have been distinctly argued before us depended in the end of all on an answer to the question—why are the contractors on this site? To that question counsel's answer was: they are there merely as wayfarers, borrowing the word of LUSH, J., in *R. v. St. Pancras Assessment Committee* (2) (2 Q.B.D. at p. 588), and are therefore not rateable. I take as the premise and foundation for what follows two sentences from the judgment of LORD RUSSELL OF KILLOWEN in the *Southern Railway* case (3) which have been already read, where he said ([1936] 2 All E.R. at p. 326): E F

“The occupier, not the land, is rateable; but, the occupier is rateable in respect of the land which he occupies”;

and (*ibid.*, at p. 329): G

“In my opinion the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence, or an easement.” H

The single question which I have stated can, in my judgment, as regards each of the structures here in question, be properly analysed and expanded so as to take somewhat the following form:—Has there been a sufficient dedication of the land as the site of the structure; is there sufficient annexation of the site by the structure; so that the contractors can fairly be said by means of the structure to be in actual, exclusive, and beneficial occupation of the land, that occupation not being of a merely transient and fleeting nature? The question in this as in other cases must always (at least substantially) be one of degree and fact according to the particular circumstances. Thus in *Mitchells'* case (5) to which JENKINS, L.J., referred, it is no doubt true that the structure there under consideration had elements of stability and permanence not to be found in these I

A structures; but the Divisional Court in effect answered the question which I have formulated affirmatively and that decision, given fifty years ago, has not, so far as I know, ever been questioned. On the other hand, as JENKINS, L.J., has observed, a caravan or a structure mounted and movable as a whole on wheels would prima facie not be a subject-matter of rateable occupation; see, for example, the reasoning in the Scottish case of *Assessor for the City of Glasgow v. Gilmartin* (9). In the present case the tribunal, in my view, were well entitled to regard the particular facts relating to the particular structures as not in substance distinguishable from the corresponding facts in the earlier decision of *Woodward (V. O.) v. Brading & Blundell, Ltd.* (10). We have been referred to that case in which the tribunal found and concluded that the answer to the question which I have attempted to formulate should be an affirmative answer. I see no good reason for this court interfering with that decision. The result of my judgment is, as my brothers have indicated, that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, London County Council; Solicitor of Inland Revenue.*

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re WEST FERRY ROAD, POPLAR, LONDON. Re PADWICK'S ESTATE.

[CHANCERY DIVISION (Harman, J.), March 24, 25, 1955.]

E *Compulsory Purchase—Costs—Promoter's liability—Registered land—Vendors' costs, charges and expenses—Basis of computation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D), schedule, as amended by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118).*

F The London County Council bought, under a compulsory purchase order made under the Town and Country Planning Acts, 1944 and 1947, freehold land registered under the Land Registration Act, 1925, with absolute title. The transaction having been completed, the vendors' solicitors submitted to the vendors a lump sum bill charging the scale fee appropriate to a completed transfer on sale of registered land under the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953. The vendors submitted the bill to the county council for payment pursuant to the Lands Clauses Consolidation Act, 1845, s. 82. The county council objected to the bill and, the vendors having applied for taxation under s. 83 of the Act of 1845, the taxing master allowed the bill. Objections by the county council to the taxation were overruled by the taxing master. On a summons to review taxation,

G
H **Held:** the words "the remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925," in art. 1 of the Solicitors' Remuneration (Registered Land) Order, 1925, extended to remuneration in conveyancing transactions respecting land the title to which was registered and, as there was no express exception of compulsory acquisitions from the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953, the scale fee was rightly allowed in accordance with para. (D) of art. 1 of the order of 1925, as amended, and the summons for review of taxation should be dismissed.

I [**Editorial Note.** A vendor's solicitors' remuneration by scale fee on compulsory acquisition of land the title to which is registered is to be distinguished from remuneration where land, the title to which is not registered, is compulsorily acquired. In the latter case remuneration by scale fee is not recoverable as such from the acquiring authority because the Solicitors' Remuneration Orders,

1883 to 1953, expressly except compulsory acquisitions where the vendor's costs are paid by the acquiring authority (see r. 11 of the Rules applicable to Part 1 of Sch. 1 to the Order of 1883); and accordingly charges under Sch. 2 are appropriate (see p. 200, letter H, post). A

As to the taxation and recovery of costs from an authority acquiring land compulsorily, see 6 HALSBURY'S LAWS (2nd Edn.) 142, para. 163; and for cases on the subject, see 11 DIGEST (Repl.) 247, 1157-1161. B

For the Lands Clauses Consolidation Act, 1845, s. 82, s. 83, see 3 HALSBURY'S STATUTES (2nd Edn.) 929, 930.

For the Solicitors' Remuneration (Registered Land) Order, 1925, as amended, see 20 HALSBURY'S STATUTORY INSTRUMENTS 205; and for the Solicitors' Remuneration Order, 1883, see *ibid.*, pp. 195 et seq.]

Summons to review taxation. C

On a compulsory purchase of land (being freehold land registered with absolute title) by the London County Council, the vendors, after the transaction had been completed, submitted to the purchasers for payment by them in accordance with the Lands Clauses Consolidation Act, 1845, s. 82, the bill delivered to the vendors by their solicitors. The bill was for a lump sum calculated in accordance with the scale fees allowable under the Solicitors' Remuneration (Registered Land) Order, 1925 (as amended by the Solicitors' Remuneration (Registered Land) Order, 1953). The business was undertaken at a time such that, if otherwise the orders applied, the remuneration would be regulated by, among other orders, the Order of 1953. The purchasers objected to the bill, which, therefore, became taxable under s. 83 of the Act of 1845. D

The taxation having been ordered, the purchasers objected to the allowance of the costs on the following grounds: E

"(i) because this taxation (being the taxation of vendors' costs arising out of a sale to which the Lands Clauses Consolidation Act, 1845, applied) is governed by s. 83 of that Act, under which the taxing master had an unfettered discretion to certify the amount to be paid by the [purchasers] to the [vendors] in respect of their costs. F

"(ii) because the Solicitors' Remuneration (Registered Land) Orders, 1925, 1944 and 1953, do not apply to a taxation as between the vendors and the promoters under s. 83 of the Lands Clauses Consolidation Act, 1845, but apply only on the taxation of a solicitor's bill as between him and his client. G

"(iii) because the Solicitors' Remuneration (Registered Land) Order, 1925; is expressed to apply to the remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925, whereas the business between the [vendors] and the [purchasers] arose under the Town and Country Planning Acts, 1944 and 1947 and the Lands Clauses Consolidation Acts, 1845, 1860 and 1869 as well as the Land Registration Act, 1925. H

"(iv) because in exercising his said discretion the taxing master ought to allow only such costs as are in all the circumstances fair and reasonable, using as a guide (but not as fettering his discretion) the Sch. 2 remuneration prescribed by the Solicitors' Remuneration Orders. I

"(v) because, if and so far as the Solicitors' Remuneration Orders are relevant, there is no reason in principle for distinguishing between unregistered land and registered land in regard to the taxation of a vendor's costs arising out of sales to which the Lands Clauses Consolidation Act, 1845, applies, and that since the Solicitors' Remuneration Order, 1883, expressly excludes the scale in the case of sales of unregistered land a similar exclusion ought to be implied in the Solicitors' Remuneration Orders relating to registered land."

The taxing master overruled these objections and the purchasers issued this summons to review the taxation.

- A *H. E. Francis* for the applicants, the London County Council.
J. W. Brunyate for the respondents, the vendors.

B **HARMAN, J.:** This summons arises out of a petition and an order of course made thereon by vendors of real property to the London County Council. In or before 1954, the council bought certain properties in Poplar from the trustees of what is called Padwick's Estate under a compulsory purchase order known as the County of London (West Ferry Road, Poplar) Compulsory Purchase Order. That order was made under the Town and Country Planning Acts, 1944 and 1947. It is common ground that the relevant compulsory powers bring into play the Lands Clauses Consolidation Act, 1845. The validity of the council's title depends in fact on s. 81 of that Act, which serves to bring in all interests on a sale so completed. It follows that the costs of the sale are payable by the council under s. 82 which provides:

D "The costs of all such conveyances shall be borne by the promoters of the undertaking; and such costs shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interest therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

E In due course application was made by the vendors to the council asking for payment of the bill as delivered to them by their solicitors on Sept. 10, 1954. The bill is a lump sum bill without items and is drawn on the footing that the solicitors are entitled against their clients, the vendors, to payment of a scale fee which is described as being in accordance with the authorised land registry scale.

F The London County Council objected to paying the bill and, therefore, the costs became taxable under the Lands Clauses Consolidation Act, 1845, s. 83, which so far as relevant, is in these terms:

G "If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof, such costs shall be taxed by one of the taxing masters of the Court of Chancery upon an order of the same court, to be obtained upon petition in a summary way by either of the parties . . ."

and then there is a provision for payment of whatever the taxing master certifies.

H A petition of course was preferred. This referred to certain matters which were not relevant in my judgment, as, for instance, to the Lands Clauses Consolidation Act, 1860 and 1869 and to the Solicitors' Remuneration (Registered Land) Order, 1925, and the Solicitors' Remuneration (Registered Land) Order, 1953. It was a petition of course under the Act of 1845 and nothing else. An order of course for taxation was made on Oct. 7, 1954. The order recites that it was alleged that the petitioners were the owners of the land and that the purchase money for the land had been paid and the deed of transfer executed. It then recites that by s. 82 of the Lands Clauses Consolidation Act, 1845, the London County Council are liable to pay the costs of the conveyance of the land including all charges and expenses specified in the section, that a bill of costs was delivered on Sept. 10, 1954, that the London County Council does not agree the amount of the costs stated in the bill and that the petitioners are desirous of having a taxation under s. 83, and then it adds "and the Solicitors' Remuneration (Registered Land) Orders, 1925 and 1953." In my judgment those last words are inappropriate.

The taxing master heard the reference and allowed the bill as drawn. On Jan. 17, 1955, objections were entered by the London County Council and those were overruled by the master.

The first objection was that

"this taxation (being the taxation of vendors' costs arising out of a sale to which the Lands Clauses Consolidation Act, 1845, applied) is governed by s. 83 of that Act, under which the taxing master had an unfettered discretion to certify the amount to be paid by the respondents to the petitioners in respect of their costs."

That statement is unexceptionable in so far as it insists that the master must tax under s. 83 which directs the taxing of the costs mentioned in s. 82 including all charges and expenses, the widest possible words. The master has, therefore, to tax the costs, charges and expenses of the vendors, and if the bill presented to him consisted of those proper costs, charges and expenses, the propriety of which he must decide, then undoubtedly the vendors should get them. The vendors have been compelled to sell their land and there is no reason why they should not get the costs. What they did was to hand in the scale fee bill and the master has allowed that as being the proper costs for which the purchasers were liable.

If that be right there is no question but that the vendors can recover those costs and the real question here is whether as between the solicitors and the vendors that was the right bill to deliver. If it was the fee properly payable to the vendors' solicitors, then I cannot conceive that the master could do other than say: "These are proper costs, charges and expenses under s. 82 and you shall have them." The question which arises, therefore, is: What, if any, part of the Solicitors' Remuneration Orders apply to a taxation as between solicitor and client on a compulsory purchase order relating to registered land?

The second objection taken by the purchasers is that the Solicitors' Remuneration Orders do not apply to a taxation as between vendors and the promoters under s. 83. That is true, but it misses the point which is whether this bill as delivered was a proper bill as between solicitor and client. The same is true of the third objection. It is clear that the Solicitors' Remuneration Orders would apply if the vendors had been dissatisfied with the bill delivered to them by their solicitors and had asked for a taxation.

The Solicitors' Remuneration Order, 1883, has been amended many times and it and the amending orders are now cited as the Solicitors' Remuneration Orders, 1883 to 1953. By virtue of art. 2, the costs would be taxed according to the scale prescribed by Sch. 1, but under art. 1 this schedule does not apply in the case of registered land. Moreover, by virtue of r. 11* applicable to this Part 1 of Sch. 1 the scale is excluded in cases of sales under the Lands Clauses Consolidation Act, 1845; it would follow that if this were unregistered land Sch. 2 would apply, this being business not thereinbefore provided for. Schedule 2 gives the taxing master a wide discretion as to the amount which he shall allow, which is such sum as may appear reasonable having regard to all the circumstances of the case. Therefore, if this were unregistered land these costs would be taxable under Sch. 2 and not on scale at all.

It is said that there ought to be no difference between registered and unregistered land in this respect, and that is a very reasonable submission. But this is registered land so that Sch. 1 is excluded by art. 1, but that does not have the effect, curiously enough, of bringing in Sch. 2 where the land is registered. There have been separate orders for registered land ever since the date of the original order of 1883, and costs in such cases are now governed by the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by the Solicitors' Remuneration (Registered Land) Orders, 1944 and 1953. By the Solicitors' Remuneration (Registered Land) Order, 1925, art. 1:

* As substituted by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117).

A "The remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925, shall be regulated as follows . . ."

The word "under" is an imperfect expression, but, I think, must be treated as meaning remuneration for conveyancing in connection with registered land.

B It is true that the conveyancing is not done "under" the Land Registration Act, 1925, and the form of words is inept, but I feel that is what it must mean, having regard to the fact that, as the order of 1883 correctly phrases it, Sch. 1 does not apply to transactions respecting real property, the title to which has been registered under the Land Registration Acts. Paragraph (D) (i) of art. 1 of the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by the orders of 1944 and 1953, provides that for every completed transfer on sale of registered land, where the land is registered with absolute or good leasehold title—it is absolute title here—the remuneration shall be that prescribed in the schedule thereto.

C The schedule provides a sliding scale of remuneration which is the one followed by the solicitors in the present case. There have been certain percentage additions to that scale with which I am not concerned. I am of opinion that the solicitors were entitled to charge their clients on that scale. It is odd that there is no rule in this order excepting compulsory purchases as there is in the order applying to unregistered land. I do not see why there should be this difference, but there it is, and the result is that this scale applies to compulsory purchases as well as to others. That being so, the taxing master was right. I have not given quite the reasons he gave because an erroneous view prevailed that he was taxing under the Solicitors' Remuneration Orders. His adjudication must be measured by the words, "costs, charges and expenses" under the statute of 1845. No order is needed from me, therefore, except to dismiss the summons, which I do.

Summons dismissed.

Solicitors: *Solicitor, London County Council* (for the applicants); *Coward, Chance & Co.* (for the respondents).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re A. (an infant).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., and Jenkins, L.J.), March 24, 1955.]

Infant—Custody and upbringing—Illegitimate child—Conflict between mother and natural father—Welfare of child paramount consideration.

The mother of an illegitimate child who was born in 1952 had parted from the child's natural father, who was a married man living apart from his wife, and, being a very young woman who wished to make a fresh start in life, she placed the child in the care of a charitable society and wanted to have it legally adopted through the society. The natural father, who was very attached to the child and had never denied paternity, applied to the court, under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, for the child to be made a ward of court, for her custody to be entrusted to him, and for him to be given care and control of the child. At the hearing of the summons, the judge came to the conclusion that, in the difficult circumstances of the case, the best course was to give the care and control of the child to the father's brother and sister-in-law, and, accordingly, he made an order, dated Dec. 21, 1954, directing that the child should remain a ward of court during minority or until further order, that she should be committed to the care and control of the father's brother and sister-in-law, and that the order should be reviewed by the court not later than the end of December, 1956. The brother and sister-in-law gave an undertaking that the child should be brought up as a member of the Roman Catholic Church, into which church the child had been baptised. The mother appealed to the Court of Appeal on the ground that the judge had erred in law in not acceding to her wishes in regard to the child. She contended, among other things, that, in the case of an illegitimate child, subject to any considerations of essential importance to the child's welfare, it was the mother's wishes which should prevail unless the mother were shown to be wicked or irresponsible.

Held: the paramount (but not the exclusive) consideration was the welfare of the child, and, in view of the fact that the mother did not wish herself to bring up the child, the mother's wishes regarding the person who should bring up the child were not entitled in law to prevail merely because they were her wishes; it was the duty of the judge to exercise his discretion by considering the alternatives presented to him by the mother and by the father and to come to a conclusion which was the better plan in the interests of the child; on the facts, the mother's wishes had not been disregarded by the judge, who had made no error in law.

Observations on the weight to be given to an undertaking as to the religious upbringing of a child given by a person to whose care the child was to be committed (see p. 205, letters F to I, post)

Appeal dismissed.

[**Editorial Note.** In the present case the child was a ward of court, as from the date of the application to the court (see Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2); 28 HALSBURY'S STATUTES (2nd Edn.) 777). Thus the court had a special jurisdiction over her beyond that which the court may exercise by virtue of its inherent jurisdiction or by statute in relation to all infants who are British subjects in England (see, as regards the jurisdiction over wards of court, 17 HALSBURY'S LAWS (2nd Edn.) 717, para. 1470).

As to the rights and liabilities of the mother of an illegitimate child, see 3 HALSBURY'S LAWS (3rd Edn.) 106, para. 165; as to the position of the natural father in relation to the custody of an illegitimate child, see *ibid.*, p. 109, para. 169; and for cases on these subjects, see 3 DIGEST 381, 382, 198-211.

A For the Guardianship of Infants Act, 1925, s. 1, see 12 HALSBURY'S STATUTES (2nd Edn.) 955.]

Cases referred to:

- (1) *Barnardo v. McHugh*, [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 3 Digest 382, 207.
- B (2) *Re Carroll (J. M.)*, [1931] 1 K.B. 317; 100 L.J.K.B. 113; 144 L.T. 383; 95 J.P. 25; Digest Supp.
- (3) *R. v. Nash, Re Carey*, (1883), 10 Q.B.D. 454; 52 L.J.Q.B. 442; 48 L.T. 447; 3 Digest 381, 204.

Appeal.

C The mother of an illegitimate infant appealed from an order of HARMAN, J., dated Dec. 21, 1954. The natural father of the infant applied to the court by originating summons, under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, for an order (i) that the infant might be made a ward of court; (ii) that he should be appointed the guardian of the infant; (iii) that the custody of the infant should be entrusted to him; (iv) that he should have the care and control of the infant; and (v) that he might have reasonable access to the infant.

D The application was opposed by the mother of the infant, who had placed the infant in the care of a society and wanted her to be legally adopted through the society. HARMAN, J., made an order that the infant should remain a ward of court during her minority or further order; that she should be committed to the care and control of the natural father's brother and sister-in-law; and that the order should be reviewed by the end of 1956 at the latest.

E *P. Ingress Bell, Q.C.*, and *S. Seuffert* for the mother.
J. F. F. Platts-Mills for the natural father.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from an order made by HARMAN, J., which bears date Dec. 21, 1954, in regard to the present custody and maintenance of an infant, a girl, who was born on May 25, 1952.

F As the learned judge said, the case is a difficult one, and, indeed, all these cases are necessarily anxious cases. In this particular case, however, the little girl's launching on her voyage in this world was the more unfortunate in that she is the fruit of an illicit union between her mother, who was then a young girl of under twenty years, and the father, who was very greatly her senior, and who was at the time living away from his wife. The relations between the mother

G and the father became somewhat embittered, and the order from which the appeal is brought was an order made on an application by way of originating summons taken out by the father. This is a case in which the natural father has never denied the paternity, and has obviously taken an interest in the child and, according to a note of what the judge said, obviously has an affection for her. The summons asks, first, that the infant may be made a ward of court, and it

H goes on to ask that the father may have the custody and the care and control of the infant.

The order appealed from directed that, the infant having become a ward of court*, she should remain a ward during her minority or until further order, and that she should be committed to the care and control of a Mr. and Mrs. A., the former being the father's brother. The order then proceeded to give directions

I for the infant to be handed over, she then being in the actual care of a well-known society, the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children; and it is of importance that an undertaking was given and signed by Mr. and Mrs. A. that the infant should be brought up in the Roman Catholic faith, into which church she had already been baptised.

* By the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (2) (28 HALSBURY'S STATUTES (2nd Edn.) 777), where an application is made for an order that an infant be made a ward of court, the infant becomes a ward of court on the making of the application, but may cease to be one under R.S.C., Ord. 54p, r. 3.

It is not, perhaps, surprising that the mother should feel a certain bitterness against the natural father, with whom she lived and from whom she has parted; and I think that the present appeal is to be attributed, in some measure, to that bitterness and, in some measure, to religious zeal rather than to the single purpose of the welfare of the child. The reasons why I say that will appear later. The notice of appeal is certainly a bold document, for it asks that the order made by HARMAN, J., may be reversed, that the summons may be dismissed altogether, and that the costs be paid to the mother. A B

The two notes which were made of the learned judge's observations by the learned counsel appearing before him have been supplied to us, and they are in substantially the same form, except that the note of counsel for the father is somewhat fuller. The learned judge observed that the father was greatly attached to the child, and, putting the matter quite shortly, the learned judge came to the conclusion that the best thing to do in the difficult circumstances of this case was to let the child go to Mr. and Mrs. A. It was a case in which the mother, being a young girl, had come quite naturally to the conclusion that (and I now quote from counsel's notes) she "would like to start fair and fresh without the stigma of having borne such a child". That is fundamental to the decision in this case. The case, therefore, is not one in which the mother of the child desires to have its custody and upbringing. She desires to put the whole of this episode behind her and to have nothing more to do with the child. Indeed, as counsel for the mother pointed out, the gist of her case is that her scheme, which the learned judge, according to counsel's argument, should have accepted, would have led to an adoption under the Adoption Act, 1950. That, of course, would have meant an abandonment, and extinguishment for all practical purposes, of all her maternal rights towards the child. As JENKINS, L.J., observed, it is somewhat paradoxical for it to be asserted on her behalf that, in the interests of the child, the mother's wishes must be acceded to in the absence of some very special reason, when those wishes involve, as a necessary part of them, the total extinguishment of her maternal rights. C D E

This, however, is a case which is also unusual, to judge from the authorities mentioned, in that here the putative father is very much on the scene. We were referred, for example, to *Barnardo v. McHugh* (1), in the House of Lords, and to *Re J. M. Carroll* (2), a decision of this court. In each of those cases the putative father was not on the scene at all, if, indeed, he had ever been identified; and the question that the House of Lords and this court were there considering was the extent to which the wishes of the only parent who was, so to say, on the scene ought to be acceded to. The present case seems to me to be different. This is a case, in the first place, of the invocation of the parental duties and power of the court as regards a ward of court, and it is not in doubt that in every such case, by statute* and well-established principle, the paramount consideration must be the welfare of the child. Junior counsel for the mother suggested that the judge never really considered that matter at all, but I entirely reject that suggestion. As leading counsel for the mother pointed out, however, "paramount" is not the same as "exclusive", and what really has been said for the mother here is that, when the balancing considerations are looked at, the mother's wishes should, as a matter of law, have prevailed, since, as a matter of law, the natural mother, even though she does not herself seek the company and custody of the child, has a right to choose who will bring it up unless (as leading counsel for the mother put it) there emerged prevailing considerations of essential importance to the child. Junior counsel for the mother suggested that that should be the case unless the mother was shown to be in some way irresponsible or wicked. F G H I

In my judgment those submissions are altogether too wide. I find nothing here to show that the mother's wishes were, in fact, disregarded. What the

* See the Guardianship of Infants Act, 1925, s. 1; 12 HALSBURY'S STATUTES (2nd Edn.) 955.

A learned judge did, I think quite plainly, was to exercise his discretion by considering the alternatives presented to him on the one side and the other and to come to a conclusion that in the interests of the child the better plan was that to which he gave effect in the order which I have read. I can see no error of law in the matter at all.

B In *Barnardo v. McHugh* (1), the observations of SIR GEORGE JESSEL, M.R., in *R. v. Nash, Re Carey* (3) were cited with approval by LORD HERSCHELL, who said ([1891] A.C. at p. 398):

C "It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by SIR GEORGE JESSEL, M.R., in *R. v. Nash* (3) (10 Q.B.D. at p. 456): 'In equity regard was always had to the mother, putative father, and relations on the mother's side'."

D In the present case the real point made, I think, on the facts—and when I say "on the facts" I do not mean having looked into all of them, but on the balance as presented by the statements in the judge's note—was this. If the child goes to Mr. and Mrs. A., then, for reasons which are stated*, it is very unlikely to be adopted, and counsel for the mother submitted that, from the point of view of the child's welfare, it would be far better that she should be legally adopted under the Adoption Act, 1950, and the mother's scheme (what the learned judge called the "rival" scheme) was that, through this very reputable society, the child should be, so to say, put in the way of a legal adoption under the Act. That is, of course, a point of substance, but I have no doubt that the matter was considered by the judge, and, as his judgment states, not later than—and I emphasise the words "not later than"—the end of December, 1956, the case will be reconsidered. Against that consideration put forward on the mother's side, there is the further consideration which, I think quite properly, entered into the judge's mind, the consideration expressed F by the ancient proverb that "Blood is thicker than water".

As I have said, behind all this there has, undoubtedly, lurked another matter, on which I do not want to say much, but which I must briefly state. A written undertaking has been given that the child will be brought up according to the tenets of the Roman Catholic faith. It is said that in the course of cross-examination Mrs. A.'s own adherence to the doctrines of that church was shown G to be somewhat lacking in sincerity, because she admitted, it was said, that of her three children none was, in fact, being brought up according to the tenets of that faith, and that she herself only went occasionally to church. Therefore, counsel for the mother submitted that the undertaking that the child would be brought up as a member of the Roman Catholic Church was an undertaking which should not have been accepted at its face value. Religious feeling is a matter H which deserves everybody's respect, but I do not accept the view that the suggestion made is one to which we can or should accede. I see no reason why this undertaking, which was solemnly given, should not have been accepted, and I have not, for my part, I confess, altogether appreciated the somewhat veiled attack on the position in which this child was placed because, it is said, the religious observances of Mrs. A. are not what it is thought on the mother's side I that they ought to be. I say no more about it, but I have said, I hope, enough to indicate that I do not think that there is any ground which would justify the court in differing from the learned judge, or in embarking on a consideration of the matter with a view to exercising afresh a discretion properly vested in the learned judge, and, as I think, properly exercised by him. I would dismiss the appeal.

* HARMAN, J., said that the father's objections would be fatal to any adoption by a stranger.

JENKINS, L.J.: I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Willes & Gladstone* (for the mother); *O. H. Parsons* (for the natural father).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BEVAN v. BEVAN.

[QUEEN'S BENCH DIVISION (Sellers, J.), March 23, 24, 25, April 6, 1955.]

Husband and Wife—Separation agreement—Arrears—Wife residing in enemy territory throughout the war—Whether separation agreement abrogated by outbreak of war.

The plaintiff and her husband had agreed in 1932, by written agreement, to live separate and apart, and the husband agreed to pay her maintenance at the rate of £9 per month. In September, 1939, the wife was living in Vienna which became enemy territory on the outbreak of war. The husband paid the monthly instalments until June, 1939, but not after that month. Austria ceased to be enemy territory as from Nov. 5, 1952. In 1951, no payments having been made by the husband to the Custodian of Enemy Property, the husband was authorised to hold at the disposal of the wife all moneys payable to her under the agreement free from restriction under the Trading with the Enemy Act, 1939. In April, 1953, the wife brought this action against her husband claiming the arrears. The husband contended in respect of the instalments due after the outbreak of war in September, 1939, that: (1) as the wife was and remained in enemy territory further performance of the agreement would have involved intercourse with the enemy and the continuance or further performance of the agreement was contrary to public policy; (2) the provisions of the Trading with the Enemy Act, 1939, made further performance illegal; and (3) the agreement became impossible of performance and was frustrated.

Held: public policy did not require that this agreement should terminate on the outbreak of war and the agreement was not abrogated by the outbreak of war, but throughout the war payments should have been made by the husband to the Custodian of Enemy Property in accordance with the agreement; accordingly the wife was entitled to the arrears which she claimed.

Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag ([1946] 1 All E.R. 36) considered; observations of LORD GREENE, M.R., in *Re Furness* ([1944] 1 All E.R. at p. 578) applied.

[As to causes of frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 187, para. 321; and for cases on the subject, see 12 DIGEST (Repl.) 436, 3331-3334.]

For the Trading with the Enemy Act, 1939, see 26 HALSBURY'S STATUTES (2nd Edn.) 326.

For a list of the countries affected by cessation of enemy territory orders under the trading with the enemy legislation and the dates of cessation, see 23 HALSBURY'S STATUTORY INSTRUMENTS 125.]

Cases referred to:

- (1) *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr)*, [1943] 1 All E.R. 76; [1943] A.C. 203; 112 L.J.K.B. 32; 168 L.T. 323; 2nd Digest Supp.
- (2) *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; [1946] A.C. 219; 115 L.J.Ch. 58; 174 L.T. 49; 12 Digest (Repl.) 436, 3334.

- A (3) *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 12 Digest (Repl.) 447, 3380.
- (4) *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial & Overseas)*, [1954] 2 All E.R. 226; [1954] A.C. 495.
- (5) *Robson v. Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 2 Digest 169, 379.
- B (6) *Halsey v. Lowenfeld*, [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 2 Digest 157, 272.
- (7) *Fasbender v. A.-G., Kramer v. A.-G.*, [1922] 2 Ch. 850; 91 L.J.Ch. 791; 128 L.T. 85; Digest Supp.
- (8) *Niboyet v. Niboyet*, (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest (Repl.) 469, 1021.
- C (9) *Roe v. Roe*, [1916] P. 163; 85 L.J.P. 141; 114 L.T. 1184; *subsequent proceedings*, 115 L.T. 792; 27 Digest (Repl.) 353, 2914.
- (10) *Re Furness*, [1944] 1 All E.R. 575; 2nd Digest Supp.
- (11) *British Movietone, Ltd. v. London & District Cinemas, Ltd.*, [1951] 2 All E.R. 617; [1952] A.C. 166; 3rd Digest Supp.
- D (12) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, 3333.

Action.

The wife claimed arrears of maintenance payable by the husband under an agreement of Sept. 14, 1932. The facts appear in the judgment.

E *F. Hallis* for the wife.

N. J. Skelhorn, Q.C., and *N. R. Blaker* for the husband.

Cur. adv. vult.

F Apr. 6. **SELLERS, J.**, read the following judgment: By a written agreement of Sept. 14, 1932, the wife agreed with the husband as follows:

G “1. The husband and the wife hereby mutually agree that they will for the future live apart from each other and that the wife shall be free from the control of the husband and may live where she thinks proper. 2. The husband agrees with the wife that he will pay to her for her support and maintenance the monthly sum of £9 during the joint lives of the husband and wife, such payments to be made to her on the first day of each month through the National Provincial Bank, Limited, at Hastings, or such other bank as the husband may select. 3. The wife agrees with the husband that she will out of the said allowances or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her. 4. If the husband and the wife shall at any future time come together and cohabit or if their marriage shall be dissolved this agreement shall thereupon determine.”

H The question for consideration in this case is whether, in the circumstances existing at the outbreak of war on Sept. 3, 1939, between Great Britain and Germany (then incorporating Austria), the agreement was put an end to by the state of war and the respective obligations of the parties under it terminated, in particular the husband's obligation to pay the moneys monthly for the support of his wife.

I The parties were married in England on Dec. 2, 1931. The husband was a British subject. The wife was Austrian by birth, but acquired, according to our law, her husband's nationality on marriage. On Sept. 14, 1932, the parties separated under the agreement of that date. They have never come together again, and the marriage has not been dissolved. On Sept. 3, 1939, the wife was in Vienna, having moved there shortly before from Brazil. Notwithstanding

the plea in para. 4 of the statement of claim*, it was admitted at the trial that she was voluntarily resident there at the commencement of and throughout the war.

The husband paid the monthly instalments until June 1, 1939, but not after. Three instalments totalling £27 were due and unpaid when the war broke out, and they are included in this claim. The substantial claim is that the further monthly instalments as they accrued should have been paid to the Custodian of Enemy Property, from whom, if that had been done, the wife, as events turned out, could have received them before this action was brought. Since they were not paid to the custodian, the husband has been authorised by letter of Sept. 25, 1951, to hold at the disposal of his wife all moneys payable to her under the terms of the separation agreement free from the restrictions imposed by the Trading with the Enemy Act, 1939, and any orders made thereunder. By S.I. 1952 No. 1923, it was ordered that Austria should for all purposes of the Trading with the Enemy Act, 1939, and for the purposes of any order made thereunder, cease to be treated as if it were enemy territory as from Nov. 5, 1952. Therefore, the sole question is whether the agreement has subsisted so that any money was payable thereunder after the outbreak of war. If it has subsisted, it is conceded that the husband is liable for the accumulated arrears less income tax thereon.

It was contended on behalf of the husband that (1) the outbreak of war abrogated the agreement under the common law of this country as the wife was and remained in enemy territory and was and remained an enemy, that further performance of the agreement would have involved intercourse with the enemy and would have been for the benefit of an enemy, and that the continuance or further performance of the agreement became illegal and contrary to public policy; (2) the Trading with the Enemy Act, 1939, made further performance illegal and therefore put an end to the agreement; and (3) the agreement, in the circumstances, became impossible of performance without any fault on the husband's part and was frustrated.

At the Bar it was not contended that the contract was executed. It was accepted that it was executory, by which I understand the parties to mean not that it was wholly unperformed but that there remained something to be done on both sides. The wife's obligation to live apart and the husband's obligation to leave his wife free from his control continued up to the war, and the impact of the war in the circumstances tended to enforce those obligations by the necessity of the situation. There was nothing actively to be done by the wife, unless it was to communicate to her husband, for the forwarding of the monthly maintenance, any change from the address in Vienna which she had given him before the war broke out, or possibly to give a receipt for moneys received. It remained for the husband to make the payment each month as it fell due, and to do this his bankers would have had to transmit the £9 monthly to the bank in Vienna named by the wife. No doubt this would have involved a degree of intercourse, and there was the benefit to the wife as an enemy of £9 a month, which could only be the barest maintenance. The money was only payable during their joint lives, but up to the war the wife had not been required to establish each month that she was still living. It had been taken for granted and the money had been sent (except for the last three instalments), and the obligation to pay could well have continued on the same understanding.

Those are, as I see them, the features and characteristics of the contract under consideration. One is tempted to say outright that a simple insignificant contract of this character, designed to provide a very modest monthly subsistence allowance by a British subject to his wife whilst they were living apart, and which

* In this paragraph it had been pleaded that the wife's permanent place of residence was Brazil, that on Sept. 3, 1939, she was on holiday in Austria, was unable to leave and became an involuntary resident there.

A in its ordinary performance would require the slightest formal communication by his bank to hers, could hardly be said to be against public policy and, therefore, ended for all time, with the strange result that the war removed the contractual obligation to live apart and at the same time made it very difficult for them to do otherwise.

B As the question appears to come before the courts for the first time and there must have been many separation agreements in 1914 and perhaps more in 1939, it would seem improbable that the aggregate of any payments under such agreements would have been of great benefit financially to any country; but authority is against that attitude. SIR ARNOLD MCNAIR, in his work on the LEGAL EFFECTS OF WAR (3rd Edn.) discusses the matter, at p. 84, and quotes LORD PORTER'S observations in *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* (1) ([1943] 1 All E.R. at p. 100):

C "The question, however, whether a given act is against public policy must, I think, be decided on general principles. It is not permissible to say that a particular act will not in fact assist the enemy. The proper inquiry is whether that act is of a class which is likely to assist him and it is immaterial to ascertain whether in the individual case he may or may not be found to have profited from it."

D It is necessary, therefore, to consider the law, and I take first the position at common law. This has been stated and summarised in recent cases which have reviewed the authorities. I take one extract from LORD PORTER'S speech in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (2) ([1946] 1 All E.R. at p. 48):

E "It is, no doubt, generally true that the further performance of contracts made before the outbreak of war and not fully performed on either side is prohibited as contrary to public policy provided that such performance involves intercourse with an enemy or benefits him. For the sake of brevity I speak of this result as abrogation of the contract though the contract itself is not abrogated, but further performance alone forbidden. There are, however, exceptions and limitations upon this doctrine. So far, at any rate, as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment by the other are suspended, not dissolved, and in the same category are to be placed certain contracts, particularly those which are really concomitants of the rights of property though still executory: see per LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (3) ([1918] A.C. at p. 269). In each case, therefore, before deciding whether a contract is abrogated or merely suspended on the outbreak of war it is essential to determine its exact construction and effect."

H In the recent case of *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial & Overseas)* (4), LORD MORTON OF HENRYTON took two passages from that speech in the *Ertel Bieber* case (3) as correctly stating the common law ([1954] 2 All E.R. at p. 231):

I "LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (3), stated the common law of England as to trading with the enemy as follows ([1918] A.C. at p. 267): 'My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial". As to this I agree with the judgment of the

Court of Appeal in the case of *Robson v. Premier Oil & Pipe Line Co., Ltd.* (5), where PICKFORD, L.J., delivering the judgment of the court, LORD COZENS-HARDY, M.R., himself and WARRINGTON, L.J., said ([1915] 2 Ch. 136): "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction." That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt'. LORD DUNEDIN went on to point out that there are certain exceptions to the general rule. He said ([1918] A.C., at p. 269): 'There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Lowenfeld* (6). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases'."

It was argued for the husband that this was a clear case where further performance of the contract would involve intercourse with the enemy and was for the benefit of an enemy as the wife was a resident in enemy territory, and therefore the contract was abrogated. For the wife it was submitted that the facts of this case made it an exception to the general rule as it was closely analogous in principle to those contracts which are really the concomitants "of property, which even so far as executory are not abrogated"; to use LORD DUNEDIN's phrase in the *Ertel Bieber* case (3), or to the payment of a debt by instalments as in the *Schering* case (2), where the instalments fell due for payment after the war had commenced and the war did not abrogate or discharge the debt.

In support of the first submission it was argued that the contract of marriage is not affected by war (McNAIR, op. cit., pp. 100, 101; *Fasbender v. A.-G.*, *Kramer v. A.-G.* (7)). Marriage is not affected because it is a contract creating a status and the status continued; and reliance was placed on the definition of "status" by BRETT, L.J., in *Niboyet v. Niboyet* (8) (4 P.D. at p. 11):

"Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law."

A separation agreement, it was argued, was a contract affecting or modifying the status of the married parties and was therefore a concomitant of status and should avoid abrogation by war as do payments under a lease or it may be under a settlement by deed. In *Roe v. Roe* (9), SHEARMAN, J., used this expression ([1916] P. at p. 164):

"Having separated by consent, if the document or contract under which they so separated comes to an end, then from the moment when it comes to an end, . . . the status conferred by it comes to an end also."

From that it was submitted that the separation agreement established a status of marriage modified by the several disabilities which the contract created; the

A inability to claim relief in the courts for desertion, the husband's inability to complain if anyone harboured his wife, restrictions on the wife's right to proceed for maintenance on grounds of wilful neglect to maintain, and alteration in the husband's common law relationship with the rest of the community as regards his liability for his wife's necessities. I doubt whether SHEARMAN, J., intended the word "status" as so used to have any technical meaning. The parties to this agreement have remained husband and wife throughout and have retained their marriage status. The agreement has not deprived them of any right or obligation of that status, but it may afford evidence that rights have not been infringed and that obligations have been performed. It may be difficult to regard the spouses as having a modified status, but the payment does arise out of the husband's obligation to maintain his wife where she has committed no matrimonial offence and is therefore quite different from a trading contract, which is the kind of contract most frequently held to be abrogated in the cases, although it has been authoritatively held that contracts other than commercial contracts may be abrogated by war.

D In *Robson v. Premier Oil & Pipe Line Co., Ltd.* (5) the judgment of PICKFORD, L.J., from which LORD DUNEDIN quoted in the *Ertel Bieber* case (3), contained also this passage ([1915] 2 Ch. at p. 136):

E "We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden."

F It is difficult to conjecture any executory contract which would not require for its further performance at least an address, receipt or acknowledgment from the party in enemy territory. If the husband had given his wife some real property in this country, or some shares in an English company, which produced £9 a month, then the wife's right would have been preserved. No such permanent provision was made, perhaps for the reason that the husband had not the means so to do, or that he contemplated his wife's early return to him. These are all considerations which indicate some injustice if the further performance of this contract is held to be abrogated, but the exigencies of war may involve many injustices, and the question is whether in the public interest the contract is one which the law has stigmatised, or should stigmatise, as being against public policy.

G I turn now to consider *Schering's* case (2), where the contract was held not to be abrogated by war. Nothing remained to be done under the contract but to discharge an accrued debt by instalments. The debt had accrued before the outbreak of war, but the payments of the majority of the instalments were outstanding, and the fifth of fourteen instalments fell due on Oct. 28, 1939. It was held that as all that remained to be done was to discharge an accrued debt by instalments the war did not abrogate or discharge a debt incurred before the declaration.

H The *Schering* case (2) was closely analysed in the course of the speech of LORD MORTON OF HENRYTON in *Arab Bank, Ltd. v. Barclays Bank* (4), and was referred to and applied by other members of the House. LORD MORTON said I ([1954] 2 All E.R. at p. 234):

"In the *Schering* case (2) there was no existing right of action to recover the remaining instalments, for these instalments had not yet become payable; yet this House held that the right to receive these instalments when they fell due was a right which survived the outbreak of war. Having regard to this decision, I do not think that the right which was vested in the appellants at the outbreak of war can be held to have been destroyed merely because no action could be brought to recover the credit balance

without a previous demand. I am content, without elaborating the matter further in words of my own, to adopt the reasoning of JENKINS, L.J., when he said, speaking of the *Schering* case (2) ([1953] 2 All E.R. at p. 283): 'If, as was recognised in the *Schering* case (2), a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security, on the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning, a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go to the length of confiscating enemy property, is recognised, I see no reason in principle or common sense why a debt, for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception'."

The differences between the *Schering* case (2), where the debt had accrued and where a contrary decision would have meant confiscation of proprietary rights, and the present case do not seem from the point of view of public security and public policy in time of war so cogent as the similarities. That which would have been involved in communication with the enemy in the payment of the instalments there and the monthly instalments here appear to be almost identical. LORD REID observes ([1954] 2 All E.R. at p. 238) that the preservation of debts from abrogation is to some extent anomalous, and he quotes a passage from LORD GODDARD's speech in the *Schering* case (2) which points out that the differences between abrogation and non-abrogation are not always logical. LORD MORTON refused to attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war. The courts have, I think, throughout dealt with each case as it has arisen and viewed it from the standpoint of public policy rather than rigid precedent or rule.

In my judgment, public policy did not require that this contract should terminate on the outbreak of war. It continued to exist, and statutory provisions required the husband to make his payments after the war had started to the Custodian of Enemy Property.

Although the case came before the court on a different issue, the observations of LORD GREENE, M.R., in *Re Furness* (10), lend support, I think, to the view I have expressed. The succeeding Lord Furness was attempting to enforce a forfeiture clause in a settlement made by the late Lord Furness in favour of his wife. At the outbreak of war and up to the death of Lord Furness they were both living in the south of France, an area which became enemy territory on July 10, 1940. Lord Furness died on Oct. 6, 1940. The Master of the Rolls said ([1944] 1 All E.R. at p. 578):

"So far as the instalments payable between July 10, 1940, and the date when Lady Furness on her return to England ceased to be an enemy for the purposes of the Trading with the Enemy Act are concerned, admittedly, on the basis that there was no forfeiture, they are payable to the custodian."

Secondly, the husband relies on the Trading with the Enemy Act, 1939. The wife was admittedly an "enemy" within the Act so long as she remained in Austria or other enemy territory, but her agreement with her husband could have been equally well performed by her quitting there for England or a neutral country, for it was agreed that she might live where she thought proper. I

- A accept counsel for the husband's submission that the Trading with the Enemy Act, 1939, and the rules thereunder would not revive a contract abrogated by the outbreak of war or provide for any performance of it; but I have found that the contract subsisted at common law, and if that is so it is not defeated by the Act of 1939. The Act prohibited certain dealings and made provision for the collection of enemy debts and the custody of enemy property. I do not think
- B I need develop this further. It was not disputed that if the contract subsisted the husband should have paid the instalments when due each month to the Custodian of Enemy Property.

- Neither need I deal at any length with the third defence, that the contract was frustrated. If I am right in the views I have already expressed, then clearly the contract was not frustrated even if it ever was the kind of bargain to which the
- C doctrine could be applied. The House of Lords, in *British Movietonews, Ltd. v. London & District Cinemas, Ltd.* (11), expressed, it would seem, a preference for VISCOUNT SIMON's view in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.* (12) as to the basis on which the doctrine of frustration is founded. LORD SIMON said ([1941] 2 All E.R. at p. 171):

- D "The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties . . . Every case in this branch of the law can be stated as turning on the question of whether, from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract."

- E I am inclined to think it would be a wild conjecture to frame the term which the parties or an officious informed bystander would have inserted into this contract to deal with the situation of war arising between the respective countries or territories in which the parties were at the time respectively residing, but it could be hazarded that the obligation to live apart would continue and that the monthly instalments would be paid to the custodian, from whom the wife would have some hope of retrieving them in time. It seems hardly likely that the
- F husband would be released from his financial obligations by this fortuitous event.

- In my judgment, the husband has no defence to this claim, although it may seem burdensome to him if he has not put on one side the instalments as they fell due, for the total has grown to a large figure. I give judgment for the wife. The precise amount after the appropriate tax has been deducted must be
- G calculated.

Judgment for the wife.

Solicitors: *Buckeridge & Braune* (for the wife); *Bartlett & Gluckstein* (for the husband).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

AUTOMOBILE PROPRIETARY, LTD. v. BROWN (VALUATION OFFICER).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.),
March 25, 28, 29, 1955.]

Rates—De-rating—Industrial hereditament—Factory or workshop—Premises occupied by non-profit-making company—Company carrying on club—Services in connection with motoring provided for club members—Premises used by company for upkeep of its own road vehicles and their component parts—Whether work done “by way of trade”—Factory and Workshop Act, 1901 (1 Edw. 7 c. 22), s. 149 (1) (c)—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (2) (b) (as amended by the Local Government Act, 1929 (19 & 20 Geo. 5 c. 17), s. 69).

A limited company, Automobile Proprietary, Ltd., established a club, known as the Royal Automobile Club, the full members of which were required to be members of the company, and the company provided for the use of these members a club-house in London and a country club. The company also provided services and facilities in connection with motoring, such as road patrols, road-side telephone boxes and assistance in touring, for the use, not only of the full members of the club, but also of “associate members” of the club, who were not members of the company and not entitled to use the club-house or the country club. The services and facilities in connection with motoring were paid for out of a separate fund provided by a capitation fee in respect of the full members and the whole of the subscriptions of the associate members. The whole of this fund was spent on these services and facilities, it being the object of the club, not to make a profit, but to provide the maximum services and facilities which the available money could provide. For the purpose of providing these services the company owned a large fleet of road vehicles. The company was the occupier of certain premises, a great part of which was used in various ways for the upkeep and re-conditioning of its vehicles or parts of vehicles. When a part of a vehicle used by one of the company’s road patrol men needed to be re-conditioned, it was the practice of the company to send to the patrol man a similar part out of its stock and to have the defective part sent to the company’s premises where the “unit” was re-conditioned and kept in store until it was required again. The repair and maintenance of the vehicles and the repair of the “units” sent in for re-conditioning took place in the same area of the company’s premises, but the greater part of the work done in that area consisted of the repair of the units. A few of the company’s vehicles were housed in one part of the premises, and other relatively small areas were used for, among other things (a) the making of badge fittings for attaching to motor vehicles the badges issued by the company to members, and (b) brazing, in connection with other work done on the premises. The company claimed that the premises were an “industrial hereditament” within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. It was agreed that the areas where the badge fittings were made and the brazing was done were used as “a factory or workshop” within the meaning of the Act of 1928 and s. 149 (1)* of the Factory and Workshop Act, 1901, because the activities carried on by the company within those areas fell within the phrase “metal and india-rubber works”, which was No. (13) of the non-textile factories listed in Part 1 of Sch. 6 to the Act of 1901. It was conceded by the company that, by the

* The relevant terms of s. 149 (1) (c) of the Act of 1901 as incorporated by the Act of 1928 are set out in the judgment at p. 222, letter G, post. The concession was made on the footing that this part of the premises came within para. (a) of the definition of non-textile factory in s. 149 (1) of the Act of 1901, to which the qualification “by way of trade” does not apply.

A terms of s. 3 (2) (b)* of the Act of 1928 (as amended by the Local Government Act, 1929, s. 69), the whole of the area used for the maintenance of the vehicles was excluded from the definition of "factory", notwithstanding that the main activity in that area was the repair, not of the vehicles, but of the units; but it was contended by the company that the repair of "units" was a factory purpose because it was being done "by way of trade"

B within para. (c) of the definition of "non-textile factory" in s. 149 (1) of the Act of 1901. The valuation officer contended, among other things, that the overhaul and re-conditioning of "units" was part of the maintenance of the company's road vehicles.

C **Held:** on the facts, the activities carried on by the company at the premises in question were in the nature of club activities and were not conducted there "by way of trade", within para. (c) of s. 149 (1) of the Factory and Workshop Act, 1901, and accordingly the premises were not an "industrial hereditament", within s. 3 (1) of the Rating and Valuation Apportionment) Act, 1928.

Inland Revenue Comrs. v. Eccentric Club, Ltd. ([1924] 1 K.B. 390) applied. *Challoner v. Robinson* ([1908] 1 Ch. 49) distinguished.

D Per CURIAM: to accept the contention of counsel for the valuation officer that the overhaul and re-conditioning of the units was part of the maintenance of the company's road vehicles would involve dissenting from the opinion expressed by VISCOUNT DUNEDIN in *Potteries Electric Traction Co., Ltd. v. Bailey* (*Stoke-on-Trent Revenue Officer*) ([1931] A.C. at p. 169) that maintenance of road vehicles imported the notion of the vehicles being at the premises when being maintained; and the court was not prepared to go to the length of expressing such dissent in the present case (see p. 228, letter H, post).

E Appeal dismissed.

[As to rating relief for factories and workshops, see 27 HALSBURY'S LAWS (2nd Edn.) 439-455, paras. 876-886.]

F For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.

For the Factory and Workshop Act, 1901, s. 149, and Sch. 6, see 20 HALSBURY'S STATUTES (2nd Edn.) 180-183.]

Cases referred to:

- G (1) *Potteries Electric Traction Co., Ltd. v. Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.
- (2) *National Asscn. of Local Government Officers v. Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.
- H (3) *Challoner v. Robinson*, [1908] 1 Ch. 49; 77 L.J.Ch. 72; 98 L.T. 222; 71 J.P. 553; 8 Digest (Repl.) 665, 99.
- (4) *Simpson v. Hartopp*, (1744), Willes, 512; 125 E.R. 1295; 31 Digest (Repl.) 207, 3381.
- (5) *Inland Revenue Comrs. v. Eccentric Club, Ltd.*, [1924] 1 K.B. 390; 93 L.J.K.B. 289; 130 L.T. 538; 12 Tax Cas. 657.
- I (6) *New York Life Insurance Co. v. Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles v. New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, 300.

Case Stated.

This was a Case Stated by the Lands Tribunal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, for the decision of the Court of Appeal.

* The terms of s. 3 (2) (b) of the Act of 1928 are set out in the judgment at p. 222, letter A, post.

The appellant, Automobile Proprietary, Ltd., was the occupier of a hereditament which was entered in Part 1 of the valuation list for the Heston and Isleworth rating area and which was described as "workshops and appurtenances, 15, Maswell Park Road, Hounslow", and assessed at £1,048 gross value and £870 rateable value. On June 23, 1952, the company made a proposal that the hereditament should be treated as an industrial hereditament and transferred to Part 2 of the valuation list. The respondent valuation officer objected to the proposal and the company appealed against the objection. On Dec. 18, 1952, the local valuation court determined that the hereditament should remain in Part 1 of the valuation list at the existing assessment. The company thereupon appealed to the Lands Tribunal.

The Lands Tribunal found the following facts. The appellant company was a company limited by guarantee, and its objects were expressed in its memorandum of association as, among other things,

"to establish, maintain and conduct a club for the encouragement and development in Great Britain of the auto-motor vehicle and other allied industries, and for the accommodation of members of the company and their friends, and to provide a club-house or club-rooms, and other conveniences, and generally to afford to members and their friends all the usual advantages, conveniences and accommodation of a social club and centre of information and advice on all matters pertaining to auto-motor vehicles."

The income and property of the company, whencesoever derived, was to be applied solely towards the objects of the company. No portion thereof was to be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the company, and, in the event of the company being wound up, the members were not to receive any surplus assets but were to be liable each to contribute such a sum not exceeding £1 as might be required for payment of the debts and liabilities of the company. The company had established a club known as the Royal Automobile Club, the members of which were required to be members of the company, and had provided a club-house in Pall Mall, London, and a country club at Woodcote Park, Epsom, available for the use of its members. It also provided services and facilities in connection with motoring, such as road patrols, road-side telephone boxes, road signs, assistance in home and foreign touring, legal aid, etc. There was another class of members of the club, termed "associate members", who were not members of the company and were not entitled to use the club-house or country club, but who were entitled to the services and facilities provided by the company in connection with motoring. The subscriptions of associate members were wholly utilised for those services and facilities, which were paid for out of a separate fund provided by the subscriptions of the associate members and by a capitation fee in respect of the full members. It was not the object of the club to make a profit, but to provide the maximum services and facilities which the available money was sufficient to provide, and this separate fund was wholly spent on the provision of such services and facilities. On Dec. 31, 1952, the company owned a fleet of 754 vehicles, made up of 628 motor bicycles with side-car boxes, fifty road-service vans, seventy-four cars, one motor cycle and passenger side-car, and one invalid tricycle.

The hereditament in question was a collection of single storey buildings, with an upper floor, used as offices, in part of the main building, and there was a gallery to the main building used principally for the storage of the company's papers. At the hereditament the company serviced, re-conditioned and repaired motor cars, motor vans, motor cycles, combinations of motor cycles and side-cars, and parts of such cars, vans, cycles and combinations belonging to it. At least four of these motor cars and motor vans were usually housed at the hereditament. The company also made badge fittings for attaching to motor

- A vehicles the badges issued by the company to members, and painted, sprayed and stencilled the traffic signs used in connection with the motoring services which it rendered. On the ground floor, to the rear of the main building, was a smaller area coloured pink on the plan annexed to the Case. In the part of this area marked "Bracket Making" on the plan, work was carried out in the making of various fittings for affixing badges to motor vehicles, and during 1952 sixty-
- B four thousand badge brackets were made at a cost of £2,147. In the part marked "Sign Painting and Stencilling", the preparation of the traffic signs took place, and, during 1952, 12,238 road signs were made, renovated and prepared at a cost of £989. The part of this area marked "Store and Brazing" was used, in part, for the storage of metal and boards used in connection with the bracket making and sign painting, and, in part, for brazing in connection with the work carried
- C out in the main building. The ground floor of the main building was divided into the following sections. (i) On the left-hand side, coloured yellow and marked "A" on the plan annexed to the Case, was a vehicle washing bay, a space used for garaging, overhauling and greasing cars or vans, and a space for storing new motor cycles which were awaiting assembly into motor cycle and side-car box combinations. (ii) In the middle, coloured a neutral tint and marked "B" on
- D the plan, was the general utility and manoeuvring space, providing access to various parts of the premises. (iii) In the part coloured yellow and marked "C" on the plan, was a standing space for four motor vehicles. (iv) On the right-hand side, coloured blue and marked "D" on the plan, were the dismantling and assembly area and the work bays in which the overhaul and repair of motor cycles and re-conditioning of units took place. (v) The part of the ground floor
- E coloured blue on the plan was mainly used for storage of spare parts and other materials used (partly on the hereditament and partly elsewhere) in the overhaul and repair of motor cycles or units such as engines, gear boxes and clutches, and also for the storage of such units after they had been overhauled and repaired on the premises until they were required for use on the premises or for sending away. (vi) On the right-hand side, coloured yellow on the plan, were standing space for
- F a caravan and a tyre store. (vii) Also on the right-hand side, coloured pink on the plan, were the motor cycle frame stores. Also on the ground floor, and coloured a neutral tint on the plan, were other parts of the hereditament which were of general utility in relation to the purposes for which the hereditament was occupied, namely, lavatories, canteen, battery-charging room, boiler house, coal bunker and oil stores.
- G The company's normal arrangement was for a stock of spare parts, re-conditioned units of the various kinds mentioned, and other materials to be kept at the hereditament so that they could be dispatched as required to any part of Great Britain or Northern Ireland for the maintenance or repair of a patrol man's vehicle. The part or unit was then substituted either by the patrol man himself or by a local motor repairer. Where a re-conditioned unit was sub-
- H stituted for an unserviceable unit, the latter was sent to the hereditament, overhauled and repaired as necessary, and put into stock ready for use on the hereditament or for sending away. The cars and vans normally housed on the hereditament were there overhauled and maintained as necessary. Motor cycle combinations operated by patrol men in the neighbourhood were, when possible, also overhauled and maintained on the hereditament instead of by local motor
- I repairers. If a vehicle was brought in for a complete overhaul, the machine was stripped right down, and any damaged or worn-out parts were repaired, if possible, or (in most cases) replaced, and for this purpose any new or re-conditioned parts required were provided from stock. Overhauls of units were carried out by the same method as overhauls of machines. In 1952, the work carried out in the area marked "A" on the plan (work of the nature of maintenance of road vehicles) cost £2,873. During the same year, in the part marked "D" on the plan, the cost of the overhaul work in connection with units amounted to

£4,063 10s. In the same year there were issued from the stores articles of stock amounting to a value of £4,596 for use on the hereditament, and to a value of £12,733 for sending out to motor vehicle patrol men for use in the repair of their vehicles. A

It was contended on behalf of the company that the hereditament was an industrial hereditament within the definition of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, in that (a) the making of badge brackets constituted the premises "metal works" and, therefore, a non-textile factory B specified in Part 1 of Sch. 6 to the Factory and Workshop Act, 1901; (b) the other processes carried on on the hereditament constituted the premises a factory or workshop within the definition in s. 149 (1) (c) (i) and (ii) of the Factory and Workshop Act, 1901; (c) the overhaul and repair of "units" was not main- C tenance of road vehicles; and (d) in considering for what purpose the hereditament was primarily occupied and used, s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928, required any part in which the housing and maintenance of road vehicles took place to be excluded from consideration. On behalf of the valuation officer it was contended that the hereditament was not an industrial hereditament within the definition in s. 3 (1) of the Act of 1928 in that (a) the making of badge brackets was not the primary purpose for which D the hereditament was occupied; (b) the other processes carried on on the premises were not done "by way of trade or for purposes of gain" within the meaning of s. 149 (1) (c) of the Act of 1901; (c) the parts of the ground floor which were coloured yellow on the plan, the part coloured blue and marked "D", and the parts coloured pink and marked "Frame Store" and "Store and Brazing" were places used by the company for the housing or maintenance of E their road vehicles; (d) the overhaul and re-conditioning of "units" was part of the maintenance of the company's road vehicles; (e) in considering the purpose for which the hereditament was primarily occupied and used, the whole hereditament had to be considered, including places used by the company for the housing or maintenance of their road vehicles; (f) any place F used by the occupier for the housing or maintenance of his road vehicle must in law, having regard to s. 3 (2) (b) of the Act of 1928, be treated as being occupied for "purposes which are not those of a factory or workshop", notwithstanding that it was also used for other purposes; (g) the whole hereditament apart from the part marked "Bracket Making" was occupied and used for purposes which G were not those of a factory or workshop within the meaning of the Act of 1928; and (h) the hereditament was primarily occupied and used for the purposes of storage and for other purposes, among other things the housing or maintenance of the company's road vehicles, which purposes were "not those of a factory or workshop", within the meaning of para. (f) of the proviso to s. 3 (1) of the Act of 1928.

The tribunal was satisfied on the evidence that the primary purpose for which the hereditament was, in fact, occupied and used was the overhauling, repairing and re-conditioning of units, and that, in view of the decision in *Potteries Electric Traction Co., Ltd. v. Bailey* (Stoke-on-Trent Revenue Officer) (1), such work did not constitute "the maintenance of road vehicles" within the Act of 1928. The tribunal, applying the dictum of LORD WRIGHT in *National Assn. of Local Government Officers v. Bolton Corpn.* (2) ([1942] 2 All E.R. at p. 433), took the view that "trade" was "not only in the etymological or dictionary sense, but in legal usage a term of the widest scope," and that having regard to that dictum and the decision in *Challoner v. Robinson* (3) all the work done on the premises, being work done in carrying on a proprietary club, was done "by way of trade". The tribunal was, however, also satisfied that the overhaul, repair and maintenance of cars, vans, motor cycles and combinations of motor cycles and side-cars, as carried out at the hereditament, was "maintenance of . . . road vehicles", and that some of such work as well as the overhauling, repairing and re-conditioning of units took place in the part of the hereditament coloured blue H I

A and marked "D" on the plan. It seemed to the tribunal, therefore, that, by reason of the provisions of s. 3 (2) (b) of the Act of 1928, that part was excluded from the definition of a "factory or workshop", and that all the purposes for which that part was used must, therefore, be "purposes . . . which are not those of a factory or workshop". The tribunal took the view that it had to look at the whole hereditament to ascertain the primary purpose for which it was occupied and used, and, on the assumption which it felt obliged to make having regard to the provisions of s. 3 (2) (b) of the Act of 1928, it determined that the hereditament was not an industrial hereditament within the meaning of s. 3 of the Act of 1928. The tribunal went on to say that, had the tribunal regarded it as permissible in law to treat the purposes of overhauling, repairing and re-conditioning units carried out in the part of the hereditament coloured blue and marked "D" as purposes of a factory or workshop, the tribunal would have reached the contrary conclusion. The tribunal dismissed the appeal and confirmed the decision of the valuation court. The question for the Court of Appeal was whether the tribunal came to a correct conclusion in law in holding that the hereditament was not an industrial hereditament within s. 3 of the Act of 1928.

D *G. D. Squibb* for the appellant company.
Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

SIR RAYMOND EVERSHERD, M.R.: At the beginning of his interesting argument in opening this case counsel for the appellant company, the Automobile Proprietary, Ltd., told us that in order to succeed he must show that the hereditament here in question was being occupied by the company "by way of trade", that being, as will be seen, a reflection of certain language in the Factory and Workshop Act, 1901.* The Lands Tribunal, from whom the appeal comes, was of opinion that the condition stated by counsel for the company had been satisfied. In para. 12 of the Case Stated, the tribunal said that it took the view, having regard to a dictum of LORD WRIGHT in *National Assn. of Local Government Officers v. Bolton Corpn.* (2) ([1942] 2 All E.R. at p. 433) and the decision in *Challoner v. Robinson* (3), that all the work done on the hereditament "being work done in carrying on a proprietary club was done 'by way of trade'". With all respect to the tribunal, I have come to a different conclusion on that point; for, in my judgment, it is not true to say that the activities (which I will describe presently in more detail) with which we are concerned are activities undertaken by the company by way of trade; and, if that view is right, then, as counsel for the company conceded, he cannot succeed in this case. Certain other points have also been raised, but I shall confine my conclusion to the view which I take on the point to which I have referred, and I shall find it unnecessary to express, and shall not express any concluded view on those other matters.

G First I must make some further reference to the facts. They are stated at considerable length in a number of sub-paragraphs of cl. 8 of the Case Stated.
 H I shall read some of them which are necessary to make clear what follows.

I " (c) The [appellant company has] established a club known as the Royal Automobile Club the members of which are required to be members of the company. (d) The [company has] provided a club-house in Pall Mall, London, and a country club at Woodcote Park, Epsom, available for the use of such members. (e) The [company] also provide[s] services and facilities in connection with motoring such as road patrols, road-side telephone boxes, road signs, assistance in home and foreign touring, legal aid, etc. (f) There is another class of members of the Royal Automobile Club termed 'associate

* The Factory and Workshop Acts, 1901 to 1920, were repealed by the Factories Act, 1937, s. 159 (1), and Sch. 4, but by s. 159 (3) of the Act of 1937, the definitions of the expressions "factory" and "workshop", contained in s. 149 of and Sch. 6 to the Factory and Workshop Act, 1901, were expressly saved for the purposes of the Rating and Valuation (Apportionment) Act, 1928.

members' who are not members of the company and who are not entitled to use the club-house or country club but who are entitled to the services and facilities referred to in para. (e). The affairs and finances of the associate members are administered by a committee specially constituted for this purpose."

I pause to note that we are not told how that committee is, in fact, constituted, although counsel for the valuation officer stated that, as he understood it, it was a committee of the members of the club and, therefore, of the company.

"(g) The subscriptions of associate members are wholly utilised for the services and facilities referred to in para. (e). The services and facilities are paid for out of a separate fund provided by the subscriptions of the associate members and by a capitation fee in respect of the full members; it is not the object of the club to make a profit, but to provide the maximum services and facilities which the available money is sufficient to provide, and this fund is wholly spent on the provision of such services and facilities."

The Case then proceeds to state, in great detail, the facts in regard to the company's fleet of vehicles, their upkeep, and so on—the fleet which is maintained for the purpose of providing the services mentioned in cl. 8 (e) of the Case. The hereditament with which we are concerned and which is situate in Maswell Park Road, Hounslow, is a place substantially devoted in one way and another to various aspects of the upkeep of these road vehicles and their component parts. I shall refer presently to the plan attached to the Case but, quite briefly, on this hereditament are, first, the means for the service and repair of the vehicles which I have mentioned and of separate parts of those vehicles. Generally speaking, the parts are sent to the company's premises for re-conditioning, and the company sends out to the patrol man (whose vehicle may be a long way from London) another part out of its stock, either a new part which has been acquired or a similar part which previously has been re-conditioned by the company, in order that the vehicle should be kept on the road, and kept efficiently on the road, and that there should not be the waste of time taken by bringing the whole vehicle, let us say, all the way from Newcastle-upon-Tyne to London to have a particular part replaced. In addition to those activities of service and repair, a few vehicles are housed on these premises. There is also an activity of making badge fittings. I take it to be generally known that members and associate members of the Royal Automobile Club are entitled to carry on their vehicles a badge indicating such membership, and it is at this place that badge fittings are made in large quantities for the benefit of members and associate members. Finally, there is a place for the painting of the road signs which I have referred to earlier. All those activities, in addition to what may be called offices and store premises, are to be found at this hereditament.

I turn next to the plan attached to the Case. The ground floor of the premises consists, first, at the back (the part most remote from Maswell Park Road) of a section which was referred to in argument as "the pink section". In area, that section would amount to something like a quarter of the whole ground floor area. It is itself divided into three distinct parts separated one from another by partitions. In one part the bracket making, to which I have already alluded, takes place. In another part the activity known as brazing occurs, and for the purposes of this case it has been conceded by counsel for the valuation officer that the brazing can be taken to be an activity so connected with the bracket making that, since the bracket making part is, for reasons which I shall later state, certainly a factory or workshop within the language of the Act of 1901, that part of the pink area which is occupied for the brazing should also be taken to be occupied as a factory or workshop. The third part is devoted to the painting of the signs which I have also mentioned. That is not, in terms, within Sch. 6 to the Act of 1901, and, if that part is to be regarded as a factory for the purposes

A of s. 149 (1) of the Act of 1901, it must be because that activity is being undertaken "by way of trade".

The larger ground floor section (roughly, perhaps, three times in area the size of the pink part) is made up of parts coloured on the plan yellow, grey or neutral, and blue. There is a small pink area called Frame Store but that may be disregarded for present purposes. The grey part (in so far as it is not used as
B canteens, lavatories and other such uses which are incidental to the main purpose for which the premises are used, being for the convenience and needs of those employed there) may be called "the general manoeuvring part", vehicles coming in to the grey part and going thence to whatever other section of the building is appropriate. In the very middle of the larger ground floor section,
C there is, coloured yellow on the plan, the standing place to accommodate four vehicles. The section which is lettered "A" and which is also coloured yellow is, perhaps, itself a quarter of the total of this part of the ground floor in space. It is not suggested that the uses to which "A" is put are, in themselves, purposes of a factory or workshop within the meaning of the relevant statute. Some service of motor cars takes place there: there is a washing bay, and so forth. The most important section, however, for present purposes is the part which is
D coloured blue on the plan and is also lettered "D"; for it is on that part, save in so far as it is used for stores, that the repair and maintenance of the vehicles and of the units of parts of vehicles takes place. As will be seen later, a great deal depends, in the view taken by the tribunal, on the appropriate answer to the question: For the purposes of de-rating is this blue part, lettered "D", occupied for factory purposes or not? Upstairs there is a much smaller area
E consisting of a gallery and general offices, but this area, which is used for storing documents or records of the town and country clubs, does not play any significant part for the purposes of the present argument. I have given that brief and, I hope, sufficient description of the premises or hereditament, and it will, therefore, be clear when I refer hereafter to the pink part and to the blue part, lettered "D", to what I mean to allude.

F I now turn to the relevant statutory provisions (some of which I have already briefly anticipated) in order to found the necessary conclusion in the case. The claim on behalf of the company is for what is commonly called "de-rating", on the ground that the hereditament here in question is being occupied as an industrial hereditament. The expression "industrial hereditament" is defined in s. 3 of the Rating and Valuation (Apportionment) Act, 1928. Section 3 (1)
G reads:

"In this Act the expression 'industrial hereditament' means a hereditament . . . occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used
H as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—(a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

I If it is permissible to make some criticism of the choice of language, it will be noticed that there is a certain lack of uniformity. Opening with the formula "the purposes of a dwelling-house" the legislature changes that form in para. (c) to "the purposes of distributive wholesale business" and in para. (d), again, to "purposes"—without any article—"of storage". Those slight variations do not altogether assist the argument which arises in a case like this. Sub-section (2) in its original form contained what is now para. (b) of that sub-section, para. (a) having been added by the Local Government Act, 1929, s. 69. It is

unnecessary to read para. (a), and, that paragraph being omitted, sub-s. (2) of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, reads: A

“For the purposes of this Act . . . (b), any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions ‘factory’ and ‘workshop’ have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920.” B

The selection of the Factory and Workshop Act, 1901, as a means of defining those expressions “factory” and “workshop”, strikes the reader as somewhat strange: since that was an Act which, as JENKINS, L.J., observed, was concerned with a wholly different subject-matter, namely, the protection of workpeople from injury; and it made, accordingly, a distinction between factories or workshops of a special character from the point of view of danger and other factories. The former class, the more dangerous class, are stated by name or description in Sch. 6 to the Act of 1901. They include such factories or workshops as “print works”, “lucifer-match works”, “cartridge works”, and, No. (13) of Part I, “Metal and india-rubber works”. It is to be noted that by virtue of the provisions of s. 149 (1) of the Act of 1901 a factory, or, more specifically, a “non-textile factory” includes, first, “(a) any works, warehouses . . . named in Part I of Sch. 6” to the Act. C D

Reverting for a moment to the plan, it is not in dispute in this case that the activities of the company conducted in the bracket-making part of the pink area fall within the phrase “metal and india-rubber works”, being No. (13) of the list of non-textile factories in Part I of Sch. 6. That part of the pink area, therefore (and, for reasons which I have given, the part devoted to brazing) is clearly a “factory” by what VISCOUNT DUNEDIN in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1) ([1931] A.C. at p. 166), called “direct description”, by virtue of s. 3 of the Rating and Valuation (Apportionment) Act, 1928; for that part of the hereditament is a “factory or workshop”, having expressly the meaning assigned to those words by the Act of 1901. It is, however, equally clear that no other of the activities of the company are factories or workshops within the special list of identified factories or workshops in Sch. 6 to the Factory and Workshop Act, 1901. If any other of the activities of the company are such as to bring the area where they are performed into the definition of “factory”, it must be under the later language of s. 149 (1) of the Act of 1901. For present purposes it is sufficient to read the part of that sub-section which follows the reference to Sch. 6. Going back to the opening words, E F

“The expression ‘non-textile factory’ means . . . (c) any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article . . .” G H

Later in the sub-section the expression “workshop” is given a corresponding definition. Again, to pick the matter up by reference to s. 3 of the Act of 1928, it follows that, prima facie, an industrial hereditament means a hereditament occupied and used as a factory, if it is occupied and used in any of the manners indicated in para. (c) of the definition of “non-textile factory” in s. 149 (1) of the Act of 1901, which I have just read. The company claims that the activities conducted (i) in the sign-painting and stencilling section of the pink area, and (ii) in the blue section marked “D”, must be treated as factory purposes, and, therefore, the area occupied by those activities must be regarded as an area used or occupied as a factory. I

A It will now be appreciated why counsel for the company said that he must show that the activities of the club are "by way of trade", for that is a necessary condition to what follows in para. (c) of the definition of "non-textile factory" in s. 149 (1) of the Act of 1901. If the activities are "by way of trade", then I think that, so far as the sign painting is concerned, there would be little difficulty in concluding that such operation amounted to the ornamenting or finishing of any article. In the area marked "D", the greater part of the work done does consist undoubtedly (because the tribunal has so found) of repair, not of the vehicles themselves, but of the units sent for re-conditioning. Such an activity, if again, of course, it is done by way of trade, would fall within the definition in para. (c) as being the repairing of any article. So much, I think, is not in doubt. It is, however, at this point that the further complication is introduced by the terms of what is now para. (b) of s. 3 (2) of the Rating and Valuation (Apportionment) Act, 1928. I will read the opening words again:

D "For the purposes of this Act . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory . . . "

E It is also the fact, as I have earlier stated, that, in addition to the primary function on this part of the premises of repairing units, there is also some repair or maintenance of the vehicles themselves, belonging to the company, which are brought in for such services. Therefore, it is, undoubtedly, the fact that part of the space is "used by the occupier for . . . maintenance of his road vehicles", and there is no railing-off or separation of that part of the premises which is used for that purpose of maintaining the road vehicles from the other parts which are devoted to what the tribunal held to be the much more substantial operation of repairing units. Counsel for the company felt bound to concede that the whole of the area where maintenance of these vehicles in fact takes place must be excluded from the definition of factory, although on that area a greater activity is performed, the more significant activity, of the repair of units. Counsel for the company felt bound, therefore, to concede that the area marked "D" cannot itself be regarded as a factory.

F So far, then, the situation may be put thus. If (as the tribunal held) what the company is doing is being done by way of trade then, says counsel, here in this hereditament, which is a single unit, there is, first, on the pink part, beyond any doubt, a factory—the sign painting falling within the language of para. (c) of the definition of "non-textile factory" in s. 149 (1) of the Act of 1901, and there being no question about the bracket making and the brazing. Therefore, this hereditament is being used as to a part, and a significant part, as a factory. Further, and with regard to the rest of the premises, as the tribunal found, the primary purpose for which they are occupied is repairing units: and the tribunal took the view, having regard to certain authority*, that repair of the units was not the same thing as maintenance of vehicles from which the units come. "Therefore", says counsel for the company, reverting to the opening words of s. 3 (1) of the Act of 1928, "I have shown that my hereditament is occupied as a factory, and it cannot be successfully said against me that it is excluded from being an industrial hereditament on the ground that it is primarily occupied for non-factory purposes". It may well be that the part marked "D" is not itself a factory because of the performance there of maintenance of the company's road vehicles; but, says counsel, that is not to say that, in view of the findings of the tribunal, the hereditament as a whole is being primarily used for non-factory purposes: it is being primarily used, according to the findings of the tribunal,

* *Potteries Electric Traction Co., Ltd. v. Bailey* (Stoke-on-Trent Revenue Officer) (1) ([1931] A.C. 151).

for the purposes of repairing road vehicle units, which is not an excluded occupation, so to speak, even though the area marked "D" where that is, in substance, carried on, is not itself a factory by reason of the maintenance there also of the road vehicles. It was that latter part of the argument of counsel for the company which the tribunal rejected; for they held that, since the area "D" could not be regarded as a factory, therefore, equally it could not be said on behalf of the company that the repair of those units was a factory purpose: they had, so to speak, been disqualified altogether for de-rating purposes. The result was, as a piece of logic, a little surprising, for the tribunal was saying, in one and the same breath, that the primary purpose for which this blue, yellow and grey area is being occupied is the purpose of repairing units (which is not the maintenance of the company's road vehicles and is, because it is being done by way of trade, the purpose of a factory); and, at the same time, since the area "D" cannot itself be called a factory, therefore, one has got to say that the primary purpose for which this hereditament is being occupied is a non-factory purpose. If it were necessary to decide this case on that point, I should for my part feel some hesitation in accepting the conclusion of the tribunal. The anomaly and apparent lack of logic appears if one refers to para. 12 of the Case. It reads:

"We were satisfied upon the evidence that the primary purpose for which the hereditament was in fact occupied and used was the overhauling, repairing and re-conditioning of units and that . . . such work did not constitute 'the maintenance of road vehicles' within the Act of 1928. We took the view that . . . all the work done on the premises . . . was done 'by way of trade'. We were, however, also satisfied that the . . . maintenance of cars . . . was maintenance of road vehicles and that some of such work as well as the . . . repairing . . . of units took place on the part marked 'D' . . . It seemed to us, therefore, that by reason of the provisions of s. 3 (2) (b) [of the Act of 1928] such part was excluded from the definition of a 'factory or workshop' and that all the purposes for which such part is used must therefore be 'purposes which are not those of a factory or workshop'. We took the view that we must look at the whole hereditament to ascertain the primary purpose for which it was occupied and used and . . . we determined that the hereditament was not an industrial hereditament . . ."

They added:

"Had we regarded it as permissible in law to treat the purposes of overhauling, repairing and re-conditioning units carried out in the part of the hereditament coloured blue and marked 'D' on the said plan as purposes of a factory or workshop we would have reached the contrary conclusion."

As I have said, I myself should feel some reluctance in accepting a conclusion which, it seems to me, involves what looks very much like an illogical result. In the view that I take, however, it is not necessary to express a final opinion on that matter; for, in my judgment, as I have already indicated, the necessary premise to the vital conclusion about the repair of units (namely, that those are factory purposes) is not established—that is, the condition that it is being done by way of trade.

The tribunal took the view that, as a matter of law, the case was, in effect, governed in this respect by the decision in *Challoner v. Robinson* (3). That case was not connected with rating, but was a case in which a landlord was seeking to distrain on certain premises for non-payment of rent. He found on the premises certain pictures which were being exhibited. He claimed, and was held by this court entitled to claim successfully, that he could take those pictures by way of distress. The action was brought by the tenant who said that these pictures were not liable to distraint on the ground, quite shortly, that he, the tenant, was the proprietor of an institution known as the United Arts Club and

A that these pictures had been committed to him to be managed in the way of his trade. If that were so they would be exempt from distress. The headnote states the decision of NEVILLE, J., in the court of first instance thus ([1908] 1 Ch. 49):

B “ . . . the pictures were liable to distress unless the plaintiff could bring his case within the exceptions laid down in *Simpson v. Hartopp* (4), as ‘ things delivered to a person exercising a public trade to be . . . managed in the way of his trade or employ ’. In the present case the plaintiff was not carrying on the trade of a commission agent with all who chose to deal with him; his trade was essentially a private trade, and for this reason the pictures were not within the exemption.”

C On appeal it was held (*ibid.*, 50):

D “ . . . that it was not necessary on the facts to consider the meaning of the words ‘ public trade ’, but that the word ‘ managed ’ must be taken to include, if not to be equivalent to, ‘ disposed of ’; that the pictures were not delivered to the plaintiff, but to the picture committee, and even if they were delivered to the plaintiff, they were not delivered to him ‘ to be managed in the way of his trade ’, which was that of a club proprietor, and not that of a picture dealer . . . ”

It is in those last few words which I have read that, it is said, the answer to the present problem resides. In the reserved judgment of this court delivered by SIR HERBERT COZENS-HARDY, M.R., there is this language ([1908] 1 Ch. at p. 60):

E “ These being the facts, we think the true view is that the pictures were not delivered to Mr. Challoner, but were delivered to the picture committee; and, further, that if, contrary to the above view, they were delivered to Mr. Challoner, they were certainly not delivered to him to be ‘ managed in the way of his trade ’.”

F If the language had stopped there, the case would not have been of any real assistance to counsel for the company, but there then occurs the sentence (*ibid.*): “ His trade or business is that of a club proprietor, and not that of a picture dealer ”. I think that, on the facts of that case, the statement which I have just read is not one at which it would be possible to cavil. Mr. Challoner was running, to use the popular word, the institution known as the United Arts Club for his personal profit or gain. His trade or business was that of a club proprietor. G But does it follow from that statement, as counsel for the company contended, that as a matter of law any person, whether an individual person or a *persona ficta* like the present company, who is a proprietor of a club is, therefore, necessarily carrying on a trade consisting of the activities inherent in that proprietorship? I do not think that it does follow.

H Another instance which was given in the course of the argument, and which, in some respects, is closer, I think, to the present case was *Inland Revenue Comrs. v. Eccentric Club, Ltd.* (5), the circumstances of which were considered by the Court of Appeal on a claim for corporation profits tax. The Eccentric Club, Ltd., as its name implies, was a company incorporated under the Companies Act [the Companies (Consolidation) Act, 1908] and its purpose, as stated by its memorandum of association, was to own and manage an ordinary social club known as the Eccentric Club. The full facts of the incorporation of the company are to be found in the report. It was contended on behalf of the Crown that, since the company was carrying on the trade or business of proprietorship of a club, it was, therefore, liable to the impost of corporation profits tax. The court, however, held that, the company being limited by guarantee and carrying on a social club in the ordinary way, that club was a members’ club and not a proprietary club. By the memorandum of association profits were not distributable among the members nor, in the event of the winding-up of the company,

was any surplus distributable among them, but it was to be applied as the committee might determine. It was, therefore, held that the company was not carrying on an undertaking of a character similar to that of a trade or business and was, therefore, not liable to the tax. We were referred to a number of passages and I will cite one passage from the judgment of SARGANT, L.J., where he said ([1924] 1 K.B. at p. 430):

"They [referring to the club company] insist that this limitation of activities to a system of self-supply [referring to the activities of the social club] altogether differentiates their enterprise from that of an individual or company carrying on an ordinary proprietary club with the object of making a profit out of the supply of club amenities . . ."

Then the lord justice went on to rely on certain reasoning which he derived from the speech of LORD WATSON in *New York Life Insurance Co. v. Styles* (6). As counsel for the valuation officer in the present case indicated, the conclusion which SARGANT, L.J., drew from the language of LORD WATSON was later disapproved in the House of Lords*; but that does not, I think, indicate any doubt as to the validity of the passage which I have just read where the lord justice is saying (and the other members of the court used language to the same effect) that the substance of the *Eccentric Club* case (5) was that there was being carried on a social club in all material respects as a members' club. As in the present case, the members of the club had to be members of the company, any profits made were not distributable, nor was excess property liable to be distributed among members of the company or the club on winding-up. The case, therefore, was different for the purposes then in hand from what SARGANT, L.J., called the ordinary case of an individual owning and running a proprietary club for gain. It may be true, as counsel for the company in the present case said (referring to a passage at the end of the judgment of SIR E. M. POLLOCK, M.R., [1924] 1 K.B. at p. 415), that, if a company is incorporated under the Companies Act, there is a presumption that it is a trading company. If that be so, however, still it is a presumption which may be rebutted. It was rebutted in the *Eccentric Club* case (5) and it is certainly capable of being rebutted in very many cases in which, as JENKINS, L.J., pointed out, a company is formed to carry on an activity which is plainly not a trading activity. Yet it may well be that not in every such case can the use of the word "limited" be dispensed with.

Counsel for the company drew our attention to the terms of the memorandum and articles of association of the company in the present case, and it is true that cl. 3 of the memorandum, the objects clause, contains many common-form powers or provisions in the widest terms, such as, in para. (f): "To carry on or conduct any other businesses or proceedings which may seem to the company capable of being conveniently carried on . . ." Another of the objects, in para. (m), is: "To sell or dispose of the undertaking of the company, or any part thereof . . ." By art. 8, which is headed: "Application of profits of company":

"The income and property of the company, whether arising from subscriptions of members of the said club . . . or from any other source, shall be applied solely towards the promotion of the objects of the company as set forth in its memorandum . . ."

As counsel for the company observed, that provision, in terms, covered any of the objects in the memorandum. But, even if those considerations are of some force in distinguishing this case in some degree from the facts in the *Eccentric Club* case (5), still, in my judgment, the facts in this case bring it much nearer to the *Eccentric Club* case (5) than to *Challoner v. Robinson* (3).

Another point taken by counsel for the company was that in the present case the club, properly so-called, consisted of the premises in Pall Mall and Woodcote

* See *Cornish Mutual Assurance Co., Ltd. v. Inland Revenue Comrs.* ([1926] A.C. at p. 287), per VISCOUNT CAVE, L.C.

A Park and the amenities there provided, which were the exclusive privilege of full members. In addition to those activities, the company was carrying on a separate enterprise in providing these road services to full members and associate members. It might, according to counsel for the company, therefore, fairly be said that the company was selling to each and every one of its associate members these services and that was, in the ordinary sense of it, trading. That is not an analysis of its

B activities which I am prepared to accept. The full members as well as the associate members are equally entitled to these privileges and amenities and, as the tribunal found as a fact, the company is bound to apply, and does apply, the whole of the funds, which are made up from the associate members' subscriptions and capitation fees in respect of full members, in the provision of these services. That activity, though distinct and different, no doubt, from the activity of

C providing the amenities of a social club in the West End of London, is, nevertheless, an activity more akin to a club activity than a trading activity in the ordinary sense of it.

On all the facts of this case, then, I am of opinion that the activities carried on by the company at this Maswell Park Road hereditament are not there conducted "by way of trade". And I do not think that *Challoner v. Robinson* (3) compels

D us to hold the contrary. I do not think, indeed, that the present case is at all parallel on its facts with *Challoner v. Robinson* (3), the decision in which was, as I have already said, directed to an entirely different subject-matter. I do not lose sight of the significance and weight appropriate to be attached to the language of LORD WRIGHT in *National Assn. of Local Government Officers v. Bolton Corpn.* (2) ([1942] 2 All E.R. at p. 433) which the tribunal mentioned, to the effect that the word "trade" is a word of very wide import. The task, however, which falls

E on the court is to determine whether the activities being carried on in the premises are being carried on "by way of trade". I am unable, for my part, to accept the proposition that, because the well-known institution known as the Royal Automobile Club, consisting of full members, and of associate members, enjoys those amenities which are rendered possible by the activities carried on at

F the Maswell Park Road hereditament, and because the club and these activities are managed and conducted by the limited company as a proprietor, therefore, the company is carrying on this activity (and, indeed, it follows, all its activities) "by way of trade". If that conclusion be right, then it follows, as I have earlier said, that counsel for the company cannot succeed, because he is left only with his bracket making and brazing activities; and beyond question, as the tribunal

G found, the primary purposes of the occupation of the hereditament cease to be factory purposes.

Another point was raised on which also I do not propose to express a conclusion; but it would not be right, since the matter was argued before us, that I should pass it by unnoticed. In para. 12 of the Case, it is stated at the beginning that the activities of repairing units, in the view of the tribunal, "did not constitute

H the 'maintenance of road vehicles'", and the tribunal felt itself governed in that respect by the decision of the House of Lords in *Potteries Electric Traction Co., Ltd. v. Bailey* (1). Counsel for the valuation officer contended, and, I think, rightly, that, on its facts, the present case was materially different from the *Potteries Electric Traction Co.'s* case (1) and for this reason. The Potteries Company, among other things, owned a fleet of trams or omnibuses, and on the

I hereditament in question in that case they manufactured certain component parts for their omnibuses. If they had not manufactured them, as was pointed out, they would have had to have bought those parts and, probably, paid more money for them. As the House pointed out, however, the essence of the matter was that they were there carrying on the distinct enterprise of manufacturing those parts, and the hereditament did not cease to be a factory for rating purposes and become merely a site for an activity of maintenance of vehicles because, when the parts had been manufactured and had left the premises, they were

then used for maintaining the vehicles. The question is: What is done on the premises? The question is not : What is done afterwards with what has been made on the premises? In the present case there is no such separate activity of manufacture. What is done at Maswell Park Road is to repair and re-condition units which are sent for such purposes by servants of the company from various parts of the country. As I earlier said, as a matter of efficient maintenance of this fleet of vehicles, it is far better that the unit is sent and a new unit sent back at once, so that the vehicle can be got again quickly on to the road, than that the vehicle should come itself all the way to Maswell Park Road and there remain out of action while some part of it was put right. A B

During the course of the argument counsel for the valuation officer was asked the question: If, in connection with repairing units, the company are maintaining vehicles, then what vehicle is being maintained when an individual unit is being in fact repaired? The answer given was: No individual vehicle can be identified, but the proper way to look at the matter is to say that the vehicles, as a fleet, as a whole, are being maintained by the activities of repairing units which have come from one or other of the vehicles to Maswell Park Road. If I may say so, I see the force of that contention. On the other hand, in the *Potteries Electric Traction Co.* case (1), certain language was used by VISCOUNT DUNEDIN, and, I think, also in the same sense by LORD TOMLIN, which indicates that in their view the phrase "maintenance of road vehicles" necessarily imported the notion that the vehicle being maintained should be at the place where the alleged maintenance was being conducted. VISCOUNT DUNEDIN so stated in clear terms, for he said ([1931] A.C. at p. 169): C D

"Now the Court of Appeal held that, inasmuch as the spare parts manufactured in the factory were used for the omnibus fleet, this was a case in which the place was used for the 'maintenance' of road vehicles. I cannot assent to this. Maintenance is taken along with housing, and points, I think, to something done to the vehicle on the premises." E

LORD TOMLIN used somewhat different language, but, as I have said, I am inclined to think that the matter struck him in the same way as it struck LORD DUNEDIN. LORD TOMLIN said (*ibid.*, at p. 180): F

"The only question therefore is whether or not having regard to the facts found by the learned recorder the premises are a 'place used by the occupier for the housing or maintenance of his road vehicles or as stables'. Now these words seem to me to refer to what is done on the premises. The manufacture of spare parts for use elsewhere is not in my view within the contemplation of the sub-section." G

I, therefore, prefer to express no view of my own on this matter. To accept the contention of counsel for the valuation officer would certainly involve dissenting from the opinion so clearly expressed by LORD DUNEDIN, and, although it is quite true that that particular point was not essential to his conclusion, it would be going further than I am prepared to do in the present case (where it is also not necessary for the decision) to express a contrary opinion in acceptance of the argument of counsel for the valuation officer. For the reasons which I have stated, however, and because, as I think, the company is not doing the activities on the part marked "D" or elsewhere on their hereditament by way of trade, it follows, as counsel for the company conceded, that the company have failed to show that this hereditament is an industrial hereditament within s. 3 of the Act of 1928. The appeal, therefore, in my judgment, should be dismissed. H I

JENKINS, L.J.: I entirely agree with the judgment which my Lord has just delivered and he has dealt with all the relevant facts so fully that I do not find anything that I can usefully add to what he has said.

A **ROMER, L.J.:** I also agree, and I find myself in the same position in this matter as JENKINS, L.J. I cannot usefully add anything to the very careful and exhaustive judgment which the Master of the Rolls has delivered.

Appeal dismissed.

B Solicitors: *A. J. A. Hanhart* (for the company); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

C **LONDON COUNTY COUNCIL v. VITAMINS, LTD. LONDON COUNTY COUNCIL v. AGRICULTURAL FOOD PRODUCTS, LTD.**

[COURT OF APPEAL (Denning, Romer and Parker, L.J.J.), March 23, 31, 1955.]

Landlord and Tenant—Notice to quit—Validity—Signature—Agreement providing for signature by landlords' valuer—Signature by valuer's assistant in valuer's name—No indication that signature not valuer's.

D *Agent—Signature of principal's name—Validity of signature.*

E A clause in a tenancy agreement provided that: "The tenancy may be determined by three months' notice . . . If determined by the [landlords] it shall be by a written notice signed by the valuer to the [landlords] . . . If determined by the tenants it shall be by a notice in writing signed by the tenants and served upon the valuer or one of his assistants . . ." A notice to quit given by the landlords was signed: "J.E.J.T., valuer and agent of the [landlords]", but the valuer's name was written by the valuer's assistant without any indication that he was acting on behalf of the valuer or with his authority.

F **Held:** provided that the signature was duly authorised by the valuer, the notice to quit was validly signed, since there was nothing in the terms of the agreement to require a personal signature or to displace the common law rule that a document, including a notice to quit, may be signed by an authorised agent in the principal's name without indicating that the signature is appended by an agent.

G *R. v. Kent JJ.* (1873) (L.R. 8 Q.B. 305), and *France v. Dutton* ([1891] 2 Q.B. 208) applied.

Goodman v. J. Eban, Ltd. ([1954] 1 All E.R. 763) considered.

Appeals allowed.

H [**Editorial Note.** The decisions in the present cases are those of all members of the court, and in the present cases, as in *Goodman v. J. Eban, Ltd.* ([1954] 1 All E.R. 763), the validity of the signing is upheld. In that case SIR RAYMOND EVERSHERD, M.R., intimated that the method of signature, which was by the use of a rubber stamp, was undesirable as a matter of proper practice. In the present case DENNING, L.J., intimates that it would be more appropriate for an agent to sign per procuracionem than to sign the name of the principal without qualification (see p. 231, letter I, post).]

I As to the signing of instruments under hand by agents, see 10 HALSBURY'S LAWS (2nd Edn.) 247, para. 310.

As to the form of a notice to quit, and the giving of notice by an agent, see 20 HALSBURY'S LAWS (2nd Edn.) 135, 139, paras. 145, 149; and for cases on the subject, see 31 DIGEST (Repl.) 493-495, 501, 6189-6211 and 6259, 6260; and 1 DIGEST 327, 328, 394, 432-444, 972.]

Cases referred to:

(1) *Goodman v. J. Eban, Ltd.*, [1954] 1 All E.R. 763; [1954] 1 Q.B. 550.

(2) *R. v. Kent JJ.*, (1873), L.R. 8 Q.B. 305; 42 L.J.M.C. 112; 37 J.P. 644; 1 Digest 272, 39.

- (3) *France v. Dutton*, [1891] 2 Q.B. 208; 60 L.J.Q.B. 488; 64 L.T. 793; A 1 Digest 275, 67.
- (4) *R. v. Cowper*, (1890), 24 Q.B.D. 533; 59 L.J.Q.B. 265; 13 Digest 492, 427.
- (5) *Re Blucher (Prince), Ex p. Debtor*, [1931] 2 Ch. 70; sub nom. *Blucher (Prince), Re, Debtor v. Official Receiver*, 100 L.J.Ch. 292; 144 L.T. 152; Digest Supp.
- (6) *Hyde v. Johnson*, (1836), 2 Bing.N.C. 776; 5 L.J.C.P. 291; 132 E.R. 299; B 1 Digest 276, 86.

Appeal.

London County Council, the landlords, appealed against orders of His Honour JUDGE SIR GERALD HARGREAVES in the West London County Court, dated Jan. 10, 1955, dismissing actions for possession of premises in Beavor Lane, Hammersmith, London, brought against the two tenants on the ground that the notices to quit were invalid. The notices had been signed in the name of the valuer of the landlords by one of his assistants without any indication that he was signing on behalf of the valuer or with his authority. The tenants contended that this was not in compliance with the terms of the tenancy agreements, which required the notice to be signed by the landlords' valuer.

Gerald Gardiner, Q.C., and *C. Wigram* for the tenants.

C. F. Fletcher-Cooke for the landlords.

Cur. adv. vult.

Mar. 31. The following judgments were read.

DENNING, L.J.: By an agreement of tenancy dated Mar. 18, 1940, the London County Council, the landlords, by Herbert Westwood, their valuer and agent, let to Vitamins, Ltd., the first tenants, some property in Beavor Lane, Hammersmith, for storage purposes at a rent of £30 a year. The agreement contained a provision for determining the tenancy which is in these terms:

"The tenancy may be determined by three months' notice to expire at any time after Mar. 31, 1941. If determined by the council it shall be by a written notice signed by the valuer to the council and served on the tenants or left for them upon the premises or if the same are unoccupied affixed to the premises three months at least prior to the day of determination. If determined by the tenants it shall be by a notice in writing signed by the tenants and served upon the valuer or one of his assistants at the offices of the council three months at least prior to the date of determination. The notice in either case may instead of being served be sent through the post by registered letter addressed to the tenants at the premises or to the valuer at the offices of the council as the case may be."

The landlords now want to get possession of the property, because they have a plan to build a new arterial road across the site. Accordingly they gave a notice to quit in these terms:

"To Vitamins, Ltd. On behalf of the landlords, the London County Council, I hereby give you notice to quit and deliver up possession, on Thursday, Sept. 30, 1954, of the premises situate: On the east side of Beavor Lane, Hammersmith, London, W.6 which you now hold as a tenant of the said council. Dated June 24, 1954. J. E. J. Toole, valuer and agent of the London County Council."

It so happens that there is an adjoining piece of land of which the landlords also seek to get possession for the new arterial road. This was let to Agricultural Food Products, Ltd., the second tenants, who are associated with the first tenants. The agreement is in the same form as that with the first tenants. There is a similar provision for notice to quit, except that it provides for one month's notice instead of three months'. A notice to quit has been given in the same form except that it is one month's notice.

A When these two associated companies received these notices to quit, they saw that the signature "J. E. J. Toole" on the two notices to quit was in different handwriting. They deduced therefrom, quite rightly, that Mr. Toole had not written the signatures himself: and they say that on this account the notices are bad. Their point is short and simple. It is this: the agreements require that the notices should be "signed by the valuer to the council", but these notices

B were not signed by him.

This point would not in the ordinary way worry the landlords very much, because it could soon be remedied by serving fresh notices on which the valuer, Mr. Toole, had written his own signature. But we are told that the new Landlord and Tenant Act, 1954, has since come into operation and will give the tenants considerable security of tenure unless these notices are good. Hence the concern

C of the landlords to show that they are valid. They admit that Mr. Toole did not write his own name on either of the notices. They say that an assistant valuer did it in each case on his behalf. But they contend that this is a sufficient signature by him.

In the ordinary way, when a formal document is required to be "signed" by a person, it can only be done by that person himself writing his own name on it, or affixing his own signature on it, with his own hand (see *Goodman v. J. Eban, Ltd.* (1)). But there are some cases where a man is allowed to sign by the hand of another who writes his name for him. Such a signature is called a signature by procuration, by proxy, "per pro", or more shortly "p.p." All of these expressions are derived from the Latin *per procurationem*, which means by the action of another. A simple illustration is when a man has broken his arm and cannot write his own name. In that case he can get someone else to write his name for him: but the one who does the writing should add the letters "p.p." to show that it is done by proxy, followed by his initials so as to indicate who he is.

In the present case it is said that Mr. Toole signed by the hand of a proxy, the assistant valuer, but the proxy did not add the letters "p.p.". In order to test

F the validity of the signature, we have first to inquire whether a signature by proxy was permissible at all: and, secondly, if it was, whether the omission of the letters "p.p." was a fatal flaw.

On the wording of this tenancy agreement, I think that a signature by proxy was permissible on this notice to quit. Take the case where the tenants desire to determine the tenancy. The notice has to be in writing "signed by the

G tenants"; but the tenant is a limited company which cannot write its own name, and it can only sign by proxy, as for instance by a director or secretary signing on its behalf. Take next the case where the landlords desire to give a notice to quit. The notice has to be a written notice "signed by the valuer to the council". The valuer is not designated by name, but by his office. The tenants might not

H even know his name. Valuers come and go without the tenants being any the wiser. The personality of the valuer does not come into it. In these circumstances I think that a signature by proxy is permissible. The valuer can get one of the assistant valuers to write his name for him: but the assistant should add the letters "p.p." to show that it is done by proxy, followed by his initials.

The second question is more difficult. The assistant valuer did not add the

I letters "p.p." as he ought to have done. This is bad practice because it is misleading. Anyone who did not know Mr. Toole's signature would think that Mr. Toole had himself signed the document. If it were not for authority, I should have thought this was a fatal flaw. But there are two cases which show the contrary. In *R. v. Kent JJ.* (2) and *France v. Dutton* (3) a clerk wrote the name of the principal, being duly authorised so to do, but did not add anything to show that it was done by proxy. Nevertheless, the signature was held good. I do not think we should disturb cases of such long standing, especially when

s. 91 (1) of the Bills of Exchange Act, 1882, proceeds on the same footing. That section says that:

"Where, by this Act, any instrument or writing is required to be signed by any person it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority."

That Act is a codification Act, and is therefore a statutory recognition of the rule in *R. v. Kent JJ.* (2). Applying this rule, I think that the signature to this notice to quit should be held good so long as it was authorised by Mr. Toole.

No evidence was called at the trial to show that Mr. Toole authorised this signature; but this was because the judge ruled that Mr. Toole ought to have signed himself and that nothing short would suffice. Now that we think that an authorised signature will do, the landlords should be given an opportunity of proving due authority. The appeals should be allowed and a new trial ordered in each case.

ROMER, L.J. (read by **PARKER, L.J.**): In each of these cases the landlords could terminate the tenants' tenancies by serving on them "a written notice signed by the valuer to the council". The notices which were in fact served, and on which the council relies, were not signed by the valuer himself (a Mr. J. E. J. Toole) but by one of his assistants, who signed, not in his own name, but in that of Mr. Toole; and the question before us is whether, on the assumption that the assistant possessed the necessary authority so to sign, the tenants were bound to accept the notices as valid.

It is established, in my judgment, as a general proposition that at common law a person sufficiently "signs" a document if it is signed in his name and with his authority by somebody else, and in such case the agent's signature is treated as being that of his principal. That this is so was recognised by **BLACKBURN, J.**, in *R. v. Kent JJ.* (2), by **LORD ESHER, M.R.**, in *R. v. Cowper* (4), and by the Divisional Court in *France v. Dutton* (3). The definition of "signature" in **STROUD'S JUDICIAL DICTIONARY** is also in conformity with the principle.

On the other hand, if, by some rule of law, or by statute, a document has to be personally signed, the duty of signing cannot be delegated to a third person (cf. *Re Prince Blucher, Ex p. Debtor* (5)), and the same result will follow if two parties agree that any document which one of them may serve on the other under and by virtue of their contract is to bear his personal signature.

Inasmuch as there is no rule of law or statute which requires a notice to quit to be signed personally by a lessor, it follows that the notices in question on these appeals were sufficiently signed by the valuer's agent (assuming due authority) unless it is to be gathered, on the true construction of the tenancy agreements as a whole, that they were intended by the parties to be signed by the valuer himself. The tenants contend that they were so intended and they rely on the provision in the agreements that, if a tenant desires to determine his tenancy,

"it shall be by a notice in writing signed by the tenant and served upon the valuer or one of his assistants."

The difference between this language and the earlier phrase "signed by the valuer to the council" shows, it is argued, that a notice given by the landlords cannot be signed by one of the valuer's assistants, but must be signed by the valuer himself. This, of course, is true and if the notices in dispute had been signed by the assistant in his own name they would doubtless have been invalid. This, however, is not what was done, for the assistant signed in the name of the valuer and, as I have already intimated, the signature is to be regarded as the valuer's own, provided that the assistant was authorised to affix it. There is no other context in the tenancy agreements which in any way tends to displace the common law rule, and accordingly, in my judgment, the rule applies.

- A There remains the question whether the cases should be remitted to the county court in order to enable the landlords to prove that the assistant had due and proper authority to sign in the valuer's name. After some little hesitation I have arrived at the conclusion that they should. Although at an early stage of the hearing before the learned judge the tenants' counsel appears to have intimated in general terms that the defence to the actions was that the notices to quit
- B were bad, I do not think that the landlords had any sufficient warning of the real point which they had to meet. Notwithstanding their omission to ask for an adjournment, it appears to me on the whole that they should nevertheless have an opportunity of adducing, if they can, the requisite evidence to enable them to take advantage of the legal point which we have now decided in their favour. I therefore agree that the appeals should be allowed and that a new trial should be
- C ordered in each case.

PARKER, L.J. : The definition of "Signed; signature" in STROUD'S JUDICIAL DICTIONARY is as follows:

- D " (1) Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself, or by his authority . . . with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed . . . "

- E As stated by ROMER, L.J., in *Goodman v. J. Eban, Ltd.* (1) ([1954] 1 All E.R. at p. 770) that statement appears to be in accord with the authorities. So far as the present case is concerned, the relevant words are "by his authority" and these words are in accord with what BLACKBURN, J., said in *R. v. Kent JJ.* (2) (L.R. 8 Q.B. at p. 307), viz.:

- F "No doubt at common law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it; nevertheless there may be cases in which a statute may require personal signature."

This statement, moreover, was expressly approved by LORD COLERIDGE, C.J., in *France v. Dutton* (3) ([1891] 2 Q.B. at p. 210). See also LORD ESHER, M.R., in *R. v. Cowper* (4) (24 Q.B.D. at p. 535).

There is much to be said for the view expressed by DENNING, L.J., in *Goodman v. J. Eban, Ltd.* (1) ([1954] 1 All E.R. at p. 768), that:

- G "In modern English usage, when a document is required to be 'signed' by someone, that means that he must write his name with his own hand on it."

- H This view, however, was not shared by the majority of the court, who held that a rubber stamp bearing a solicitor's name, put on with his authority, was a good signature on a bill of costs. It is true that the question in that case was not "by whom, but how, the relevant document must be 'signed'", but it does show that the old common law rule still survives.

- I That being so, the only question is whether the word "signed" in the context of the tenancy agreements requires a personal signature. It has always been recognised that, certainly in some statutes, the context may demand a personal signature, cf. *Hyde v. Johnson* (6), and I conceive that, even apart from statute, the context is a matter to be taken into consideration. For myself I can see nothing in the context here which requires an exception to be made to the common law rule. It is said that the notice to quit should bear the personal signature of the valuer, who in fact will have signed the tenancy agreement, for only thus will a tenant be able to know that the notice is valid. The valuer who has signed the agreement may, however, no longer occupy that position, as indeed was the case here. The emphasis is, I think, rather on the office or department of valuer and agent than on the man who occupies the office or department. That being so, I see no reason to depart from the common law rule.

Reliance was also placed on the later words in cl. 6 "and served upon the valuer or one of his assistants", but I do not find these words of any assistance. In the first place they are dealing with the question of service as opposed to signature, and, in the second place, even if the words had been "signed by the valuer or one of his assistants", it would not cover the present case since it was not a case of an assistant signing his own name but the name of the valuer. Again, this is not within the principle of "*delegatus non potest delegare*" since the assistant did not sign his own name. Indeed, the facts of this case are in this respect, assuming that there was authority, very like the facts in *R. v. Kent JJ.* (2).

The fact remains, however, that no authority to put the valuer's name on the notices to quit was proved. As to this, no defence was put in, but it appears that, in opening the case counsel for the tenants stated that the only defence was that the notices were invalid. He did not, however, elaborate this by stating that he disputed the validity in law of anyone, other than the valuer, putting on the valuer's name and that, even if he were wrong in this, he required proof of actual authority to do so. In those circumstances I do not think that the landlords can be penalised for not having asked for an adjournment in order to adduce evidence as to authority. In my opinion the appeals should be allowed, and a new trial ordered in each case.

Appeals allowed. New trial ordered.

Solicitors: *Signy & Co.* (for the tenants); *Solicitor to London County Council* (for the landlords).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. ROWE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Pearce, JJ.), April 19, 1955.]

Criminal Law—Appeal—Application for leave to appeal against sentence of imprisonment—Death of prisoner before application heard—Whether widow allowed to continue application.

R. was convicted of obtaining money by false pretences and sentenced to eighteen months' imprisonment. He gave notice of application for leave to appeal against conviction but, before the hearing of the application, he died in prison. His widow applied to be allowed to continue the application.

Held: the sentence being one of imprisonment and the prisoner having died, neither his widow nor his executors or administrators had any such legal interest as would justify the court's allowing them to continue the appeal, and accordingly the application would be refused.

Per CURIAM: if the sentence on a prisoner is a sentence to a fine and the prisoner dies, his executors or administrators may be allowed to appeal against his conviction so that, if the appeal should succeed, the fine may be saved or recovered.

Case referred to:

(1) *Hodgson v. Lakeman*, [1943] 1 K.B. 15; 112 L.J.K.B. 162; 168 L.T. 78; 107 J.P. 27; 2nd Digest Supp.

Application.

Ivor Clyde Rowe was convicted at Bedford County Quarter Sessions on Feb. 18, 1955, of false pretences and sentenced to eighteen months' imprisonment. On Feb. 21, 1955, he gave notice of application for leave to appeal against conviction, but on the night of Mar. 6/7, 1955, he died in prison. His widow now applied for leave to continue his application.

Peter Lewis in support of the application.

A LORD GODDARD, C.J., delivered the judgment of the court: The prisoner was convicted at the Bedford County Quarter Sessions of a charge of false pretences and was sentenced to eighteen months' imprisonment. He was convicted on Feb. 18, 1955. He gave notice of application for leave to appeal within time on Feb. 21, and he has since died in prison.

B Counsel, instructed not by the prisoner but by his widow, applies to be allowed to continue this application, but, in the opinion of the court, we cannot allow a widow, or an executor, or an administrator of a deceased person to appeal to this court unless they can show an interest, which must be a legal interest. If a person is sentenced to pay a fine and, having appealed, dies, or even if he dies after or immediately after the fine has been paid, the court would, perhaps, allow his executors or administrators to carry on the appeal or to appeal **C** merely on the ground that, if they can get the conviction quashed, they can save or recover the fine for the benefit of the estate of the deceased which they are bound to administer. In *Hodgson v. Lakeman* (1), which was a case in the Divisional Court, the appellant was dead and the court allowed the executors to continue the appeal because there was a pecuniary interest. If a man is convicted on indictment and fined £500, the Crown can recover that money whether **D** he is alive or dead. The money can be recovered against his estate and, therefore, it would be an injustice if one did not allow the executors to appeal in order to say that the conviction was wrong because, if it was wrong, the money would be saved. It may seem artificial to say that, if there is a pecuniary penalty, an appeal by executors or administrators may lie, whereas if corporal punishment or imprisonment is imposed they cannot appeal, but I do not see any ground on **E** which we can say here that anybody has an interest. It may be that the widow would be very glad to have her husband's name cleared, but we cannot take any notice of that sentimental interest. Nobody is affected now by the judgment of the court because the judgment of the court was a sentence of imprisonment and the prisoner has died. If the sentence of the court had been a fine then, as I say, somebody would be affected by the judgment of the court and would have **F** an interest in getting it set aside.

For these reasons this application must be refused.

Application dismissed.

Solicitors: *Giffen & Couch*, St. Albans.

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

KELMAN AND ANOTHER *v.* LIVANOS.

[QUEEN'S BENCH DIVISION (McNair, J.), February 15, 16, 1955.]

Ship—Contract for sale of ship—Ship to be delivered to buyer free from average and with clean swept holds and class maintained—“Free from average”.

A contract for the sale of a ship provided that the sellers should deliver the ship “free from average”. Other clauses of the contract provided for her delivery free from encumbrances and for inspection of the ship's bottom and parts below the water line in dry dock and for repairs found requisite on such inspection to be carried out by the sellers to the satisfaction of Lloyd's surveyor. There were indents in keel and shell plates of the ship. Lloyd's surveyor determined that the ship could maintain her classification without the indents being repaired, but the buyer refused to accept the ship without the sellers' having repaired the indents and relied on, among other provisions, the stipulation that the ship should be delivered free from average as entitling the buyer to receive the ship free from this damage.

Held: the words “free from average” on their true construction in the contract meant free from claims against the ship, and did not mean free from damage.

Consideration of the meaning of the word “average” (see pp. 238, 239, post).

[As to the acquisition of ownership of a British ship, see 30 HALSBURY'S LAWS (2nd Edn.) 175, para. 305.

For the meaning of free from average in marine insurance, see 18 HALSBURY'S LAWS (2nd Edn.) 356, para. 511.]

Special Case stated by arbitrator.

By a contract in writing, dated Mar. 10, 1953—an agreement for sale on “Priam Terms”—the sellers, Richard Cameron Kelman and Andrew George Shirreffs as joint trustees on behalf of the Gwent Co., agreed to sell the s.s. Goodmar to the buyer, George John Livanos. By cl. 1 of the contract:

“The steamer shall be able to proceed under her own steam, and shall be in a seaworthy condition at the time of delivery.”

By cl. 4:

“The [sellers] shall deliver the steamer to the [buyer] free from average and with clean swept holds and class maintained in Aberdeen not later than Apr. 15, 1953. In the event of the [sellers] failing to deliver the steamer within the time herein specified, the [buyer] shall have the option of maintaining or cancelling this agreement, but any delay not exceeding thirty days caused by force majeure and/or caused by repairs in order to pass inspection by Lloyd's surveyor at port of delivery, under cl. 6 of the agreement, to be accepted by the [buyer].”

By cl. 6:

“For the inspection by Lloyd's surveyor of steamer's bottom and all outside parts below the water line including the drawing of tail shaft the [sellers] agree to place the steamer in dry dock in Aberdeen . . . In the event of the bottom or any outside part below the water line being found broken or damaged, and [buyer] decline to accept steamer in such state, it shall be repaired and put in good and seaworthy condition to the satisfaction of the surveyor to Lloyd's at the [sellers'] expense.”

And by cl. 13:

“The [sellers] agree to deliver the steamer to the [buyer] free from all debts and incumbrances.”

The steamer had been built in 1943 as a minelayer, and, in 1949, was converted into a trawler, and at some date after that came into the ownership of the

A Gwent Co. In March, 1952, she was laid up in Aberdeen. Her last Lloyd's special survey had taken place in September, 1949, and her classification certificate issued in December, 1949, carried an indorsement:

"The following items relating to the condition of this ship have been noted, but do not affect the maintenance of classification. Indents in keel plates and shell plates A. 3 and 4 (port side) and A.4 (starboard side)."

B In March, 1952, she was further surveyed by Lloyd's for condition and docking when her class was maintained with the same indorsement. The practice of Lloyd's Register of Shipping as regards deferred repairs and classification was that deferred repairs were divided into two groups—(a) those which would prejudice class maintenance if not dealt with within a specified time, and (b) those which, though not affecting seaworthiness, might be left to the owner's convenience. The practice with regard to (b) was that it was merely noted by way of indorsement on the classification certificate. Shortly before the contract was signed, the buyer and his consultant marine engineer made a superficial inspection of the ship, which was then afloat, and the buyer was shown the survey certificate of December, 1949. On Apr. 3, the Ministry of Transport having sanctioned the transfer of the ship to the buyer, she was, pursuant to cl. 6 of the contract, dry docked in Aberdeen, and on Apr. 4, she was inspected, so far as her bottom and outside parts below water line, by the surveyor to Lloyd's Register and the sellers' and buyer's consultant marine engineers. The surveyor to Lloyd's Register formed the opinion that the indents to the keel plates and shell plates had not deteriorated since the previous inspection of the ship and that she could maintain her class without any repair then being carried out. However, the buyer's consultant marine engineer informed the sellers that he refused to accept the ship with the indents and requested that they be made good. The sellers, not being then fully informed of the opinion of the surveyor to Lloyd's Register, instructed their consultant marine engineer to get out estimates from two ship repairers of the cost of the repairs, which was done. On learning of the opinion of the surveyor to Lloyd's Register, the sellers refused to undertake any repairs and insisted on the buyer completing the contract, which he, in his turn, refused to do. The parties agreed that the dispute should be referred to arbitration. One of the issues before the arbitrator was whether the sellers were in breach of their obligation under cl. 4 to deliver the ship free from average, the sellers contending that (i) "free from average" in cl. 4 was a phrase of no certain meaning and any ambiguity in that clause or cl. 6 or the contract as a whole should be resolved against the buyer, who must for the purposes of applying the contra proferentem rule be considered as the proferens; (ii) alternatively "free from average" meant "free from average claims"; (iii) it would have been easy to have said "free from damage" if this had been the intention; (iv) if "free from average" standing by itself meant "free from damage other than wear and tear" or "free from damage", nevertheless such wide words must, in view of the particular provisions of cl. 6, be construed as applying to damage to the vessel other than to her bottom and outside parts below water line. The buyer contended that the words "free from average" in cl. 4 were either words of a technical nature meaning, or, as ordinary words in the language meant, "free from damage other than wear and tear" or "free from damage".

I This case is reported only on the meaning of the phrase "free from average" in this contract.

M. R. E. Kerr for the sellers.

Eustace Roskill, Q.C., and J. P. Honour for the buyer.

McNAIR, J., having reviewed the Special Case and referred to the questions of law thereby raised and having considered the construction of cl. 6 of the contract, continued: The next point is one of some difficulty arising under cl. 4 of the agreement, and turns primarily on the meaning which has to be

given to the words "free from average". In order that one may get those words into their context, it is right that I should read this clause again: A

"The vendors shall deliver the steamer to the purchasers free from average and with clean swept holds and class maintained in Aberdeen . . ."

It is argued that, in order that this vessel may satisfy the requirements of the contract so far as they relate to her physical condition, it must be proved: first, that she was seaworthy; secondly, that she had clean swept holds; thirdly, that she was in a condition to qualify for maintenance of class; and fourthly, that she was "free from average", meaning, "free from physical damage". B

That construction of the meaning of the phrase "free from average" was, to some extent, based on the submission that, in its context in cl. 4, it is to be found with two other requirements, both relating to the physical condition of the ship, namely, "clean swept holds" and "class maintained". In the first place, I do not accept that submission because, in my view, the phrase "class maintained", in cl. 4, does not relate to the physical condition of the vessel but relates to a condition of affairs in her Classification Society. The vessel would, in my judgment, under cl. 4, be properly described as "class maintained" although her physical condition was such as not to justify the maintenance of her class. Accordingly, one can approach cl. 4, as it seems to me, without the necessity of finding a meaning for the words "free from average" which is in the same field of thought as "clean swept holds" and a condition sufficient to justify maintenance of class. C

Before I deal with the text-books on the subject, I should refer to the findings of the arbitrator as to the evidence which was given before him with regard to the meaning of the phrase "free from average". The learned arbitrator says this in his award: D

"Evidence was adduced by the [buyer] and was not objected to by the [sellers] as to the meaning of 'free from average' on the ground that this was a technical term. From the evidence of a very experienced shipbroker it appeared that the printed form of contract used in this case, known as Priam Terms (hence the letters P.T. in the top left-hand corner) dated back to shortly after 1903, that the phrase 'free from average' had no generally accepted meaning in the trade, that it was thought to be a term in favour of the buyer and as such was often objected to by or on behalf of sellers, that he had always used it as meaning 'free of damage other than fair wear and tear', that he had never known it to be given in the trade the meaning of 'free from average claims' against the vessel, but that it had no settled meaning and was vague and nebulous." E

The learned arbitrator concludes:

"I find that there is no settled technical meaning to the phrase 'free from average' when used of the sale of a ship." F

That is a finding of fact, and, accordingly, the task which is left to me is to construe that phrase without the assistance of any finding as to any technical meaning of that phrase in a particular trade. H

Counsel for the buyer has urged that this is, in effect, a phrase (to use his submission) borrowed from the language of marine insurance and that, in marine insurance, "average" connotes physical damage, and he submits that it is in that sense that the phrase is used in s. 64 (1) of the Marine Insurance Act, 1906, which provides that I

"A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss."

I was referred, in support of that argument, to the views expressed by SIR MACKENZIE CHALMERS, the draftsman of the Marine Insurance Act, 1906, which are to be found in CHALMERS' MARINE INSURANCE ACT, 1906 (4th Edn.), at p. 162,

A where the learned author appends an interesting note under the heading "Definitions of Average", and states that

"Much learning and ingenuity have been spent on the endeavour to define the true meaning of the term 'average' . . . The fact is that the term is used in different senses, and its meaning in each case must be sought in its context."

B He continues:

"The word is derived from the French 'avarie' or Italian 'avaria,' which themselves are of uncertain derivation . . . Originally the term 'average' signified a toll or duty (see OXFORD DICTIONARY). In ordinary shipping law it denotes an extra charge, as in the expression 'primage and average as accustomed', or when such charges as pilotage or anchorage are referred to as 'petty average'. In fire insurance it has a special meaning. When a fire policy is made 'subject to average' the effect is that if the assured has not insured the subject-matter for its full value he is treated as his own insurer for the difference between the sum insured and the real value."

D Then he continues:

"In marine insurance the use of the word 'average' is very puzzling. The fact is the law has been developed piecemeal by decisions, and no uniform theory has been worked out. A partial loss, as distinguished from a total loss, may be either a general average loss or a particular average loss, that is to say, it may be a loss which gives rise to a right of contribution, or a loss which does not do so."

E Then he continues in a passage which deals with the familiar complication as to the difference between particular charges and sue and labour charges, and finally refers to the section of the Act which I have already cited.

F It does not seem to me, with respect, that that note lends much support to the view that the term "average" means physical damage, although it well may, in certain contexts, have the meaning of a claim arising out of physical damage.

G If one turns to find its dictionary meaning (and I turn, for the purposes of convenience, to the SHORTER OXFORD ENGLISH DICTIONARY, although I have had reference made to the larger OXFORD ENGLISH DICTIONARY), in the SHORTER OXFORD ENGLISH DICTIONARY one finds, as I think, no support for the view that, as a matter of English language, the word "average" ever means "physical damage". Apparently, it is clear from this dictionary that, originally, it meant

"a duty charged upon goods; a customs duty or the like."

A secondary meaning is:

H "Any charge over and above the freight incurred in the shipment of goods, and payable by their owner."

Then a special meaning is given of

"The expense or loss to owners, arising from damage at sea to the ship or cargo";

and, finally,

I "The incidence of any such charge, expense, or loss; especially the equitable distribution of such expense or loss among all the parties interested."

From those four rather archaic meanings there has developed the modern meaning of the arithmetical mean determined by calculation.

In SCRUTTON ON CHARTERPARTIES (15th Edn.), at p. 368, there is to be found an interesting and informative note dealing with the phrase "with Primage and Average accustomed", a form of words which is still to be found in many

bill of lading, and I think it is clear from that passage that SCRUTTON, L.J. (I think it was, or it may have been MACKINNON, L.J.), certainly took the view that in that context "average" was used as meaning some form of charge or expense and was not used in any way in relation to physical damage.

I was also referred to passages in an early edition of ABBOTT'S LAW OF MERCHANT SHIPPING AND LOWNDES' GENERAL AVERAGE, which do not, to my mind, give any very clear answer as to the meaning.

As I have stated, the learned arbitrator has taken the view that, in this contract, the words mean "damage to the ship other than fair wear and tear", but that they should not be read as applying to damage to the bottom or outside parts below water line of the vessel. It seems to me, with respect, that that is a great deal to get out of those three words. I would prefer to take the view that, inasmuch as cl. 6 deals with the bottom damage and underwater damage, and inasmuch as another clause of the contract gives the purchaser a right to inspect, the words "free from average", in cl. 4, relate not to physical damage at all but to the freedom from claims against the ship, of whatsoever nature.

It is clearly of importance to the prospective purchaser that he should know (whether under English law or under some foreign system of law) whether there may be claims against a ship, or extra charges, which SIR MACKENZIE CHALMERS says, in the passage I have read, is the meaning of these words in ordinary shipping law. If I give that construction it seems to me that I avoid any conflict at all between cl. 1, which contains the obligation that the vessel shall be seaworthy, and cl. 6, which deals with damage to the bottom. If, on the other hand, one takes the view that "free from average", in cl. 4, means "free from physical damage to the ship", one gets a most awkward conflict between cl. 1 and cl. 6 in relation to cl. 4. Applying what I conceive to be the right method of construction, namely, to adopt a construction which does not involve conflict with other provisions of the document, and taking the view that there is a reasonable and accepted meaning of the phrase "free from average" which does not connote damage, I take the view, as a matter of construction, that, in this context, "free from average" does not mean "free from damage to the ship", but does mean "free from claims against the ship".

It is quite true that that view involves, or may in certain circumstances involve, some surplusage in the contract, because there is, in cl. 13, a provision,

"The [sellers] agree to deliver the steamer to the [buyer] free from all debts and incumbrances",

but there may well be claims against a ship, either in English law or in foreign law, which are not debts or encumbrances, from which a prospective purchaser would wish to be guaranteed that the ship is free.

Solicitors: *Staddon, Pyke & Barnes* (for the sellers); *Constant & Constant* (for the buyer).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A COMPANIA NAVIERA MAROPAN S.A. v. BOWATERS
LLOYD PULP AND PAPER MILLS, LTD.

[COURT OF APPEAL (Singleton, Hodson and Morris, L.J.J.), February 21, 22, 23, 24, 25, 28, March 21, 22, April 5, 1955.]

B *Shipping—Charterparty—Safe port—"Approved loading place"—Warranty of safety of berth—Right to charterers to order loading at two safe loading places—Ship grounded at unsafe loading place—Liability of charterers—Volenti non fit injuria.*

Shipping—Charterparty—Contract—Application of general law of contract.

C By a charterparty dated Oct. 17, 1951, the defendants chartered the steamship Stork, owned by the plaintiffs, to load on the East coast of Newfoundland a cargo of logs for carriage to England. The charterparty provided that the ship should "proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get " and there load. It further provided that, "Charterers have the right to order the ship to load at two safe berths or loading places . . . " The Stork was directed by the defendants to load in an inlet of the sea on the East coast of Newfoundland, known as Tommy's Arm. On Oct. 26, 1951, the Stork having taken on board the pilot, a man with intimate local knowledge, entered Tommy's Arm and was instructed by a servant of the defendants to proceed to a position in the inlet known as "berth C" where she made fast in the customary way, i.e., with her head held by her two anchors and her stern held by four lines secured to ring bolts on an island. On the port side were rocks known as the "Five Foot Rocks" and on her starboard quarter were the "Seal Rocks". In the evening of Sept. 29, a severe south to southwesterly gale sprang up which continued through the night. During the night one of the Stork's stern lines parted and by dawn the ship had slipped her position considerably towards the Seal Rocks. On the morning of Sept. 30, the master of the Stork, believing his ship to be in danger, cut the stern lines and steamed ahead to try to find a safe anchorage. The Stork was taken by a gust of wind, grounded on the Five Foot Rocks and sustained damage. In an action for damage resulting from the grounding, the court found that "berth C" was an unsafe loading place and that the master had acted reasonably and without negligence.

G **Held:** (i) there was to be implied in the charterparty a term that the defendants would direct the ship to a safe loading place and the defendants having in breach of contract directed the ship to a loading place which was unsafe, the plaintiffs were entitled to recover by way of damages such damage sustained by the ship as was the natural and probable consequence of the breach of contract, and the doctrine of *volenti non fit injuria* did not apply.

H *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932) (44 Lloyd's Rep. 136) applied.

Reardon Smith Line, Ltd. v. Australian Wheat Board ([1954] 2 Lloyd's Rep. 148) not followed.

I (ii) although the master had allowed his fears as to the safety of berth C to be overridden by the pilot who had intimate local knowledge, the master's actions did not break the chain of causation of the damage to the ship.

Per CURIAM: the term "approved" in the phrase "approved loading place" in the charterparty was used in the sense of approved in the trade or recognised as acceptable and not in the sense of requiring the agreement of the parties.

Decision of DEVLIN, J. ([1954] 3 All E.R. 563) affirmed.

[As to consequences of naming an unsafe port, see 30 HALSBURY'S LAWS (2nd Edn.) 518, para. 670; and for cases on the subject, see 41 DIGEST 521, 3497-3500.]

Cases referred to:

- (1) *Axel Brostrom & Son v. Louis Dreyfus & Co.*, (1932), 44 Lloyd's Rep. 136; 38 Com. Cas. 79; Digest Supp.
- (2) *Grace (G. W.) & Co., Ltd. v. General Steam Navigation Co., Ltd.*, [1950] 1 All E.R. 201; [1950] 2 K.B. 383; 2nd Digest Supp.
- (3) *Portsmouth Steamship Co. v. Liverpool Salvage Co.*, (1929), 34 Lloyd's Rep. 459.
- (4) *Summers v. Salford Corpn.*, [1943] 1 All E.R. 68; [1943] A.C. 283; 112 L.J.K.B. 65; 168 L.T. 97; 107 J.P. 35; 31 Digest (Repl.) 198, 3305.
- (5) *Reardon Smith Line, Ltd. v. Australian Wheat Board*, [1954] 2 Lloyd's Rep. 148.
- (6) *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.*, (1934), 50 Lloyd's Rep. 62; *affd.* C.A., (1935), 52 Lloyd's Rep. 141; 40 Com. Cas. 320; Digest Supp.
- (7) *West (Samuel), Ltd. v. Wright's (Colchester), Ltd.*, (1935), 51 Lloyd's Rep. 105; 40 Com. Cas. 186; Digest Supp.
- (8) *Hall Brothers S.S. Co., Ltd. v. Paul (R. & W.), Ltd.*, (1914), 111 L.T. 811; 41 Digest 523, 3515.
- (9) *Hadley v. Bazendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 8 Digest (Repl.) 152, 956.
- (10) *Scott (Donald H.) & Co., Ltd. v. Barclays Bank, Ltd.*, [1923] 2 K.B. 1; 92 L.J.K.B. 772; 129 L.T. 108; Digest Supp.
- (11) *Hodgson v. Davies*, (1810), 2 Camp. 530; 170 E.R. 1241; 6 Digest 11, 22.
- (12) *Limerick S.S. Co. v. Stott*, [1921] 1 K.B. 568; *affd.* C.A., [1921] 2 K.B. 613; 90 L.J.K.B. 865; 125 L.T. 516; 41 Digest 521, 3496.
- (13) *Woolley v. Reddelien*, (1843), 5 Man. & G. 316; 12 L.J.C.P. 152; 134 E.R. 584; 41 Digest 519, 3486.
- (14) *Ogden v. Graham*, (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 121 E.R. 901; 41 Digest 522, 3509.

Appeal.

The defendants appealed from an order of DEVLIN, J., dated Nov. 8, 1954, and reported [1954] 3 All E.R. 563, whereby he held that the plaintiffs were entitled to recover damages against the defendants in respect of the grounding of the plaintiffs' ship and gave judgment in their favour with damages to be ascertained on inquiry.

The plaintiffs were the owners of the steamship *Stork* of 7,111 gross tonnage, length 441 feet and beam fifty-seven feet. The defendants were paper manufacturers, part of their business being the export of logs to England for the making of wood pulp into paper. On Oct. 17, 1951, the defendants chartered the *Stork* to load on the East coast of Newfoundland a cargo of logs for carriage to Rochester. The charterparty provided that the *Stork* should:

"proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get."

Under "berth place" the charterparty provided:

"Charterers have the right to order the ship to load at two safe berths or loading places . . ."

The *Stork* was directed to load at an inlet known as "Tommy's Arm", a place from which the defendants were accustomed to export wood during the export season from May to November and which was considered suitable for the end of the season. Tommy's Arm was about one mile in length running east and west and was entered from the east. In the centre of the arm was an island called "Central Island" and there were three berths or loading places in the arm where vessels could be moored. In berth C a vessel's head was held by her anchor on a heading of about 280° her stern being held by lines secured to ring

A bolts on Central Island. In this berth a vessel would have some rocks called the "Five Foot Rocks" on her port side and the "Seal Rocks" on her starboard quarter, the distance between the two sets of rocks when awash at low water being 1,040 feet. On Oct. 25 the Stork arrived at Great Dunder Island, about ten miles east of Tommy's Arm where she was met by a Mr. Watkins. There was no compulsory pilotage and there were no certified pilots but Mr. Watkins usually acted as pilot and was recommended by the defendants to ships consigned to them. Mr. Watkins brought the Stork in about noon and was directed to berth C, but owing to the fact that there was an easterly wind blowing and because of a mishap with stern wires it was considered imprudent to moor the Stork on that day and she steamed out of Tommy's Arm. The Stork was brought back the following day and successfully moored in berth C, being secured to Central Island by four stern lines. The master regarded berth C as a dangerous anchorage for a ship of the size of the Stork but relied on the experienced pilot who brought the ship to the berth. Loading began and continued till noon on Oct. 29, but it was stopped through bad weather. In the evening the weather deteriorated into a severe gale from the west or southwest. During the night one of the stern lines parted and by dawn the Stork had moved considerably to starboard in the direction of Seal Rocks. At 9 a.m., as the pilot had not arrived, the master, thinking that the position had become worse and that he was in danger of striking the Seal Rocks, decided to move. Accordingly he cut his stern lines, steamed ahead and picked up his anchors with the idea of getting to a safer anchorage at the western end of the Arm. As the Stork proceeded she was caught by a gust of wind and grounded on the Five Foot Rocks. DEVLIN, J., found as a fact that the loading place was unsafe, and that the grounding was not due to any negligence or imprudence on the part of the master.

HIS LORDSHIP held (i) that the terms of the charterparty imposed an obligation on the defendants to nominate a loading place which should be safe for the particular ship chartered at or about the time when she was to use it; and that the words "approved loading place" meant approved in the sense of being generally acceptable in the trade; (ii) that the defendants having, in breach of their obligation nominated a loading place which was unsafe, but which was not obviously unsafe, the plaintiffs were entitled to proceed to an anchorage at the loading place, and in accordance with the ordinary law of contract which applied to the charterparty, to affirm the charterparty and claim, as damages for breach of contract by the nomination of the unsafe loading place, the amount of the damage to the Stork which was the natural and probable consequence of the breach of contract; (iii) that on the facts, although the master had substantial fears that Tommy's Arm was not a safe anchorage for his vessel, and allowed his fears to be overridden by those with local knowledge, the defence of *volenti non fit injuria* could not be sustained.

H *K. S. Carpmael, Q.C.*, and *T. G. Roche* for the defendant charterers.
Eustace Roskill, Q.C., and *H. V. Brandon* for the plaintiff shipowners.

Cur. adv. vult.

Apr. 5. The following judgments were read.

I SINGLETON, L.J., stated the facts and continued: The rights of the parties are to be determined by the contract between them, and that is contained in the charterparty of Oct. 17, 1951, which is headed "Pulpwood Charter—From Newfoundland and Eastern Canada". It is an extraordinary document, to say the least. In the course of their business the defendants collect pulpwood at places on the East coast of Canada and in Newfoundland, which places cannot properly be described as ports. Thus this form of charter [by cl. 1] requires that the vessel

"shall sail and proceed to not more than two approved loading places as ordered . . . or so near thereunto as she may safely get and there load . . ."

It appears to me that "loading place" in this context is used instead of the word "port" by reason of the nature of the places at which the defendants collect pulpwood for transport to this country. The word "approved" must mean approved generally in the trade or business. To say that it means no more than approved by the parties, or, in other words, agreed between them, has the effect of depriving the word of any meaning in this setting. The defendants have the right to nominate not more than two approved loading places *as ordered*. It is for the charterers, the defendants, to nominate an approved loading place. A loading place would not be approved in the trade unless it was satisfactory, and no loading place is satisfactory unless it is recognised as normally safe for a ship of the size for which it is nominated.

On or about the date of the charterparty the defendants nominated Tommy's Arm as the loading place. It had been used by them for a number of years and, although only one ship equal in size to the Stork had been there to load, many ships had loaded cargoes of pulpwood there. I do not think that it can be said to have been shown that Tommy's Arm was not an approved loading place within the meaning of the words in the first part of cl. 1 of the charterparty. The defendants contend that their duty was fulfilled by the nomination of Tommy's Arm. This overlooks later words in [cl. 1 of] the charterparty, apart from some general considerations which might be raised. The words to which I refer are :

"... Charterers have the right to order the ship to load at two safe berths or loading places or at one safe berth or loading place combined with one safe anchorage in the same loading place without extra freight."

The use of the words "loading place" a second time is unfortunate. It is clear, however, that it is used in the same sense as "berth", and from that I conclude that it is used in a different sense from that in which it is used in the first part of cl. 1 of the charterparty. The defendants claim that they are given an option by these later words and that, as they did not exercise the option, the words should be ignored; further that the defendants have the right to nominate a berth, which need not be a safe berth, and only if they exercise their right to order the ship to load at two berths or loading places does the element of safety enter into it. This form of charter has been used for some time, and it seems to have been amended on at least two occasions. It is a little surprising to me that it should be argued on behalf of the defendants that on their form there is no obligation as to safety of the berth to which they direct the chartered ship. The word "safe" appears four times in cl. 1. The ordinary man may find it difficult to understand why safety should be required if two berths or loading places are designated, and yet there should be no such requirement if only one is named. The ship must be told where to pick up the cargo. It is both the right and the duty of the charterers to give the necessary instruction, else the ship cannot earn freight. There is no time stated within which the option is to be exercised and, so far as I can see, the defendants might order the ship to proceed to a second berth or loading place after she had taken aboard the cargo available at the first.

I draw attention to a passage in the letter of Oct. 26 from the master to the plaintiffs' agents. The passage is:

"According to advice I had from the agent, we shall take all our cargo here in which case I figure that the fuel oil will be enough and that I shall not have to put into St. John, which call at St. John I had in mind on the assumption that we would also load at a second place, and that is why I wrote you regarding fuel. We hope to complete loading by Nov. 7, weather permitting."

This may well apply to "port" as distinct from "loading place within the port", but it is not limited to that. The master had, obviously, been uncertain

A whether he would have to move or not. On the defendants' argument, what would be the position in such a case? Is the second loading place to be regarded as in a different category from the first—a requirement as to safety applying to one and not to the other? This will not do. If it is said that there is no provision that one berth or loading place ordered shall be safe, the reply is that the words of this clause make it a necessary implication. Otherwise the introduction of the word "safe" before "berths or loading places", and again before "berth or loading place", becomes illusory. I am satisfied that under this charterparty there was a duty on the charterers to nominate a safe berth or loading place.

B [HIS LORDSHIP reviewed the evidence of what was done as regards nominating a loading place, viz., berth C at Tommy's Arm, and whether it was safe, and reached the conclusion that the ship went to a position to which she was directed by the defendants for their convenience in loading. HIS LORDSHIP agreed with the conclusion of DEVLIN, J., in the court of first instance, that the master acted reasonably in accepting the advice of the pilot regarding the length of anchor chain to be paid out. HIS LORDSHIP continued:] DEVLIN, J., found that the loading place was unsafe. He said:

D "I think the most important single fact to be determined is whether or not the Stork dragged her anchors during the night of Oct. 29. If the plaintiffs can establish that she did and that as a consequence of the anchors dragging she moved 120 feet or more, they are well on the way to establishing that the berth where she was moored was not safe. If a vessel drags her anchors in the open sea not much harm may result. But if she drags her anchors in a confined space such as Tommy's Arm, it is a different matter; the safety of her berth very largely depends on her being held there securely."

E After reviewing the evidence the learned judge found that the vessel did drag her anchors during the night. This finding was not contested by the defendants on the appeal, nor did they seek to say that the master was wrong in moving the ship. There was other evidence on the question whether berth C was a safe loading place—evidence both ways. It was a question of fact for the judge to determine on the evidence. Obviously he attached importance to the fact that a large number of ships had used it without mishap. Only one of a size equal to that of the Stork had used Tommy's Arm. The finding is stated in this way:

G "I therefore find that the master was not guilty of any of the negligence charged or of any imprudence and that the loading place was unsafe."

Nothing in the argument addressed to the court, or in the evidence given below, leads me to think that the finding that the loading place was unsafe is wrong. This court ought to accept it.

H It is submitted on behalf of the defendants that even if the nominated loading place (or the port) is unsafe the plaintiffs cannot recover damages as the master knew the risk and undertook it. He, it is said, was in charge of the ship; he could see the position; he need not have taken the ship into berth C; he did so with his eyes open. I do not consider that this is an answer to the claim. It is clear that the master had fears, but he was reassured. He was told by Mr. Watkins that he, Watkins, had berthed many ships there and that there was no reason to be afraid. It is unnecessary to refer in detail to the evidence of the master as his view is correctly stated in his letter to the owners (or their agents) to which I have already referred for another purpose, and which is dated Oct. 26, 1951. The master wrote:

"I beg to advise that we arrived here yesterday afternoon from Port Alfred. Our average speed to this point was 11.30 knots and we arrived with surplus fuel 316 tons. No sooner had the pilot boarded the ship, than very strong wind started to blow and after anchoring in the port, we found it

impossible to make fast our moorings. The bay here is so narrow with rocks flanking both sides, the ship cannot turn round when the wind blows, there is no tug or other means available for assistance in making fast. We succeeded to swing her round without damage and shifted the ship to a bay five miles away. Today we returned and after anchoring, made our moorings fast to trees and rocks. This is a very dangerous place in the winter for steamers of our size and I hope we may be fortunate enough to load quickly without bad weather . . .”

That is the letter which contained the concluding line: “ We hope to complete loading by Nov. 7, weather permitting.”

The master of a ship is placed in great difficulty when he is confronted with such a situation. His duty to his owners and employers is to fulfill the terms of the contract if it is feasible so to do. At the same time he does not wish to risk the loss of his ship. The loss of freight (with possible litigation) weighs on one side against the risk of damage to, or loss of, the ship on the other side. Moreover, one who has never been there before cannot fully appreciate all the risks. Surely he is entitled to place reliance on the assurances given him by the very experienced pilot who was sent by the defendants to meet him. The doctrine of *volenti non fit injuria* does not apply.

I now have to deal with a question of law which has given rise to much discussion over a number of years. Assuming: (1) that there was a duty on the charterers to nominate a safe loading place; (2) that the charterers nominated a loading place which was unsafe; and (3) that the ship went to that loading place and suffered damage by reason of the fact that the loading place was unsafe, can the shipowners recover against the charterers the damages so suffered? It is said on behalf of the defendants that such damages cannot be recovered in the case of a voyage charter, though other considerations arise in the case of a time charter. I do not see any necessity to bring in time charters. The distinction, such as it is, between the two is not that one is a time charter and the other a voyage charter, but that the terms of the one are normally different from those of the other type. In the case of a time charter the master usually has to obey the orders of the charterers, and the owners have an indemnity in the case of damage arising therefrom. I prefer to keep to this case in which we are dealing with a voyage charter, though one which is somewhat unusual, as I have already pointed out. The nomination of an unsafe loading place is just as much a breach of contract as is the failure to nominate one. It is a breach of duty arising out of the obligations undertaken. If no loading place is nominated the charterers may be faced with a claim for damages for loss of freight. If a loading place which is unsafe is nominated the master is not bound to take his ship thereto. His state of knowledge is important. He is sometimes on the horns of a dilemma. The material question is, I believe, whether he acted reasonably. The learned judge was of the opinion that the master, in accepting the assurances given to him, acted reasonably, and I share his view. It is to be remembered that the parties were in contractual relationship. The defendants, in nominating berth C, purported to be acting in pursuance of a duty under the charterparty. They expected the master to take his ship to the place which they nominated. In their view it was incumbent on the master so to do, and it was the only way in which the ship could earn freight—for their case throughout was that the place nominated was safe. I do not propose to enter on a review of the authorities on this subject. That has frequently been done in recent years. I would, however, feel surprised, if the defendants’ argument is sound, that the point was not mentioned in *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1), before ROCHE, J. It appears to have been assumed by everyone that on the facts found the damages were recoverable.

DEVLIN, J., held that the damages sustained by the Stork through the nomination of an unsafe berth to which she had gone under the nomination were

A recoverable against the defendants. The learned judge followed in effect a view he had expressed in the case of *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (2), in which case he said ([1950] 1 All E.R. at p. 207):

B "Once the breach of contract is established, it seems to me to follow that, subject to the ordinary rule of remoteness, damages must result. There may be cases in which the charterer is innocent of any intention to break the contract and where the master deliberately decides to enter a port which he knows to be unsafe. ROCHE, J., on a rather similar point in *Portsmouth Steamship Co. v. Liverpool Salvage Co.* (3), indicated that the master should not follow the instructions of the charterer if they lead to obvious danger, but these factors go to the question of causation only. The giving of an order does not necessarily cause the damage that flows from an act done in pursuance of it. Put more specifically, the decision of the master to obey the order may in certain circumstances amount to a novus actus interveniens, but, in the circumstances of this case, the arbitrator clearly regarded the acts of the master as done in the ordinary course of things and not blameworthy. He was doing what any intelligent observer, knowing exactly how he was circumstanced, would have expected him to do. I take these phrases from the speech of LORD WRIGHT in *Summers v. Salford Corpn.* (4) ([1943] 1 All E.R. at p. 74). The facts set out in the Special Case fully justify this conclusion."

E Between the two decisions of DEVLIN, J., there came *Reardon Smith Line, Ltd. v. Australian Wheat Board* (5) in the High Court of Australia. This was an appeal from a decision of WOOLF, J. (Western Australia) who had held that charterers were in breach of the charter in ordering the ship to a berth which they knew, or ought to have known, was unsafe; that the master acted reasonably in going to the berth and that charterers were liable to the shipowners for the damage sustained by the ship. The charterers appealed, and the appeal was allowed by a majority, SIR OWEN DIXON, C.J., dissenting. The many authorities were fully considered in the judgments which were given. The view of the majority, WEBB and TAYLOR, JJ., is expressed at the end of their judgment ([1954] 2 Lloyd's Rep. at p. 166) in these words:

G "We have been unable to find any case where, in the circumstances such as the present, a charterer has been held to warrant the safety of a port nominated by him, or where the nomination of an unsafe loading port or berth pursuant to a charterparty in the form of that which is before us has been held to constitute a breach of contract giving rise to damages where the master of a vessel has accepted the order and proceeded to the port and there sustained damage. There is, as we have already said, no doubt that a refusal or failure to provide the stipulated cargo at a safe port is answerable in damages, but such a conclusion depends upon principles which do not assist in the solution of the problem which arises in this case. In all the circumstances we prefer to adopt the observations of GREER, L.J., in the *Lensen* case (6), and those of BRANSON, J., in *West's* case (7), rather than those of DEVLIN, J. in *Grace's* case (2), and to hold that where under a charterparty in the form of that which is before us an unsafe port or berth is nominated by the charterer, he does not, merely by reason of such nomination, become liable for damages sustained as a result of the master proceeding to such unsafe port or berth. Nor do we think that in the circumstances of this case there is any other ground upon which the charterer should be held liable. Accordingly we are of the opinion that the appeal should be allowed."

I I now take two passages from the judgment of the Chief Justice. The first is where the Chief Justice said ([1952] 2 Lloyd's Rep. at pp. 157, 158):

"It is, of course, true that, since a charterparty is a contract the terms of which depend on what the parties write into it, each charterparty must

bear its own interpretation and its meaning must be derived from the full contents of the document, and it is true that a time charter often contains clauses absent from a voyage charter such as a clause of indemnity and a clause enabling the charterer to give orders as to the employment of the ship. But I can see no reason why, in a voyage charter as well as in a time charter, the traditional provision that the ship shall proceed to a safe port as ordered by the charterer or to a safe wharf, dock or berth as ordered by the charterer, should not be interpreted as imposing on the charterer an obligation to direct the ship only to a port or dock that is safe. No doubt it is one aspect of a total obligation resting on the charterer to provide a cargo at a safe port or safe berth to which he is to order the ship to proceed. But it does not follow that the breach of the obligation must be regarded always as consisting in the failure to supply the cargo at a safe port rather than in the sending of the ship to a port which is unsafe. The shipowner may reject the performance tendered of the obligation to provide a cargo and thus avoid danger to the ship at the expense of the loss of freight, and his measure of damages will be determined accordingly. But he may accept the cargo though tendered in breach of the condition that it will be done at a safe port without relieving the charterer from the consequences, if they ensue, of his breach of that condition. Indeed, that is the very point decided in *Hall Brothers S.S. Co., Ltd. v. R. & W. Paul, Ltd.* (8). The purpose of the provision is to protect the ship in both aspects. For these reasons I am of opinion that the charterer is liable under the Australian grain charter to the shipowner for damage received by the ship owing to being directed to an unsafe port or an unsafe wharf for loading . . . It was then contended that the damage to the ship was not the natural or probable consequence of her being ordered to the berth. The chain of causation was broken, it was suggested, because the decision of the master to rely upon the fine weather and not to put out a stream anchor intervened. The master knew the berth to be unsafe, so it was said, or liable to become unsafe on a change of weather. His action in going to the berth with that knowledge, it was said, was the true cause of the damage. I do not think that this view can be supported. The purpose of requiring the charterer to choose a safe port or berth is to avoid danger to the ship. By ordering the ship to an unsafe berth the charterer placed the master in a dilemma, and the master's acquiescence in the order cannot relieve the charterer of his responsibility. If it is material the charterer may be taken to have known as much about the matter as the master. The charterer was represented by an agent who took charge of the loading and had the same opportunities for knowledge as the master. The master was guided by the harbour-master pilot who did not advise any other measures. In these circumstances, it is difficult to see why the course which was taken was not a direct and natural consequence of the breach of the provision of the charter in giving an order to go to the berth at Geraldton. In my opinion, the judgment of WOOLF, J., is correct and the appeal should be dismissed."

I agree with the reasoning of the Chief Justice and with that of DEVLIN, J. I will state the position in my own way. If charterers nominate a loading place they expect that the master of the ship will take the ship to that place; that is what happens in the ordinary case, although there are cases in which the master, for reasons which seem right to him, declines to go there. The parties are in contractual relationship; the charterers wish their goods to be loaded into the ship and carried away; the shipowners wish to earn freight. The judge was satisfied that the master acted reasonably. The assurances given to the master by the very experienced man the defendants sent to meet him satisfied him that he ought to proceed; thereafter

"he was doing what any intelligent observer knowing how he was circumstanced would have expected him to do."

A And he was doing what the defendants wished and expected him to do to perform the plaintiffs' part of the contract, he believing, on the assurances given to him, that the defendants, in performance of their contract, had designated, or had directed him to, a safe loading place. The damages flowed naturally from the defendants' breach of contract. It appears to me that this point is covered by the well-known words of ALDERSON, B., in *Hadley v. Baxendale* (9) (9 Exch. B at p. 354):

"Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

C The damages sustained in this case fall under one, or under both, of the limbs of the rule there stated. Berth C was an unsafe berth for a ship of the size of the Stork. There was little room for manoeuvre, and there were rocks on every side; if she dragged her anchors the outlook was poor. These considerations were in the mind of the master throughout the night of Oct. 29/30 and in the early morning of Oct. 30, when he decided to move. Similar thoughts must have been present to the mind of Captain Miller, who was in charge of shipping operations in Newfoundland on behalf of the defendants, and who remained on board until 6 a.m., though he was not so fearful of danger as the master then was. The kind of damage suffered in this case must be in contemplation of the parties whenever there is a charter of a ship. The shipowners know and appreciate the risks of the sea. The reasons for the promise of a safe berth (as there is in most cases) are (a) that without such a promise there might well be no contract; (b) that the master at a later stage might decline to go to the nominated berth; or (c) that at least there might be delay while the master investigated the position. Both parties realise that damage, such as occurred in this case, is to be expected if a ship is directed to a berth which is unsafe for her when in the contract there is a promise of a safe berth. If a repairer agrees to repair my motor car and does not do so within the time agreed or within a reasonable time I may succeed in an action for damages against him. If he repairs it indifferently and I suffer injury therefrom, equally I can recover damages. I have done what he would have expected me to do. The damage is the natural and probable result of the faulty repair. It may be that an action would arise on negligence as well, but it arises from the contractual relationship between the parties. The indifferent or bad performance gives a right of action just as much as does failure to perform. If I may carry the illustration further, suppose I notice, when my motor car is returned, that the repair does not appear to have been well done, and I point this out to the repairer, who reassures me, asserting that the car is as good as it ever was and is perfectly sound as the result of the repair. If an accident occurs and I suffer damage through the faulty repair, can I recover damages? The answer depends on a number of factors, the first and main one being whether I acted as a reasonable man would do in the circumstances.

I I agree with the findings of fact of DEVLIN, J., and on those findings I am of opinion that he was right in entering judgment for the plaintiffs. The appeal should be dismissed.

HODSON, L.J., stated the facts and continued: There remains one finding of fact which is strongly challenged on this appeal, namely, that the berth was unsafe because it was so restricted that the master could not pay out enough anchor chain to hold the ship. This challenge, indeed, formed the spearhead of the attack on the judgment by counsel for the defendants. [HIS LORDSHIP reviewed the evidence on this question, holding that it was reasonable for the

master, although he could not pass his responsibility to the pilot, to seek his advice where the anchor was to be dropped and agreeing with the conclusion of the trial judge that the loading place was unsafe for the ship. His LORDSHIP continued:] The conclusion of the trial judge, depending as it did in part on the advice of the Elder Brother given to, and accepted by, the learned judge, would, I think, be difficult to reverse in this court, which has not had the benefit of such advice. I should add that I think it is clear on the evidence that the ship was directed by the defendants not only to Tommy's Arm, but to berth C. Before leaving the findings of fact and coming to the questions of law, it is well to state that this finding of fact applies, in my opinion, not to Tommy's Arm as a whole, but to the particular loading place, that is, berth C, to which the ship was directed. There were two other berths in Tommy's Arm, as the plan shows, and although it does not look from the plan as if there were room for the Stork in either of those other berths, no evidence was directed to the other berths or to the lack of safety of Tommy's Arm generally.

I come now to the questions of law. The defendants contend that the charterparty contained no warranty of safety, express or implied, and that if the loading place was unsafe the master went there of his own choice, and the plaintiffs cannot recover for the damage to the ship.

Clause 1 of the charterparty provided that the ship should

"proceed to not more than two approved loading places as ordered in Newfoundland on the East coast . . . or so near thereunto as she may safely get, and there load, always afloat, or safe aground where customary for vessels of similar size and draft, from the agents of the said charterers, not exceeding what she can reasonably stow and carry over and above her tackle apparel, provisions and furniture, a full and complete cargo of pulpwood maximum 4 feet lengths (inclusive of a deck load at full freight but at charterers' risk). Charterers have the right to order the ship to load at two safe berths or loading places or one safe berth or loading place combined with one safe anchorage in the same loading place without extra freight."

It is argued that the words "approved loading place" say nothing of "safety", and that they apply to Tommy's Arm, to which the ship was directed, and, as I understand it, to berth C; also, if it be held that the ship was ordered to berth C, that the second sentence, which gives the right to order the ship to load at two safe berths, etc., does not come into operation, because the right was never exercised to send her to a second loading place. This argument leads to an absurd result, since it involves that the first loading place may be unsafe, whereas the second will be safe. I think that berth C in Tommy's Arm was the loading place to which the ship was directed under the first sentence, and that the option given in the second sentence never came into operation, for the two sentences together do not contemplate more than two loading places in all. To put it another way, both sentences are dealing with the same matter, that is, safe loading places. I have no difficulty in coming to the same conclusion as the learned judge that, construing together the two sentences in which the word "safe" so often appears, the word "approved" takes for granted that the loading places will be safe. It is a necessary implication that they will be safe. I have taken the word "approved" in the sense of generally acceptable in the trade, as the defendants submit, and not in the sense contended for by the plaintiffs of "ought to be approved".

Our attention was drawn to two authorities, *Donald H. Scott & Co., Ltd. v. Barclays Bank, Ltd.* (10), and *Hodgson v. Davies* (11). In the latter case LORD ELLENBOROUGH said (2 Camp. at p. 532) that an approved bill meant a bill which ought to have been approved, and in the former case ATKIN, L.J., said ([1923] 2 K.B. at p. 17) that an

"approved assurance policy . . . means a policy to which no reasonable objection can be made by reasonable commercial men."

- A These cases deal with the form of documents, and I think the sense in which the word "approved", used in connection with a place in the context of the charterparty, need not be the same, since different considerations apply. I have taken into account the words "or as near thereunto as she may safely get" which follow the first reference to loading places, which, it is said, point at least to the possibility of the loading place itself being unsafe. I do not accept this contention,
- B since I think those words are apt to cover circumstances in which a ship is hindered from reaching her destination, and do not imply that the destination may itself be unsafe.

- The defendants contend that if they had a right to send the ship only to a safe loading place or berth, nevertheless, if the loading place or berth turns out to be unsafe, this is not a breach of contract, but only the failure of a condition
- C precedent giving the plaintiffs the right to refuse to perform the contract, and has no other consequence. In the alternative they contend, following the decision of the majority of the High Court of Australia in *Reardon Smith Line, Ltd. v. Australian Wheat Board* (5), that even if their failure to nominate a safe loading place or berth is a breach of contract, there is no remedy for the shipowner except to refuse to proceed to the loading place or the berth and treat the
- D charterer as in default in providing a cargo in accordance with the conditions of the contract. On this view, if the ship proceeds to the unsafe loading place or berth, there is no breach; the shipowner has waived fulfilment of the condition precedent, that is all, and having chosen to load the cargo, he cannot complain that it was supplied at a place where he need not have taken it. The defendants on this argument drew a distinction between a voyage charter, such as the one
- E now under discussion, and a time charter, where the employment of a ship is placed under the direction of the charterer, and there is usually a provision requiring the latter to indemnify the shipowner for loss or damage occasioned by the master's compliance with the charterer's orders.

- I do not propose to attempt the task of reviewing the authorities on these topics. This task has been performed by DEVLIN, J., in this case and in a
- F previous decision of his in *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (2), and by SIR OWEN DIXON, C.J., in the *Reardon Smith* case (5) in a judgment which I find entirely convincing. Where there has been a breach of safe port or analogous provisions in a charterparty, whether voyage or time, and damage to the ship flows therefrom, in my judgment the authorities support the view that the shipowner is entitled to recover, apart altogether from an indemnity
- G clause. I do not think that this right is confined to cases where the master has no opportunity of avoiding the damage (see *Limerick S.S. Co. v. Stott* (12)) or where expense is incurred in order to avoid unsafe conditions (see *Hall Brothers S.S. Co., Ltd. v. R. & W. Paul, Ltd.* (8), and *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1)), as was suggested in argument in the case of *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (2). Nor do I think that in construing a
- H charterparty a different construction should be given to the words "safe port" and the words "safe berth" on the ground that the finding of a safe berth is a matter of which the charterer is not to be expected to have knowledge and is the special responsibility of the master of the ship; whereas in the case of a safe port the charterer may be expected to have better knowledge than the shipowner. This distinction seems to me to involve a strained and artificial rule of construction.
- I Accordingly I am unable to accept the dictum of BRANSON, J., cited by SIR OWEN DIXON, C.J., and more fully in the majority judgment of WEBB and TAYLOR, JJ., in the *Reardon Smith* case (5) which tends to support this distinction. I agree, therefore, with the learned judge that the failure to direct the Stork to a safe berth is a breach of charterparty in the nature of a breach of warranty entitling the plaintiffs to such damages as flow from the breach.

The only remaining question is whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were

they the natural and probable consequences of the breach? If not, they are too remote. No question of the application of the doctrine of *volenti non fit injuria* arises, in my opinion. The question is one of causation. If the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the defendants would be relieved, accordingly, from the liability which would otherwise have fallen on them. The case is put most strongly against the defendants by the master in his letter of Oct. 26 in which he shows that he recognised the danger of the berth where his ship lay, and is reinforced by the fact that the master had entered Tommy's Arm with his ship on the preceding day and had an opportunity of seeing for himself the area of the anchorage and its condition generally. The master did, however, allow his fears to be overridden and deferred to the advice and assurances of those with local experience, in particular to the pilot who had brought his ship in. He was, I think, in a predicament, having the choice between declining the adventure on the one hand, and possible damage to the ship on the other. In acting as he did, obeying the order of the defendants, he was, in my opinion, acting reasonably in the circumstances and not in such a way as to destroy the chain of causation between the breach of contract committed by the defendants and the damage sustained by his ship.

A further point was taken that the plaintiffs were estopped from claiming damages for the injury to their ship as follows: When they sent the ship into the berth they represented to the defendants, through their master who knew all the facts, that they accepted the berth as a good nomination, and the defendants acted to their detriment by starting to provide the cargo there. In my opinion, there is here no evidence of any representation of an existing fact which could provide the foundation for any argument based on estoppel. I agree that the appeal should be dismissed.

MORRIS, L.J.: For a determination of the issues which are raised in this litigation it becomes necessary to construe the contract which was entered into, the wording of which was largely based on a printed form of voyage charter prepared and used by the defendants. Much debate has arisen as to the meaning of the contract. In its printed prepared form the pulpwood charter designates a voyage to Ridham Dock, River Swale, Kent. But each of the ships which in this case the owners might have nominated was too large to be accommodated in Ridham Dock. The pulpwood was, accordingly, to be carried to Rochester. Owing to conditions existing in October, 1951, ships which did not exceed the size appropriate for Ridham Dock were very difficult to secure. The charter was entered into on Oct. 17, 1951, and nomination by the owners of either the *Stork* or the *Eagle* was to be made by Oct. 19. The contract recorded that the ship was trading, but that it was expected that she would be ready to load about Oct. 22, 23, or 24. The place to which the ship was to proceed in order to load was not stated in the contract. There was no agreement to proceed to some named port or berth the features of which might have been known to, or ascertained by, the shipowners before the agreement was made. The ship was to proceed to "not more than two approved loading places as ordered in Newfoundland on the East coast." The words "as ordered" must mean as ordered by the defendants. The defendants do not state that they will order. But there must be an implication that they will. The plaintiffs could not perform their part, nor could they earn their freight, unless at least one "approved loading place" was named. It is not in terms stated in the clause in the contract where "loading places" are first mentioned that they are to be safe loading places. If, however, there is an implied obligation, as in my judgment there is, to name a loading place, it would seem strange if that obligation could be fulfilled by naming an unsafe loading place. There is no definition in the contract of a loading place. Although in cl. 1 that expression is employed and the word "port" does not appear, it is provided by cl. 2 that the master or owners are to telegraph the

A shippers of the cargo (Bowaters Newfoundland Pulp and Paper Mills, Cornerbrook) stating the name of the ship, and also stating the name of the charterers (which would seem in this case to be an unnecessary requirement) and giving notice of the probable date of the ship's arrival "at the loading port or ports". The expression "port" is defined to include "loading place".

B The obligation of the ship as laid down in cl. 1 is to proceed to not more than two approved loading places as ordered in Newfoundland on the East coast or so near thereunto as she may safely get and there load, always afloat, or safe aground where customary for vessels of similar size and draft, from the agents of the defendants. The wording of the first part of cl. 1 of the contract to which I have just referred seems to give some prominence and emphasis to the feature of safety. It is said that the next sentence in cl. 1 merely gives the defendants an option or right which in regard to the Stork was not exercised. The sentence reads:

"Charterers have the right to order the ship to load at two safe berths or loading places or one safe berth or loading place combined with one safe anchorage in the same loading place without extra freight."

D It is said, therefore, that this sentence should not in this case be considered. If that sentence be not regarded, the phrase "loading place" would have to be interpreted to denote the precise place where the ship was to load. I do not read the word "approved" as requiring the agreement of the parties. An "approved loading place" denotes a recognised loading place or a place where it has been usual for other ships to load. The presence of the word "customary" in the phrase "where customary for vessels of similar size and draft" lends support to this view. Even if the sentence which I have quoted above is not brought into play there is, I think, strong support for the view that the necessary implication of a term that the defendants *will* in fact order the ship to go to at least one place where the ship can load must include also a term to the effect that the place named for loading must be safe.

F Authority is, perhaps, hardly needed in support of the view that the implication of a term is necessary. Reference can, however, be made to two decisions. In *Woolley v. Reddelien* (13), it was held that a charterparty by which it was agreed that a ship, after delivering her outward cargo at Malta, should with all convenient speed sail to one of several ports as should be ordered at Malta, contained an implied promise on the part of the charterer that the ship should be ordered at Malta to sail to such port within a reasonable time after her arrival at Malta. G In his judgment TINDAL, C.J., said that that was "the good reason of the thing." Much to the same effect was the view expressed by BLACKBURN, J., in *Ogden v. Graham* (14) when he said (1 B. & S. at p. 780):

H "By the charterparty it is agreed that the vessel shall sail for a safe port in Chili, with leave to call at Valparaiso, and although it is not in terms so stated, it follows by necessary implication that the charterers are to name a safe port to the shipowner who will then be able to earn his freight by proceeding thither."

I I consider, however, that in construing cl. 1 it would not be correct to exclude consideration of the sentence which I have quoted. It is not stipulated when the rights or options are to be exercised. I do not think that there was any reason why the defendants should not, after the Stork had been some time at berth C, have directed her to either berth A or berth B. It is not necessary to express any final view as to this, since, in my judgment, the presence of the sentence in the clause cannot be ignored when the nature of the term which it is necessary to imply is being considered. In the sentence quoted, the phrase "loading place" seems to me to be used with two different meanings. It is first used as being synonymous with a "safe berth". It is also used as being the area within which there may be safe berths or loading places, or safe anchorages. In reference to the present case the "loading place", when the phrase is used in one

sense, may be Tommy's Arm, and when the phrase is used in another sense the "loading place" may be a safe berth or a safe anchorage within Tommy's Arm. The emphasis on "safety" in the quoted sentence is very strong. A

The conclusion I have reached is that there must be an implied term that the defendants will give an order that the ship will proceed to at least one approved or recognised loading place; that, if only the start of cl. 1 be regarded, there is a further implied term that the approved or recognised loading place which is nominated will be safe; but that if, as I think is correct, the whole of the wording of cl. 1 should be regarded, the result is that there is an implied term in the contract that the defendants will in fact order or direct the ship to the place where she would find the cargo to be loaded, together with an express or implied term that the place to which the ship would be directed would be safe. B

In the present case the ship was first ordered to proceed to Tommy's Arm, and was later ordered to proceed to berth C. One view may be that "berth C in Tommy's Arm" was the approved loading place to which the ship was ordered to go. Another view, which I prefer, is that the ship was first ordered to go to Tommy's Arm, which was the approved "loading place", using that phrase in its wider sense; and that the ship was then ordered to berth C as being the safe berth or loading place, or safe anchorage situate within the approved loading place. On either view the performance of the duty to order the ship to the place to which she was to go involved that berth C in Tommy's Arm should be safe. The corollary of being in a position to give an order is being in a position to command obedience. When the order was given to the ship to proceed to Tommy's Arm the plaintiffs were under a contractual duty to obey; likewise when the further order was given to go to berth C there was a contractual duty to go there. E If there is a right to order the ship to load at two safe berths, there must be a right to order the ship to load at one safe berth, and a contractual right to order must involve a contractual duty to obey. If it were known that berth C was unsafe, then an unlawful order would have been given which would not command obedience; but if under the terms of a contract there is the duty on the one party to give an order and on the other party to obey it, it would seem strange doctrine F if it were laid down that the latter must, before obeying, take elaborate steps to test the validity of an apparently valid order.

It was submitted on behalf of the defendants that if they named a place to which the ship should go, there was no obligation on the ship to proceed thither until such time as those responsible for the ship decided that the place was safe. Alternatively stated, the argument was presented that a nomination by charterers must be either good or bad; that if bad it could be rejected; that if accepted there could not later be complaint made in regard to the place; and that shipowners would be estopped from making any such complaint. I am unable to accept this reasoning, which seems to me to give insufficient weight to the respective obligations undertaken by the parties to the contract. If the reasoning were sound the result would in practice be highly inconvenient to all concerned. Indeed, it might H involve that a ship should not obey an order to proceed to a place without sending an advance survey party and receiving a report from them.

In the present case the defendants, in my judgment, promised (either impliedly or expressly, as I have discussed above) that they would order the ship to go to at least one safe berth or anchorage in at least one approved loading place. They would be in breach if they ordered the ship to go to an unsafe berth or anchorage. If the ship suffered damage as a result of going to the designated unsafe berth or anchorage, then her owners would be entitled to damages for breach of contract. If the position could be, or ought to be, stated more narrowly so that the only obligation was to order the ship to proceed to at least one approved loading place with the right, but not the duty, to give a further order to proceed to a safe berth or anchorage at, or within, the loading place, then, I if the right is exercised of ordering the ship to a berth or anchorage, it must be to

- A a safe berth or anchorage. This does not mean that owners would necessarily be able to recover damages in respect of injury sustained by a ship if it were quite clear that an order had been given to go to an unsafe place. The order would then not be a lawful order, and would be known not to be a lawful order. Although there would have been a breach of contract in giving the order to go to an unsafe place, this would not justify the deliberate act of allowing the ship to suffer damage.
- B The owners must not throw their ship away. If, having the opportunity to refrain from obeying the order and having the knowledge that the ship had been wrongly directed to run into danger, those responsible for the ship allowed her to be damaged when they could have saved her, it would be contrary to reason if damages could be recovered. They could not be recovered for the reason that they would not be the result of the breach of contract, but of the deliberate and unnecessary act of those in control of the ship.
- C Further, there is a duty to behave with ordinary reasonable prudence so as to minimise damages, and the readily attainable minimum may in some cases be nil. This does not involve, however, nor in practice would it be reasonable or convenient, that where charterers have the contractual duty of ordering a ship to go to some place designated safe and where the ship has the contractual duty of obeying the order, the ship must always doubt the validity of the order and must not proceed until, by making some reconnaissance or by seeking information extending beyond that ordinarily available to a reasonable and prudent ship's master, there has been a satisfactory verification that a place designated safe is in fact so. My analysis of the terms of this contract leads me, therefore, to the view that the defendants were in breach of contract if berth C of Tommy's Arm was unsafe, and that the plaintiffs can recover for the damage which they suffered unless the master of the Stork deliberately or voluntarily assumed the risk of sustaining the damage.

- It was submitted by the defendants that they did not contract not to nominate an unsafe place or berth. With every respect, I find this argument unsound. If my analysis of the contract is correct the defendants made a promise that
- F they would order the ship to go to a safe place. They break that promise if they order the ship to go to an unsafe place. If because of their breach (and not for any other reason) the ship is damaged, the plaintiffs should be entitled to recover in respect of the damage sustained. It was further submitted by the defendants that in nominating a place they merely represented that, in their view, the place was safe, and that unless they were fraudulent they would not
- G be liable. But this submission does not prevail if the obligation was to order the ship to go to a safe place; for there is a breach of that obligation if the ship is ordered to go to an unsafe place.

- There can, I think, be no question as to the meaning of the word "safe" when used in the contexts now being considered. A place will not be safe unless in the relevant period of time the particular ship can reach it, remain in it, and
- H return from it, without, in the absence of some abnormal occurrence, being exposed to danger. It is a question of fact, having regard to the circumstances of each particular case (see the judgment of ROCHE, J. in *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1) (38 Com. Cas. at p. 85)). If berth C in Tommy's Arm was unsafe for the Stork, then, unless the master of the ship so acted as to defeat a claim, I consider that the plaintiffs are entitled to recover damages
- I from the defendants. This conclusion is in accord with the decision reached in *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1). It is to be noted that in his judgment when referring to a clause in the charterparty which prescribed a safe port of discharge, ROCHE, J., spoke of the stipulation as to safety as something "which one would think would be implied if it were not expressed" (*ibid.*, at p. 87). This accords with the view of WIGHTMAN, J., in *Ogden v. Graham* (14) when he said (1 B. & S. at p. 779):

"Was such a port safe within the meaning of the charterparty? Did it

come within the terms of a safe port in Chili? I do not know what force can be given to the word 'safe' when added to the word 'port'." A

The conclusion I have expressed is also in accord with the decision reached in *Hall Brothers S.S. Co., Ltd. v. R. & W. Paul, Ltd.* (8). In that case the vessel was to be given orders to discharge at a safe port and was directed to King's Lynn, which proved not to be a safe port for the vessel; the vessel could not reach King's Lynn without lightening before reaching there, and it was held that the owners could recover the expenses incurred in lightening her. *SANKEY, J.*, rejected a submission that because the master had accepted the order to proceed to King's Lynn the owners were estopped from asserting that King's Lynn was not a safe port. B

Without referring at any length to *Limerick S.S. Co. v. Stott* (12), and *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (6), I think it can be said that each of these cases proceeded on the basis that it was a breach of the charter to order the ship to go to an unsafe place, and that there could be recovery in respect of consequential damage sustained by the ship. Any assistance derived from considering these and other authorities must be tested, however, by relation to the particular express contractual provisions. In *Ogden v. Graham* (14) there was no actual injury to the ship. The ship did not proceed to the unsafe port which was named; but damages were recovered (occasioned by the detention of the ship) because, as *WIGHTMAN, J.*, said (1 B. & S. at p. 780): C

"... the charterers must pay the damage occasioned by the breach of contract in not naming a safe port . . ."

BLACKBURN, J., said (*ibid.*, at p. 782): D

"... they are liable for damages for not naming a safe port within a reasonable time . . ."

I refer to these words because, in clear and simple terms, they illustrate that a claim for damages for breach of a contract to charter a ship must be approached just as any claim for breach of any other contract, whatever its form or subject-matter may be. There must first be ascertainment whether the party sued made a promise and, if so, what were its terms; secondly, a determination whether the promise was broken; and, thirdly (if this arises), an ascertainment as to what damage was occasioned by the breach. If the type of contract being considered is a contract chartering a ship, it seems to me that the line of approach must be just the same whether a time charter or a voyage charter is in issue. But although this is a trite observation, everything must depend on the particular terms of the particular contract which is being construed. For the reasons which I have given, I find myself in accord with the approach and the conclusion of *DEVLIN, J.*, in regard to the issues of law. It results from the views which I have expressed that unless *Samuel West, Ltd. v. Wright's (Colchester), Ltd.* (7), is distinguishable, I do not feel able to follow it. I would most respectfully express my appreciation of the line of reasoning of *SIR OWEN DIXON, C.J.*, in the *Reardon Smith* case (5). E

The determination of the question whether berth C was unsafe involved the consideration of a great deal of evidence. The ship was first required to go to Tommy's Arm, and the services of a pilot were employed for the purpose of taking the ship in. Then the defendants required the ship to go to berth C. The case for the plaintiffs was presented to the judge on the basis that berth C was unsafe. I do not consider that it is necessary to inquire whether Tommy's Arm itself was unsafe, and, indeed, I doubt whether there is much evidence whether berths A and B, could or could not, have been used. When the ship was ordered to go to berth C she was being ordered to go to that position on the water referable to surrounding landmarks which was known to the defendants and their agents and stevedores as berth C. There was nothing at all to mark the place, and the captain could have no idea whether he was in berth C or not F

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- A unless he was told. Berth C was where it suited the defendants to have the ship. The cargo would be available to her when she got to berth C. From the point of view of loading berth C was so positioned that the boom used in connection with the assembling of, and retaining of, floating timber could be conveniently placed in relation to the Five Foot Rocks. It seems to me that the evidence establishes that the ship did go to berth C. Questions were raised as to the
- B position of the pilot. On the assumption that the pilot was employed in such circumstances that the plaintiffs were responsible for what he did, there can, I think, be no doubt that he properly understood where berth C was; he caused the ship to go to that position on the water which all concerned called berth C. It was forcibly submitted on behalf of the defendants that the master of a ship must remain responsible for navigation and for all matters relating to the
- C mooring of the ship. It was said, therefore, that the master ought not to have consented to, or acquiesced in, any manner of mooring that did not satisfy him. It was said that it now appears that, as the stern of the ship was some six hundred feet from Central Island, she could have been nearer to it, and that more chain could have been let out, and that the master thought that in the interests of safety more was needed. It was also submitted that the anchors might have
- D been dropped nearer to the permanent boom so as to permit of more chain being out. It was further said that the master, being responsible for the safe mooring of his ship, was not in fact satisfied and, indeed, recorded his apprehensions, but took no further action to avert catastrophe. It was said that as a result the claims of the plaintiffs should be defeated and the principle applied which is expressed in the words "*volenti non fit injuria*."
- E The finding of the learned judge that the ship dragged her anchors was not contested before us, nor was it contended that, in view of such occurrence, the subsequent actions of the master were not justified. But it was said that the master had acknowledged that he did not have as much chain out as he would have wished. Attention was also directed to para. 9 (B) of the points of claim; and it was submitted that there was room to enable the ship to have more
- F chain out. In my judgment, the evidence shows that the ship went to berth C because she was told to go there, and because that is where the defendants wanted her. The ship went as near to the permanent boom as was reasonably practicable and then dropped her anchors. She then went back and had the amount of chain out which would allow her to be in berth C. It was important for the defendants to have the ship exactly where they wanted her for convenience of loading. They had a boom foreman who saw to it that the ship was
- G properly positioned. The master was, I think, undoubtedly unhappy about the situation and felt that he would have wished to have more chain out. If, as I think was the case, the anchors were dropped when the ship was near the boom, and dropped where the pilot indicated, then, if there had been more chain out, the ship would not have been in berth C, but in some other position. It
- H seems to me, therefore, that it has to be considered whether, having been directed to a particular berth or anchorage and then having gone to the place to which he was directed, the master should have refused to stay there on the ground that the ship was in danger, or whether, in all the circumstances, the master acted reasonably in staying where the defendants wished him to be. I have come to the conclusion that it ought not to be said that the master acted unreasonably.
- I He certainly was not abandoning the ship to some fate which he thought was inevitable. Reliance was placed on the terms of a letter which he wrote to the plaintiffs in which he referred to the place as being dangerous; but in the same letter he gave his forecast of the day when loading would be completed. I think that he hoped and expected that all would be well, although he was unable to quench all his fears. Although he was uneasy, and although he expressed his anxieties, it is to be noted that he received reassurance, expressed in picturesque language, from the pilot who possessed intimate local knowledge. It

was not imprudent for the master, even while he was unable to suppress his apprehensions, to be guided by what he was told. A consideration of the evidence leads me to the view that, being confronted with a difficult situation, the master did not act unreasonably, and that it ought not to be held that there was any deliberate assumption of risk. In my judgment, the evidence shows that, in breach of contract, the defendants directed the Stork to go to berth C in Tommy's Arm, which berth was unsafe for that ship, and that there are no reasons why the plaintiffs should not recover in respect of the damage which as a result the ship sustained. I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Lawrence Jones & Co.* (for the defendant charterers); *Stokes & Mitcalfe* (for the plaintiff shipowners).

[Reported by PHILIPPA PRICE, *Barrister-at-Law.*]

DOLTON BOURNES & DOLTON, LTD. v. OSMOND (VALUATION OFFICER).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.), March 30, 31, 1955.]

Rates—Industrial hereditament—"Retail shop"—Sawmills, timberyard and office—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (4).

A limited company carried on business as timber importers and merchants and sawmillers on a hereditament measuring some two hundred feet by two hundred feet on which stood a large number of structures of considerable size, including shelters under which timber was stacked, a sawmill, planing shop and ancillary buildings, and a small office in which, during the usual business hours, a clerk attended to deal with the requirements of customers visiting the hereditament. The hereditament was registered as a factory under the Factory and Workshop Acts, and the company employed on the premises a manager, a clerk, five sawmill operatives, eight general labourers and a lorry driver. Seventy-seven per cent. of the timber imported by the company was cut and processed on the hereditament to meet the needs of customers, the remainder being sold without processing. About ninety-two per cent. of the company's customers were builders and about eight per cent. were merchants or factories, although occasionally some timber, in quantity so small as to be negligible, was sold to members of the public, and sawdust was sold to butchers. The company neither sought nor welcomed purchasers of small quantities of timber. There was no window display at the premises to attract prospective customers, nor was there any counter in the office but a sliding window enabling an inquirer to converse with the clerk. In some cases, customers called at the office and, after having inspected the timber, placed orders and in other cases orders were placed by telephone and confirmed in writing. On the question whether the premises were excepted from being an industrial hereditament by virtue of the proviso excepting a factory or workshop primarily occupied and used for the purposes of a retail shop within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1) (b), (4),

Held: the premises were not a "retail shop" within s. 3 (4) of the Act of 1928, because, although timber was sold on the premises, they lacked one principal characteristic of a retail shop, viz., that it was a place to which members of the public could resort for obtaining their particular wants, as the customers resorting to these premises were a limited class of trade customers and the company was averse to receiving such small orders from ordinary members of the public as would be received in the course of retail trade.

A Dictum of GREENE, L.J., in *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* ([1937] 2 All E.R. at p. 376), and dictum of VISCOUNT DUNEDIN in *Turpin v. Middlesbrough Assessment Committee & Bailey* ([1931] A.C. at p. 473) applied.

Finn (Wimbledon Revenue Officer) v. Kerslake ([1931] A.C. 457) considered, and *Surrey Revenue Officer v. Gridley, Miskin & Co., Ltd.* (1931) (14 R. & I.T. 157) criticised.

B Appeal allowed.

[As to rating relief for factories and workshops, see 27 HALSBURY'S LAWS (2nd Edn.) 439, para. 876; and for cases on the subject, see DIGEST SUPP.

For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176.]

C Cases referred to:

(1) *Turpin v. Middlesbrough Assessment Committee & Bailey*, [1931] A.C. 451; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(2) *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

D (3) *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; [1937] 2 K.B. 642; 106 L.J.K.B. 398; 157 L.T. 423; 101 J.P. 307; Digest Supp.

(4) *Kaye (Barnsley Revenue Officer) v. Eyre Bros., Ltd.*, [1931] A.C. 451; 100 L.J.K.B. 1; 145 L.T. 73; 95 J.P. 115; *reussg.* [1931] 1 K.B. 385; Digest Supp.

E (5) *Finn (Wimbledon Revenue Officer) v. Kerslake*, [1931] A.C. 457; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

(6) *Toogood & Sons, Ltd. v. Green*, [1932] A.C. 663; 101 L.J.K.B. 453; 147 L.T. 201; 96 J.P. 249; Digest Supp.

(7) *W. S. Shuttleworth (Slough), Ltd. v. Lane (V. O.)*, (1953), 46 R. & I.T. 103.

F (8) *Surrey Revenue Officer v. Gridley, Miskin & Co., Ltd.*, (1931), 14 R. & I.T. 157.

Case Stated.

This was a Case stated by the Lands Tribunal (ERSKINE SIMES, Esq., Q.C.), by which a limited company, Dolton Bournes & Dolton, Ltd., appealed from a decision of the tribunal made on Oct. 1, 1954, dismissing the appeal of the company from a decision of the local valuation court for East Kent and Canterbury, made on Nov. 26, 1953, directing that a hereditament described as saw-mills, office and premises situated at Roper Road, Canterbury, should be transferred from Part II to Part I of the valuation list for the county borough of Canterbury, and therein assessed at £436 gross value and £360 rateable value. The tribunal confirmed the direction of the local valuation court. If the decision had been that the hereditament was an industrial hereditament, the direction would have been that it should be inserted in Part II of the valuation list, and there assessed at net annual value £360, and rateable value £90.

Percy Lamb, Q.C., and *J. P. Widgery* for the company.

C. P. Harvey, Q.C., and *P. R. E. Browne* for the valuation officer.

I **SIR RAYMOND EVERSLED, M.R. :** The question raised in this appeal was formulated in the Special Case thus: "The question is whether the hereditament" (which I will more specifically define presently) "is within the meaning of 'premises of a similar character where retail trade or business . . . is carried on' in s. 3 (4) of the" Rating and Valuation (Apportionment) Act, 1928*. That question was answered by the Lands Tribunal, who heard the appeal to

* The relevant passage in s. 3 (4), which contains the definitions for the purpose of the Act, is in these terms: "'retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

them, affirmatively; and the Court of Appeal are now invited to say whether they rightly so answered it. A

At first sight it would indeed appear, applying ordinary standards of common sense and language, that the opposite answer should have been given; for we are here concerned with a hereditament (and there is no question of any division in any material respect between its component parts) which is "occupied" by the appellant company for their business of timber importers and merchants and sawmillers. The plan attached to the Case "A.1", shows a number of separate sections in the hereditament. The largest, apparently, numbered "5", is where the sawmilling operations take place. Other parts consist of the places where is stacked timber which has been received by the company; and from the photographs it appears that at any rate in some cases there is a roof over the timber. A small part of the hereditament, which is numbered "13" on the plan, consists of an office in which, again according to the photographs, the company's clerk sits to receive and deal with inquiries made by people who write or come there personally. That brief description will, I think, make clear what I have just said, viz., that at first sight, and as a matter of ordinary common sense and the common use of language, this considerable area, used as I have described it, would not appear naturally to fall within the description of a "retail shop", or even of "premises of a similar character" to a retail shop. But junior counsel for the valuation officer reminded us that it is a little unsafe in rating cases to assume that these matters are governed exclusively by the standards of common sense. In any case the phrase "retail shop" in the Act is expanded by the definition in s. 3 (4) of the Act of 1928 as including "any premises of a similar character where retail trade or business (including repair work) is carried on". Nevertheless, I have no less sanction for some regard to common sense than the speech of VISCOUNT DUNEDIN in *Turpin v. Middlesbrough Assessment Committee & Bailey* (1), one of the series of cases of which the first is *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.* (2). He said ([1931] A.C. at p. 473): B C D E

"... the matter seems to me simply a question of attributing an everyday meaning to the words used in the definition." F

Let me then state, by recital from the Case Stated, what are the facts of this case. In para. 8 it is said:

"At the hearing before me the following facts were proved or admitted:

- (a) The appellants are timber importers and merchants and sawmillers.
- (b) The hereditament is registered as a factory under the Factory and Workshop Acts.
- (c) Upon the hereditament the appellants employ a manager, a clerk, five sawmill operatives, eight general labourers, one of whom is employed in the sawmill, and one lorry driver.
- (d) The appellants import timber and on the hereditament cut and process about seventy-seven per cent. of it to meet the needs of the individual customers, the remainder being sold without processing.
- (e) The customers of the appellants are as to about ninety-two per cent. builders and as to about eight per cent. merchants or factories. The appellants occasionally sell small quantities of timber to members of the public and dispose of the sawdust to butchers. They neither seek nor welcome small customers and the sales to such customers, and of the sawdust, may be regarded [and, I interpolate, having regard to the figures just mentioned, must be regarded] as negligible.
- (f) Before incorporating the timber purchased from the appellants into a building, the builder has to do work on the timber to cut and fit it for its place in the building.
- (g) There is no window display or show of timber to attract prospective purchasers.
- (h) When in March, 1951, the appellants were first granted an import licence after the war they inserted an advertisement in each of two local papers. At the time at which these advertisements first appeared licences to purchase softwood, which represents over ninety-

A three per cent. of all timber sold by the appellants, could only be obtained by builders."

The advertisement states the name of the company, describes them as "Timber Importers and Saw Millers", gives the address, and states:

B "Large stocks of Swedish and Finnish redwood, imported direct from the Baltic to Ramsgate under private import licence. Inquiries and inspection invited."

The words "Inquiries and inspection invited" in the advertisement refer to the practice (which is stated also in the findings) for builders to inspect timber at the hereditament before giving an order, unless it is a case of a repeat order.

C I think I can omit a reading of the remainder of the findings, though they may be referred to, if necessary; but I should perhaps say that from sub-para. (l) and (m) of para. 8 of the Case Stated it appears that all correspondence and inquiries are dealt with by the clerk in the office that I have mentioned, and that there is in this office no counter but a sliding window which, when moved back, enables an inquirer to converse with the clerk inside.

D Having read those facts, I should have thought that, attributing every-day meanings to the words from the statute which I have already mentioned, it would be difficult sensibly to say that this hereditament was in the least like a "retail shop", even when regard is had to the expansion afforded by the definition. In a number of cases, however, consideration has been given to these words; and the tribunal from whom the appeal comes felt that the effect of those decisions was that, contrary to what at any rate to me would appear the prima facie conclusion proper to be drawn, the conditions of s. 3 (4) were satisfied: E in other words, that this hereditament was being used for the purposes of a retail shop—i.e., of premises of a similar character to a retail shop where retail trade or business was being carried on.

F I quite agree with junior counsel for the valuation officer that the words in s. 3 (1) are, after all, "used for . . . the purposes of a retail shop", which no doubt give a somewhat wider effect to the relevant words than if the language had more simply been to the effect that the premises were primarily a retail shop. But before I consider some of the cases and the inferences which ought properly to be drawn therefrom in the present case I cite and proceed to apply hereafter what fell from GREENE, L.J., in *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* (3) ([1937] 2 All E.R. at p. 376):

G "Under s. 3 of the Act read in conjunction with the definition section, a hereditament is not an industrial hereditament if it is: 'primarily occupied and used for . . . the purposes of a retail shop including premises of a similar character where retail trade or business (including repair work) is carried on'. Now, the premises must be 'of a similar character' to a retail shop, and this similarity must exist not only with regard to 'retail' character H (which is already provided for in the words 'retail trade or business'), but also with regard to 'shop' character. It is not sufficient that retail business is carried on upon the premises, if the premises are not a shop, or similar to a shop. Now, the essential element in a shop is that people can shop in it":

I and then the lord justice dealt with the kind of case in which the operations were not such as would have made it a shop. The learned lord justice was, after all, doing what LORD DUNEDIN had said should be done—attributing an every-day meaning to the words used. It is therefore necessary first of all to see whether, on the facts as here found, this hereditament is a "shop", or has a character "similar to" that of a shop; and I hope I shall not be thought to be speaking too much in the language of assertion, if I say again, that to my mind it seems quite plain that this hereditament is not, by any ordinary standard or use of language, and notwithstanding anything that has been said in the cases, either a "shop" or a hereditament having a "character similar to" that of a shop.

If the matter were *res integra* I should, I think, be disposed to leave the matter there. Most properly, however, counsel for the valuation officer have drawn our attention to other parts of the speech made by LORD DUNEDIN, and to the series of cases from one of which I have already taken one extract. It is said that according to the authority of those cases the word "shop" really means no more and no less than this: a place where in fact transactions of purchase and sale by retail are carried on; and that here such transactions are in truth carried on. The series of cases included two which were concerned with garages. In one, *Kaye (Barnsley Revenue Officer) v. Eyre Bros., Ltd.* (4), the premises were those of a garage of the character which must bring to the mind of everyone a fairly clear picture. There was an area or space on which repairs to motor cars were carried on; there were petrol pumps whereat motorists were invited to call and buy petrol; and there were also exhibited for sale and sold all kinds of small accessories; but, as was pointed out, the main activity at the premises then in question (on which the main part of the argument turned) was related to the repair work. I may properly say (though all summaries, no doubt, are dangerous without some qualification) that, since the effect of the definition was to include the doing of repairs as part of retail trading for the purposes of the section, therefore a repair shop was a "retail shop"; and this garage, being a repair shop, was held to be within the definition.

The case of the other garage, *Turpin v. Middlesbrough Assessment Committee & Bailey* (1), was stronger still, perhaps, because the activities conducted thereon were more confined still to those of repair, and the sales, whether of petrol or other accessories, were very much smaller. VISCOUNT DUNEDIN used this language ([1931] A.C. at p. 473):

"Nor do I agree with the view that has prevailed as to the effect of the words 'of a similar character'. For myself I am unable to state what are the physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion it is not possible to say that the words 'of a similar character', even if they include, are limited to, physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? My Lords, I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein. Moreover, once you include repair work in the words 'retail trade or business', it can be truthfully said that there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop."

Before I make any comment on that extract I will refer to one other passage, in a later case in the series, *Finn (Wimbledon Revenue Officer) v. Kerslake* (5), which related to a wholly different type of business, that of a bakery. The question mainly debated in that case was whether the fact that the greater part of the hereditament was occupied in making bread which was later sold in the smaller or (more strictly) "shop" part qualified the result that primarily the premises were being used for the purposes of a shop—the bakery being, so to speak, merely the supplying end of the shop premises. In the course of the case it was said by VISCOUNT DUNEDIN ([1931] A.C. at p. 487):

"In the present case, the hereditament is all occupied and used for the one trade or business—namely, a retail trade or business in bread and confectionery, for it cannot be doubted that the sale to hotels, clubs, restaurants, etc., is typical retail trade . . ."

- A That last phrase must be taken in conjunction with the facts as set out in the report of the case in the court below, from which it appears that about half the sales from this bakery were, in the words of the Case, "sold to hotels, clubs, etc., for re-sale". I know not, of course, what discussion on it took place, and I hope that I shall not be thought in any sense disrespectful of that very learned and noble Lord if I say that I should not have thought, for my part, that selling
- B bread to hotels for re-sale to hotel customers was "typical retail trade". However, LORD DUNEDIN so stated—in a speech with which all other members of the House concurred. It is, therefore, proper and necessary that faithful acceptance should be given to LORD DUNEDIN's opinion. But in this as in every other case the judgments of the judges are to be read in relation to the facts of the cases which they are deciding; and in saying so much in connection with
- C these very cases I am doing no more than LORD THANKERTON himself did in the House of Lords in 1932 in *Toogood & Sons, Ltd. v. Green* (6). In any event, we are fortunately not concerned here with the sale of articles of foodstuffs to hotels and restaurants. Naturally, however, junior counsel for the valuation officer relied on that case to show that the word "shop" must, in its context, not be given a restricted meaning, confined to the sort of premises commonly seen
- D in an ordinary shopping street.

- I think, if I may say so, that leading counsel for the valuation officer was well entitled to observe at the beginning of his speech that the court is, in this case and in other like cases, concerned to interpret the words of an Act of Parliament rather than to interpret the words of other judgments in other cases; and it is to be noted that Parliament has not thought fit to define what it meant by
- E "shop", or indeed what it meant by "retail trade or business". As regards "retail shop", therefore, I should assume that no very special or unusual significance was intended by Parliament in using an ordinary English word; and I revert again to what GREENE, L.J., said in *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* (3) ([1937] 2 All E.R. at p. 376), that, as a foundation for any application of the words to particular facts in particular cases, you may
- F safely start by bearing in mind that the essential characteristic of a shop is that people can shop in it; and no one, I think, would really feel very much difficulty in comprehending that phrase.

- Paying respect to the language that I have already read from LORD DUNEDIN's opinion in *Turpin v. Middlesbrough Assessment Committee & Bailey* (1) ([1931] A.C. at p. 473), it is clear that the matter is not to be determined by mere regard
- G to the physical characteristics or appearance of the premises, nor, of course, to their size. Perhaps the most significant pointer in most cases (and I will assume in this case) was that to which LORD DUNEDIN made express reference and which I can put in the form of a question: Is it a place where the public resort for the purpose of having their particular wants supplied? LORD DUNEDIN said
- H "can resort". It was pointed out (I refer again to *Toogood's* case (6)) that the vital thing is not, whether they do resort in fact, but whether they really are invited to come; and that inevitably involves some understanding of what you mean by the words "the public". It is at this stage that a link, but also (in my view) a distinction, is or may be observed between the first part of the requirement of the expanded definition, "Retail shop includes any premises of a similar character", and the second, "where retail trade or business . . . is
- I carried on"; for it has been the argument of the valuation officer here that these sales of timber to builders, which represent ninety-two per cent. of the whole, represent retail trade. As I earlier indicated, it was put very plainly that, according to the case for the valuation officer, where one finds retail trade or business being carried on there, *prima facie*, one has a shop. I am not prepared to accept that: to put it another way, I should regard such a proposition as an over-simplification. If Parliament had wished to say simply that premises ceased to be an industrial hereditament if they were primarily used and occupied

for the purposes of conducting retail trade or business, they would have said so. A double requirement is, however, postulated: there must be a "retail shop", or something like it, and "retail trade or business" must be "carried on" at the "retail shop". A

I will come back in a moment to deal (to the extent to which I feel it proper to do so) with the nature of these sales to builders; but to my mind the vital facts found in this case include (and I put it in the forefront among them) the statement which may be extracted from the facts which I have read, that to any appreciable extent members of the public (as ordinarily understood) are not invited, and encouraged, to come to these premises, and do not in fact resort to them, except to a negligible extent. I am not thereby saying that builders are not "members of the public"; no doubt they are: but when LORD DUNEDIN spoke, in *Turpin's* case (1) ([1931] A.C. at p. 473), of members of the public resorting or being invited to resort to a place, he meant to refer, I think, to what one might call the ordinary man in the street—that all and sundry were invited to come. And that, as it seems to me, is significantly not the fact in this case. To that most significant fact may, I think, be added also the other circumstances—the character of the premises; the absence of any sort of display or show of timber to attract prospective purchasers; the characteristics and numbers of the persons employed (a manager, a clerk, sawmill operatives, general labourers, and a lorry driver) and indeed the whole general lay-out and appearance of the place and the nature of the business done. It will be recalled that that business is conducted substantially at the suit of builders who come and make orders, after inspection, for the purposes of themselves incorporating what they buy in the houses which they are in turn building for others. Whether or not for any purpose these builders can be fairly said to be participating in retail sales, no one, I should have thought, could by any proper use of language say of them, when engaged in these activities, that they were shopping. In my judgment, therefore, I am in no way being disloyal to anything that fell from LORD DUNEDIN or departing from his opinion, if I say that in my judgment, on the facts which I have mentioned in this case, this hereditament is neither a "retail shop" nor is it a place having "a similar character" thereto. B C D E F

In opening the case for the valuation officer, counsel placed great emphasis on the distinction between ninety-two per cent. of sales to builders and the eight per cent. of sales to the merchants or factories; and he seemed to indicate a possible threat on behalf of the valuation officer, that if the court were to hold that the sales to the builders were not retail sales then they must be wholesale operations, and that the victory which the company might gain in this case would be of a somewhat Pyrrhic character, since the valuation officer would then seek to remove the company from the privileged list on the ground that they were using the hereditament primarily for the purposes of a distributive wholesale business. Again I venture to think, if I may say so, that counsel's argument involved an over-simplification, for it took broadly this form: there was, he said, a vital and essential distinction in the Act between manufacturing on the one hand and selling on the other and these two activities must be regarded as mutually exclusive; if a man was selling then he must be selling either wholesale or retail, and if it were shown that he was not selling retail, then he must be selling wholesale. I do not think that is a fair interpretation of the section, and if the matter had been regarded as susceptible of so simple and short an antithesis I should have supposed that the Act would have taken a very different form. In any case, as regards wholesale business I note that the words in para. (c) of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, are not merely "wholesale" but "distributive wholesale business". I do not and need not pause to say anything about what those words may mean. It may be that for some purposes selling timber to builders for the purposes of being used in building houses can be properly regarded as a retail sale; though I cannot myself regard G H I

A as other than fanciful in the extreme the analogy that counsel for the valuation officer sought to draw between a builder who requires timber of a certain length (so that a foot or two is cut off at the end) and a lady who goes into a draper's shop and orders a few yards of ribbon. Whether the sales to builders can be for any purposes regarded as "retail" sales or not (and on that I express no concluded view), and whether builders can be fairly regarded (as I assume for most purposes they can) as "members of the public", still, for the reasons which I have already tried to state, I do not think that here the nature of the operations carried out, and the invitation for business which the company extended, can fairly be said to involve a "resorting" to their premises by "the public", or an invitation to the public so to resort.

C The tribunal, in deciding the present case, followed, and, if I may say so, almost inevitably followed—and I say "almost" advisedly—the previous decision of *W. S. Shuttleworth (Slough), Ltd. v. Lane (V.O.)* (7). SIR WILLIAM FITZGERALD, President of the tribunal, there used this language in his judgment (46 R. & I.T. at p. 107):

D "Generally speaking I should say a wholesale business is a sale in bulk to a person who will sell the same commodity in retail to several other persons. A sale in retail is where the purchase is conditioned to the needs of the individual customers."

E I do not desire to add attempted definitions of my own to what may already be found in the books; but I am bound to say, with all respect, that I am not satisfied that either of those simple sentences, though they may be useful in particular contexts, should be regarded as exhaustively correct and generally applicable. The first sentence does not indeed seem entirely easy to reconcile with what LORD DUNEDIN said about the sale of bread and confectionery by the baker to the hotel buyers; but, in any case, I should have thought that to say that "a sale in retail is where the purchase is conditioned to the needs of the individual customers" might be an over-simplification of the matter. The President proceeded to hold in that case that the premises (which were also those of timber merchants) were a shop; but on that matter he relied on one feature in the case which is not to be found in the present case. Thus, it is stated in the headnote (ibid., 103):

G "There was no counter on the premises, but there was a raised platform where building material was displayed for prospective customers to examine";

and that point did undoubtedly influence the President in reaching his conclusion. He said (ibid., at p. 107):

H "Many cases emphasise the difficulty of stating with precision what physical factors constitute a retail shop. The fact that premises possess a counter does not necessarily constitute them a retail shop, nor would the absence of a counter debar them from being considered a retail shop . . . I consider the fact that the goods were displayed obviously to entice customers to come in and purchase them, enables me to answer this question [whether it is a shop] in the affirmative."

I As I have said, it is expressly found in the present case that there was no similar display to entice or attract prospective customers.

We were also invited to consider and to follow *Surrey Revenue Officer v. Gridley, Miskin & Co., Ltd.* (8). Again that was a case of timber merchants, and in I think all material respects it may be regarded as parallel, on its facts, with the present case. The Divisional Court, consisting of LORD HEWART, C.J., AVORY, J., and HUMPHREYS, J., decided (adversely to the company, Gridley, Miskin & Co., Ltd.) that the hereditament was not an industrial hereditament. It does not appear to me that they based their decision on the view that the hereditament there in question was a retail shop within s. 3 (1), proviso (b) of the

Rating and Valuation (Apportionment) Act, 1928, as expanded by the definition of "retail shop" in s. 3 (4) of that Act. The contentions for the revenue officer were more generally expressed, as I understand the report, in that it was said that these premises were being used within the terms of para. (f) of s. 3 (1) for "other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop". I think that view follows also from the way in which Mr. Pearson, for the revenue officer, put the argument. He said, at the conclusion of it (14 R. & I.T. at p. 158):

"So long as both the primary and the ancillary purposes can be found upon the hereditament in question, it is unnecessary to fall back upon tests such as area. This is a timber merchants' business, and incidentally minor adaptations are carried out for customers";

and response is found to that argument in this paragraph of the Lord Chief Justice's judgment (*ibid.*):

"I think, therefore, the true view is that this was a mercantile or commercial undertaking, as distinguished from an industrial undertaking, and that the sawing and planing which took place were processes ancillary to the primary business of timber merchants."

At any rate, if the decision of the Divisional Court in that case meant, and was intended to mean, that the hereditament there in question was a "retail shop" within the meaning of the section, I venture to think it was wrong.

We have been referred to other cases, but I have, I hope, sufficiently referred to such of them as I find it necessary to mention in giving the reasons for my conclusions. Without attempt at further elaboration, I think, for the reasons which I have tried to state, that here the hereditament is not being used for the purpose of a "retail shop" within the meaning of s. 3 (1); and since it seems, on the facts, quite clear that unless it is taken out by the proviso it is within s. 3 (1) as an "industrial hereditament", I think that this appeal should be allowed.

JENKINS, L.J. : I agree, and have very little to add. The question in the case is whether the company's hereditament in Roper Road, Canterbury, is, within the meaning of the proviso to s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, "primarily occupied and used for . . . (b) the purposes of a retail shop". In considering that question, regard must be had to the definition of "retail shop" in s. 3 (4), which gives to that expression a somewhat more extended meaning than it would otherwise bear. The definition is in these terms:

" 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

The question therefore is whether the hereditament is primarily used for the purposes of a retail shop or for the purposes of any premises of a similar character where retail trade or business is carried on. These words, relatively simple and ordinary words as they are, have been the subject of much judicial discussion, and various attempts have been made to arrive at definitions or expositions of their meaning; but I hope I will not be disrespectful to the learned authors of various observations on the meaning of this language if I say that to my mind the most helpful observation, in all the wealth of authority to which our attention has been directed, appears in the speech of LORD DUNEDIN in *Turpin's* case (1), in the passage to which my Lord has already referred, where he said ([1931] A.C. at p. 473):

"My Lords, the matter seems to me simply a question of attributing an every-day meaning to the words used in the definition."

One must therefore consider the facts and apply an every-day meaning to the words used in the definition, and see whether that every-day meaning, applied to

A those facts, results in the conclusion that the hereditament is being "primarily occupied and used for the purposes of a retail shop", including in that expression what is included by the definition clause.

My Lord has already described the hereditament, and I will not take up time by repeating at length what he has said; but it is to be observed that it is an area of substantial extent: so far as I can judge by the scale supplied its frontage B on Roper Road is something over two hundred feet, and its depth is also something over two hundred feet. It has on it a large number of structures of considerable dimensions, including a number of barns or shelters under which timber is housed, and also a sawmill and planing shop and various other ancillary buildings. It includes, near the frontage to Roper Road, a small office in which, during usual business hours, a clerk is in attendance who will deal with the C requirements of customers visiting the hereditament. It is said, as I understand it, that the presence of this small office produces the surprising result that this hereditament is being primarily used for the purposes of premises of a character similar to a retail shop where retail trade is carried on; and the question is whether that, in all the circumstances of the case, is right.

It is not in dispute, and the Lands Tribunal found, that the case did not come D within the unexpanded language of s. 3 (1) (b). Thus the premises are not being used for the purposes of a retail shop. But it is said that the purposes for which they are used have a sufficient affinity with those of a retail shop to bring the case within the proviso to s. 3 (1) as extended by the definition clause. Now the primary object of the company's use and occupation of this timberyard is to sell timber. That this is their primary object admits, I apprehend, of no doubt. E The use to which they put the hereditament seems to be the storage of stocks of timber, its treatment to suit the needs of customers, and its sale and delivery or despatch to customers. That last operation is "carried on" on the premises in the sense that customers call at the office, state their demands, if so minded inspect the timber available, and place their orders. That, I gather, is the way in which some of the business is done. Alternatively, business may be done F over the telephone and confirmed in writing. Timber that has been sold is delivered or despatched to purchasers, sometimes in their own lorries, but more frequently in those of the company. So far one reaches the position that sales are effected on these premises and that customers come to these premises to give orders and to inspect the stocks available. But it does not necessarily follow from that that a "retail trade" is being here carried on; and in order to form a G view on that question it is necessary to bear in mind these findings of fact in para. 8 of the Case:

"(d) The appellants import timber and on the hereditament cut and process about seventy-seven per cent. of it to meet the needs of the individual customer, the remainder being sold without processing. (e) The customers H of the appellants are as to about ninety-two per cent. builders and as to about eight per cent. merchants or factories. The appellants occasionally sell small quantities of timber to members of the public and dispose of the sawdust to butchers. They neither seek nor welcome small customers and the sales to such customers, and of the sawdust, may be regarded as negligible. (f) Before incorporating the timber purchased from the appellants into a building, the builder has to do work on the timber to cut and fit it for its I place in the building. (g) There is no window display or show of timber to attract prospective purchasers."

As my Lord has already pointed out, LORD DUNEDIN, in *Turpin's* case (1), came to the conclusion that the distinctive characteristic of a "retail shop" was that it should be a building to which the public can resort for the purpose of having particular wants supplied and services rendered therein, and attached little importance to the absence of physical features commonly found in a typical retail shop. I have already said that the company's customers do resort to the

hereditament in this case, and I think the question really resolves itself into this: A
 Are the customers so resorting members of the general public who choose to
 come in and who are invited to come in or welcomed if they come by the company
 for the purpose of making purchases of such quantities of timber, great or small,
 as they may think fit? If the timber were in the position of the stock-in-trade
 of a retail shop, that is what would happen. The general public, including
 casual passers-by, would come in and be welcomed and make purchases, great or B
 small, according to their needs; but, as will have been seen from the extracts I
 have read from the facts found, the customers are not members of the general
 public in this case: they are a limited class, and, with exceptions so small as to
 be negligible, they consist entirely of trade customers, i.e., builders and merchants
 and factories, who purchase timber in substantial quantities for the purposes C
 of their respective trades or businesses. So far from inviting, the company are
 averse to small orders such as have to be met in the ordinary course of retail
 trade.

Accordingly, giving the words "retail shop" and "retail trade" what I
 understand to be their ordinary significance as ordinary words, I come to the
 conclusion that, while it is clear that timber is sold by the company on these
 premises, they are not of such a character, and the company are not carrying out D
 their sales of timber in such way or to such customers, as to make it possible to
 hold that they are using the hereditament "for the purposes of a retail shop or
 premises of a similar character where retail trade or business is carried on";
 and accordingly, I agree with my Lord that this appeal should be allowed.

ROMER, L.J. : I also agree, and I would only say that it appears to me E
 that the most cogent element which makes it impossible to regard these premises
 as being "of a similar character to a retail shop" is that the company do not
 deal, and do not want to deal, with the public as a whole, but substantially
 confine their invitations to resort to their premises for commercial purposes to a
 small section of the public, viz., builders. Their potential customers do not, in
 those circumstances, constitute the "people" to whom GREENE, L.J., referred F
 in *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* (3) ([1937] 2
 All E.R. at p. 376), or "the public" to whom LORD DUNEDIN referred in the
Turpin case (1) ([1931] A.C. at p. 473), but constitute merely a small section,
 and a specialised section, of the public as a whole. I think that that is the most
 important reason. There are other reasons as well, to which my brethren have
 referred.

I agree that the appeal should be allowed. G

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *William A. Crump & Son* (for the company); *Solicitor of Inland Revenue.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A **PARK ESTATE (BRIDLINGTON), LTD. v. EAST RIDING COUNTY COUNCIL.**

[COURT OF APPEAL (Denning and Parker, L.J.J., and Roxburgh, J.), March 31, 1955.]

B *Town and Country Planning—Enforcement notice—Development prior to July 1, 1948—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (1), (4), s. 75 (1).*

The owners of land on which a holiday camp had been carried on since 1934 received an enforcement notice from the local planning authority referring to the Town and Country Planning Act, 1947, stating that the development of the land appeared “to be in contravention of planning control”, and requiring the owners to discontinue the use of the land as a holiday camp and every use other than that for the purposes of agricultural land. Notes on the back of the notice drew attention to s. 23 of the Act, relating to development after July 1, 1948, when the Act came into operation, but not to s. 75, relating to development before that date. The owners applied to quash the enforcement notice under s. 23 (4) of the Act.

C **Held:** the enforcement notice was invalid because on its true construction it alleged only contraventions of existing planning control (i.e., control in force since July 1, 1948) and thus failed to specify clearly the contravention on which the local planning authority in fact relied, which was based on development before July, 1948.

E *Lincoln County Council (Parts of Lindsey) v. Henshall* ([1953] 1 All E.R. 1143) approved and applied.
Appeal dismissed.

[**Editorial Note.** On any question of what constitutes a sufficient description of development which is alleged in an enforcement notice to contravene planning control this decision may be compared with that in *Keats v. London County Council* ([1954] 3 All E.R. 303). References will be found in the note to that case to the decisions on the distinction between grounds available in proceedings to quash an enforcement notice and grounds available in defence of proceedings for disregarding an enforcement notice. The proceedings in the present case were proceedings to quash the notice under s. 23 (4) of the Town and Country Planning Act, 1947.

G For the Town and Country Planning Act, 1947, s. 23 and s. 75, see 25 HALSBURY'S STATUTES (2nd Edn.) 524, 583.]

Case referred to:

(1) *Lincoln County Council (Parts of Lindsey) v. Henshall*, [1953] 1 All E.R. 1143; [1953] 2 Q.B. 178; 117 J.P. 321; 3rd Digest Supp.

H **Appeal.**

I The appellants, the East Riding County Council, as the local planning authority, appealed against an order of the Queen's Bench Division dated Jan. 14, 1955, allowing an appeal by way of Case Stated against an adjudication of the East Riding of Yorkshire justices sitting at Bridlington, dated May 24, 1954. The respondents were the owners of land which had been used as a site for temporary dwellings, or a holiday camp, begun in 1934, all the material development of which had been carried out before July 1, 1948, the appointed day under the Town and Country Planning Act, 1947, when its relevant provisions came into operation. On Apr. 27, 1951, they received an enforcement notice under s. 23 (1) (2) of the Act from the appellants, requiring them to discontinue the use of the land for residential purposes and every other use except that for the purposes of agriculture. They appealed to the justices under s. 23 (4) of the Act on the ground that the enforcement notice was a nullity, but their appeal was dismissed (May 24, 1954). Their appeal against

that decision was allowed by the Queen's Bench Divisional Court (Jan. 14, 1955), who held that the enforcement notice was bad and must be quashed because it related to development after the date on which the Act came into operation, whereas the development complained of took place before that date. The appellants appealed to the Court of Appeal.

B. J. M. MacKenna, Q.C., and *W. L. Roots* for the appellants.

G. R. Hinchcliffe, Q.C., and *A. S. Orr* for the respondents.

DENNING, L.J.: A holiday camp at Bridlington has been there since 1934. On July 1, 1948, the Town and Country Planning Act, 1947, came into operation. Nearly three years later, on Apr. 26, 1951, the appellants, the East Riding County Council, who are the planning authority for the area, served an enforcement notice on the respondents, who run this holiday camp. By this notice the appellants required the respondents to discontinue the use of the land as a holiday camp and every use other than that for the purposes of agricultural land. The question for our consideration is whether the enforcement notice was valid. This depends on the true construction of the Act of 1947, and in particular of s. 23 and s. 75. Section 23 deals with post-Act development and s. 75 with pre-Act development. Section 23 (1) says that, if any improvement is carried out after July 1, 1948, without the grant of permission, or in breach of conditions, then within four years the local planning authority can serve an enforcement notice on the owner; and sub-s. (2) provides:

"Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with . . ."

That section deals only with development after July 1, 1948.

Before July 1, 1948, the development of land was subject to the previous planning control under the Town and Country Planning Act, 1932, as modified and amended by the Town and Country Planning (Interim Development) Act, 1943. The Act of 1947 contained provisions for dealing with breaches of this previous planning control. It enabled enforcement notices to be served in those cases also. Section 75 (1) provided that, where works existing on July 1, 1948, were carried out, or any use to which land was put on that date was begun, in contravention of previous planning control, then the provisions of the Act with respect to enforcement notices were to apply in relation thereto as they applied in relation to development carried out after the appointed day: but an enforcement notice was not to be served after three years from July 1, 1948. The latest date, therefore, for taking proceedings for previous contraventions was July 1, 1951. The development of this holiday camp was long before July 1, 1948. The appellants had therefore to serve an enforcement notice before July 1, 1951, and they did so on Apr. 26, 1951.

In my judgment an enforcement notice, in order to be valid, ought to specify the particular development which is complained of. It could be one of three things: first, development carried out after July 1, 1948, without permission; secondly, breach of conditions after July 1, 1948; thirdly, development before July 1, 1948, in contravention of previous planning control. Those three complaints raise such different considerations that it seems to me to be necessary to the validity of the notice that it should specify clearly and distinctly which of them is charged against the owner in question. Counsel for the appellants said that a breach of planning control was not a criminal offence. But it may have the most serious consequences for an owner, and in my opinion it is only right and proper that an enforcement notice should specify clearly and distinctly the particular contravention which is alleged.

A Turning to this notice, I ask myself whether it does specify clearly and distinctly the complaint against the respondents. It is headed:

“East Riding County Council. Town and Country Planning Act, 1947. Enforcement Notice”.

and it is addressed :

B “To The Secretary, The Park Estate (Bridlington), Ltd., 70, High Street, Bridlington, and to whom it may concern.”

Then it says:

C “The county council of the administrative county of York, East Riding, hereby give notice that the development or other matter hereunder specified appears to them to be in contravention of planning control, namely: the erection or placing and the use for residential and ancillary purposes of temporary dwellings and other erections on land known as Limekiln Lane Camp”

—and it gives particulars of the dwellings and other erections concerned. Then it goes on:

D “And they hereby require that the following steps shall be taken within two years from the date on which this notice takes effect: (1) The use of the said land for residential purposes shall be discontinued. (2) The said temporary dwellings and other erections shall be removed or demolished and the materials thereof removed from the said land. (3) Any materials, sheds, huts or fences brought on to or erected on the said land in connection with the construction, use or demolition of the said temporary dwellings and other erections shall be removed. (4) Every use of the said land except the use thereof for the purposes of agriculture shall be discontinued. Subject to the provisions of the above-mentioned Act, this notice will take effect at the expiration of twenty-eight days after service hereof. Expressions used in this notice have the meanings assigned to them by the above-mentioned

E

F Act, except where the context otherwise requires. Dated Apr. 26, 1951.”

Then there is this rather significant note:

“Your attention is drawn to the notes set out on the back of this notice;” and then on the back, under the heading “Notes”, it says:

G “Section 23 of the Act provides that at any time before this notice takes effect”

—and then there is summarised the effect of s. 23 and s. 24 of the Act. There is no mention whatever of s. 75.

H It seems to me that, on a fair reading of that enforcement notice, it complains only of breaches of the existing planning control since July 1, 1948, and not at all of breaches of previous planning control. The notice starts off with a direct reference to the Act of 1947 and no earlier Act. It refers to “development”, which is a term particularly defined by the Act of 1947 and has a much wider meaning in that Act than in other Acts; it refers simply to “planning control” and not to “previous planning control”; and, finally, it refers on the back to s. 23 without a single reference to s. 75. These considerations lead me to the

I conclusion that this notice complains only of contraventions after July 1, 1948.

What then is the position? The owner of the land, faced with such a notice, can properly say that he was not guilty of the contravention alleged against him. No permission was required under the Act of 1947 in respect of his development, because it was a development which had taken place before July 1, 1948. It is a case, therefore, where he can come to the court under s. 23 (4) of the Act of 1947 and ask for the notice to be quashed.

I find myself in agreement with the decision of the Divisional Court in *Lincoln County Council (Parts of Lindsey) v. Henshall* (1) and indeed with all that

LORD GODDARD, C.J., said there, and further, with the judgment in the case under appeal. I would dismiss this appeal. A

PARKER, L.J.: I agree. The Town and Country Planning Act, 1947, set up a new scheme of planning control to operate as from the appointed day, July 1, 1948. There were new local planning authorities, a new definition of "development", and a new scheme; but as part of that Act, a part entitled "Part 8. Application to Special Cases", a provision was made whereby the new local planning authorities could take up and deal with cases where there had been breaches of previous planning control, i.e., the scheme of control which operated up to July 1, 1948. In these circumstances, when by s. 23 (2) it is provided that an enforcement notice shall specify the development which is alleged to have been carried out, it seems to me to be essential—and I agree with all that my Lord has said—that the notice should specify which breach of control is complained of, whether a breach of the control existing up to the appointed day or after the appointed day. I do not desire, however, to elaborate that, because it seems to me that the point now must be largely academic, since three years have now elapsed since the appointed day, and it is too late, therefore, for any enforcement notice to be served in respect of breaches of previous planning control. B C D

Further, it seems to me that any views on what should be specified in the enforcement notice must be obiter in this case, because it depends on the power of magistrates to quash the notice, and those powers are strictly limited by s. 23 (4) of the Act. They cannot quash in every case when a notice is invalid merely because it is defective; they can only quash on certain limited grounds, and the only ground on which they could quash in this case is if the notice was a notice dealing with the breach of what I may call current planning control, and it was shown that, because the development took place before the appointed day, no permission under the Act of 1947 was required. E

Accordingly, the only point in this case is whether, on its true construction, on a fair reading of it, the enforcement notice deals with a breach of previous planning control or of current planning control. As regards that, I find this case indistinguishable from the *Lincoln* case (1), to which my Lord has referred. In that case the enforcement notice itself purported to be served pursuant to s. 23 (1), whereas in regard to a breach of previous planning control it would have to be served by virtue of s. 75 (1). Further, in the *Lincoln* case (1), the notice refers to "development which has been carried out within the meaning of the Act [of 1947]", and speaks of no permission having been granted. The court decided that, on a fair reading, that notice must be taken to be a notice of a breach of planning control. F G

Now, despite the difference in the wording in this case, I can find no real difference. The development complained of here, as stated in the notice, is a contravention of planning control, and I should have thought that "planning control" in connection with the Act of 1947 must be read as, and not be read otherwise than as, referring to current planning control, the new scheme of control set up under the Act of 1947. The position would have been entirely different if the words of s. 75 (1) had been used, namely, "previous planning control"; and, if the matter is in any doubt, it seems to me to be cleared up by the fact that the person on whom the notice was served is asked to read the notes on the back, which are notes dealing with the effect of s. 23 only. H I

Accordingly, I cannot distinguish this case from the *Lincoln* case (1). That case related to a notice under s. 23 (1) alone, as this case does, and, as LORD GODDARD, C.J., pointed out, once it appeared before the magistrates that what was really complained of was a development before the appointed day, it was open to them to hold, as they did, that no permission under the Act of 1947 was required, and accordingly the case came within the wording of s. 23 (4), which entitled them to quash the notice. I would dismiss this appeal.

A ROXBURGH, J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. A. Whitley*, County Hall, Beverley (for the appellants); *Corbin, Greener & Cook*, agents for *Lambert & Parkinson*, Bridlington (for the respondents).

B [Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NOTE.

C AUDLEY LAND CO., LTD. v. KENDALL.

[QUEEN'S BENCH DIVISION (His Honour W. K. Carter, Q.C. (Official Referee)), April 4, 1955.]

Practice—Reference to referee—Inherent jurisdiction—Court expert's report—Irrelevant matter expunged—R.S.C., Ord. 37A.

D Summons.

The plaintiffs sued the defendant for money owing under a contract whereby the plaintiffs had agreed to build a house for the defendant. By his defence the defendant pleaded, among other things, that the house built by the plaintiffs was defective in some twenty-seven particulars. The action was referred to an official referee, and on Oct. 8, 1954, pursuant to R.S.C., Ord. 37A, and with the consent of the parties, the official referee (His Honour W. K. CARTER, Q.C.) made an order appointing a court expert* in the cause,

"to inquire and report upon the questions set out in the schedule hereto . . . and to report to the court by marking upon the schedule his answers to the questions set out in columns 8, 9, and 10 of the schedule."

F The schedule was a "Scott" schedule. It contained the twenty-seven items referred to in the defence and the defendant's comments thereon, and columns 8, 9 and 10 were headed respectively, "Defects in the work", "Cost of remedying defects", and "Observations". The court expert visited the house and wrote remarks in columns 8, 9 and 10 of the schedule. The court expert also appended to the end of the schedule two paragraphs, beginning:

G "I am of opinion that defendant has generally been given a very inferior job, and that the mental anxiety and perturbation consequent thereon are not of his own making."

The paragraphs also contained a reference to a letter written by the court expert to the clerk to the official referee. In that letter the court expert repeated that the defendant had been given poor work generally and, further, made certain criticisms concerning the architectural services which the defendant had received under the contract. The completed schedule and the letter were received by the clerk to the official referee on Jan. 6, 1955. The plaintiffs applied for an order that the two additional paragraphs and the letter be struck out.

I * Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 90 (1), and the Rules of the Supreme Court (R.S.C., Ord. 36, rr. 48-51, and Ord. 40, r. 2), the official referees have, in the cases referred to them, the full powers of a judge of the High Court, except as to attachment and committal.

The present case may be compared with *In the Estate of Wipperman, Wissler v. Wipperman* ([1953] 1 All E.R. 764), where an examiner who had been appointed to make a special report under R.S.C., Ord. 37, r. 17, gave his opinion of a witness in the report, and the court held that the report must be disregarded, as the examiner was required only to record facts and it was not proper for him to give his opinion on the credibility of the witness. As to expunging scandalous matter, see *Erskine v. Gartshore* (1811) (18 Ves. 114) and *Re Miller, Re French, Love v. Hills* (1884) (54 L.J.Ch. 205; 51 L.T. 853; 42 Digest 159, 1595).

L. H. Collins for the plaintiffs: The court expert has gone outside the terms of his appointment. The additional matter is prejudicial to the plaintiff. A

HIS HONOUR W. K. CARTER, Q.C. (THE OFFICIAL REFEREE): I sent the letter back to the expert as soon as I saw what it contained.

L. H. Collins: The court should act in its inherent jurisdiction and strike out the additional paragraphs. B

J. G. K. Sheldon for the defendant.

HIS HONOUR W. K. CARTER, Q.C.: I will act under my inherent jurisdiction and order that the two additional paragraphs be expunged from the schedule.

Order accordingly.

Solicitors: *Henry B. Sissmore & Co.* (for the plaintiffs); *Bower, Cotton & Bower*, agents for *William J. Wade*, Slough (for the defendant). C

[Reported by CHRISTOPHER MCOSTRA, Esq., Barrister-at-Law.]

CLAYTON (VALUATION OFFICER) v. BRITISH TRANSPORT COMMISSION. D

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Romer, L.JJ.), March 31, April 1, 4, 1955.]

Rates—Assessment—Basis—Dock undertaking—Offices—Profits basis—Whether valuation as part of undertaking or at full commercial value—Rating and Valuation Act, 1925 (15 & 16 Geo. 5 c. 90), s. 22 (1)—Local Government Act, 1948 (11 & 12 Geo. 6 c. 26), s. 89 (6). E

Premises owned by the British Transport Commission comprised offices which were formerly railway hereditaments within the Railway (Valuation for Rating) Act, 1930, s. 1. Under the Local Government Act, 1948, s. 85 (1), they were exempted from liability to rates and were removed from the valuation list. In 1952 the offices ceased to be used for railway purposes and began to be used in connection with docks by the Docks and Inland Waterways Executive, and, therefore, they ceased to qualify for exemption from rates and became liable to be restored to the valuation list. The valuation officer contended that the offices should be restored to the valuation list at a value ascertained by reference to the rent which the offices would command as offices. It was agreed that if the valuation officer was entitled to make an independent valuation of the offices (i.e., apart from the rest of the dock undertaking) on this basis, the figures which he proposed would not be excessive.

Held: the profits basis of valuation was applicable in the absence of special circumstances sufficient to displace it and no such special circumstances existed in the present case; the profits basis involved the conception of a fair apportionment of cumulo value among indirectly productive hereditaments such as these offices, and that conception negated any distinction being made in treatment between individual hereditaments of the undertaking; and accordingly when the offices were restored to the valuation list, they should not be restored to the valuation list at a value ascertained by reference to the rent which they could command as offices. H I

Dicta of JENKINS, L.J., in *Metropolitan Water Board v. Hertford Corpn.* ([1953] 1 All E.R. at pp. 1055, 1056) applied. *Mersey Docks & Harbour Board v. Birkenhead Overseers* (1873) (L.R. 8 Q.B. 445) explained. *Metropolitan Water Board v. Chertsey Assessment Committee* ([1916] 1 A.C. 337) and *Kingston Union v. Metropolitan Water Board* ([1926] A.C. 331) considered.

A Per SIR RAYMOND EVERSHERD, M.R.: I am not disposed to accept the view that the implicit effect of the Local Government Act, 1948, s. 89 (6), is that the offices, which had been on the railway list before the Act of 1948, can only be restored to the valuation list with the same valuation for rating as they had borne prior to the exempting Act. of 1948 (see p. 282, letter E, post).

B Appeal dismissed.

[As to valuation of docks for rating, see 27 HALSBURY'S LAWS (2nd Edn.) 424, 425, paras. 858-861; and for cases on the subject, see 38 DIGEST 560-562, 986-1004.]

*Cases referred to:

C (1) *Metropolitan Water Board v. Hertford Corpn.*, [1953] 1 All E.R. 1047; 117 J.P. 265; 3rd Digest Supp.

(2) *R. v. Mile End Old Town (Churchwardens & Overseers)*, (1847), 10 Q.B. 208; 16 L.J.M.C. 184; 9 L.T.O.S. 312; 11 J.P. 505; 116 E.R. 80; 38 Digest 552, 925.

(3) *R. v. West Middlesex Waterworks*, (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; 38 Digest 548, 908.

D (4) *Metropolitan Water Board v. Chertsey Assessment Committee*, [1916] 1 A.C. 337; 85 L.J.K.B. 296; 114 L.T. 380; 80 J.P. 137; 38 Digest 551, 919.

(5) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest 547, 901.

E (6) *Mersey Docks & Harbour Board v. Birkenhead Overseers*, (1873), L.R. 8 Q.B. 445; 42 L.J.M.C. 141; 29 L.T. 27; 38 J.P. 5; 38 Digest 432, 62.

Case Stated.

This was a Case Stated by the Lands Tribunal (ERSKINE SIMES, Esq., Q.C., and J. P. C. DONE, Esq.), by which the valuation officer appealed from the decision of the tribunal made on Oct. 1, 1954, dismissing the appeal of the valuation officer from the determination of a local valuation court for the Kingston-upon-Hull and East Riding (South) area, made on July 2, 1953, that the hereditament described as dock offices, Queen Victoria Square, Hull, and offices (first floor) and offices (second floor), Monument Buildings, owned and occupied by the British Transport Commission should be added to Part 1 of the valuation list for the rating area of the Kingston-upon-Hull county borough with rateable values of £208, £20 and £13 respectively.

G The following statement of facts and contentions of the parties is taken from the Case.

At the hearing before the tribunal the following facts were proved or admitted: (i) Until the passing of the Local Government Act, 1948, the hereditaments, being railway hereditaments, within the definition of s. 1 of the Railway (Valuation for Rating) Act, 1930, were assessed by means of the procedure prescribed by that Act. (ii) The rateable values at which they stood in the valuation list in 1948 were respectively £208, £20 and £13. (iii) After the passing of the Local Government Act, 1948, the said hereditaments, being railway or canal hereditaments within the definition in s. 86 thereof and deemed to be so by s. 89 (3) thereof were omitted from the valuation list in virtue of s. 89 (4) thereof. (iv) By January, 1952, the hereditaments ceased to satisfy the definition of railway or canal hereditaments. (v) The hereditaments have subsequently been occupied and used and are now occupied and used solely in connection with Hull docks. (vi) The hereditaments, if vacant and to let, would be readily let as commercial offices. It was agreed between the parties for the purposes of this appeal, that, if the valuation officer was entitled to make an independent valuation of the hereditaments in terms of s. 68 of the Rating and Valuation Act, 1925, and by reference to the rent which they would command as commercial offices, the gross and rateable values proposed by him would not be excessive, and that, if the

hereditaments ought to be valued as part of the dock undertaking, the values should be those determined by the local valuation court. It was contended on behalf of the valuation officer: (i) That the hereditament ought to be valued as houses or buildings without land under s. 22 (1) (a) of the Rating and Valuation Act, 1925, and by reference to the rent which they would command as commercial offices. (ii) That the hereditaments should not be valued as part of the dock undertaking. (iii) That in the alternative, even if they formed part of the dock undertaking, they should be assessed at their full commercial value. (iv) That as s. 89 of the Local Government Act, 1948, prohibited a revaluation of the whole undertaking, it was impossible to arrive at a new valuation of a part by reference to the "profits basis". (v) That there was nothing in s. 89 of the Act of 1948 to limit the value to be inserted in the valuation list of any hereditament in respect of which a proposal was made under that section. It was contended on behalf of the British Transport Commission: (i) That the provisions of s. 89 of the Local Government Act, 1948, prohibit the insertion in the valuation list of any values in respect of the hereditaments other than the values at which they respectively stood before the hereditaments were omitted from the list in pursuance of that section. (ii) That in the alternative the Hull Docks were or formed part of a dock undertaking in their occupation which should, when valued, be valued on the profits earning basis and the hereditaments, if they might validly be revalued, in consequence of the appellant's proposal, should be valued as part of such undertaking and not otherwise. (iii) That if the hereditaments were valued as part of the dock undertaking, it was not open to the valuation officer to contend for any figure other than that agreed. (iv) That to apply full commercial value to some parts of an undertaking valued on the profits basis would conflict with the object for which the profits basis was designed, i.e., to ensure that the sum of the parts did not exceed the total cumulo value of the undertaking.

The tribunal was satisfied that in view of the fact that the hereditaments were occupied and used solely in connection with the docks, they were hereditaments which fell to be valued as part of a dock undertaking and did not, therefore, by reason of the note to Part 1 of Sch. 2 to the Rating and Valuation Act, 1925, fall to be valued under s. 22 (1) (a) of that Act. Since in the tribunal's view they should be valued as part of a dock undertaking, and should, therefore, be valued on the profits basis, the tribunal was of opinion that it followed from the agreement referred to above that the values determined by the local valuation court were correct. Had the tribunal decided that s. 89 of the Local Government Act, 1948, limited the values which might be inserted in the list, the tribunal would have arrived at the same conclusion, but if they had decided that the hereditaments should be valued at their full commercial value, they would have determined that the gross values to be attributed to the hereditaments would have been £2,750, £350 and £285 respectively, and the rateable values £2,288, £288 and £234 respectively. The tribunal, therefore, dismissed the appeal and confirmed the determination of the local valuation court.

Maurice Lyell, Q.C., and P. R. E. Browne for the valuation officer.

Michael Rowe, Q.C., and K. D. Potter for the British Transport Commission.

SIR RAYMOND EVERSLED, M.R. : This is an appeal by the valuation officer for the Kingston-upon-Hull rating area, and relates to certain premises owned and occupied by the British Transport Commission through the Docks and Inland Waterways Executive* as part of the docks undertaking of that executive. I need not take time by any detailed reference to the premises. They consist of offices which were formerly railway hereditaments within the meaning of the Railway (Valuation for Rating) Act, 1930, s. 1, and were rated

* The Docks and Inland Waterways Executive was abolished on Oct. 1, 1953, and its powers and liabilities were transferred to the British Transport Commission by the British Transport Commission (Executives) Order, 1953 (S.I. 1953 No. 1291).

- A accordingly down to the commencement of the Local Government Act, 1948. By s. 85 (1) of that Act railway or canal hereditaments were exempted from rates, and, because the premises then answered that description, they were therefore removed from the valuation list. In January, 1952, however, the use of the premises was changed from railway purposes to dock purposes; and as the definition of railway and canal hereditaments in s. 86 of the Act of 1948 does not
- B include hereditaments used for dock purposes they ceased to qualify for the exemption and became liable to be restored to the valuation list. The question in the case is: at what values should they be restored ?

- In para. 8 of the Case Stated it is said that it was agreed between the parties for the purposes of the appeal before the Lands Tribunal, that, if the valuation officer was entitled to make an independent valuation of these hereditaments
- C by reference to the rent which they would command as commercial offices, then the figures which he had proposed would not be excessive, and also that "if the hereditaments ought to be valued as part of the dock undertaking" the values should be those determined by the local valuation court. That agreement is in fact recorded in certain correspondence annexed to the Case. It was contended as a preliminary point both below and in this court by counsel for the British
- D Transport Commission that by that agreement the appellant, who was the valuation officer, had in effect conceded himself out of the arena; for it is quite apparent from the way in which it is stated and from the contentions recited in the Case that these hereditaments were and are in fact owned and occupied as part of the dock undertaking. Although, however, that matter of fact is not without its significance, yet it would not be right to suppose that the parties
- E had deliberately entered into such an agreement as made the argument in this court really impossible: in other words, I think it was the intention of both parties that the question put forward on behalf of the valuation officer, which is a question of some significance and some novelty, should be adjudicated on in this court.

- The question may, I think, be put quite briefly somewhat in the manner that
- F junior counsel for the valuation officer formulated it in the course of his reply. He said that it is fundamental to all rating law that what has to be done is to take any individual hereditament and value it on the footing of what it would command to prospective tenants in the market. He said that, in this case, there was no doubt that the offices in question were offices which would command, in a competitive commercial market, a rent easily capable of ascertainment: in
- G other words, as offices they could not be said to be only of value to a dock undertaking occupying them as part of such an undertaking. "Therefore", said the valuation officer here, "you should adopt what the statute says is the basis on which you should rate". Speaking for myself, I see the force of that contention, and, if this matter had come before the court half a century ago, it may well be that it would be a contention to which we should, or could, have acceded. But,
- H in my judgment, during the course of the last half century at any rate, there has grown up a method of proceeding in regard to public utility undertakings which is sometimes referred to as the profits basis of valuation, which I think makes it impossible for this court to accept the contention put forward by the valuation officer, and impossible for us to say that one can segregate these offices, rate them by application of the ordinary principles of s. 22 of the Act of 1925, and at the
- I same time quoad the rest of the undertaking, or indeed quoad the undertaking as a whole, concede the propriety of the profits basis of valuation.

A number of cases has been referred to in the course of the argument, but I should like to adopt and make the premise of my judgment what was stated by JENKINS, L.J., in the last of the cases which came before this court, namely, *Metropolitan Water Board v. Hertford Corpn.* (1). JENKINS, L.J. said ([1953] 1 All E.R. at p. 1056):

"But if the 'profits basis' is to be applied it follows that the net annual

values attributed to all the hereditaments (directly or indirectly productive) must not exceed the cumulo value, and it follows, further, that, in order to achieve this end consistently with a fair apportionment of the cumulo value amongst the hereditaments in the several rating areas, and, in particular, with the attribution of a fair proportion of it to the indirectly productive hereditament here in question, an aggregate net annual value must be placed on all the indirectly productive hereditaments in the undertaking, and a fair proportion of that net annual value must be attributed to this hereditament."

It is fundamental to that proposition that you take the indirectly productive hereditaments together, arrive at a net annual value for them as a totality, and then proceed to apportion that total valuation among the individual units: in other words, if that proposition is sound, as I think myself on the authorities as I understand them it is, then it is a negation of the proposition that you can, while applying the cumulo principle, the profits basis principle, to the undertaking as a whole, segregate individual items of assets (whether they are productive or unproductive hereditaments) and proceed to value those items distinctly and without any apportionment to them of the total profits basis valuation. It need hardly be said that, if such picking out, such selective segregation, were allowable, considerable practical difficulties might be encountered in the process of selection. Arithmetically it seems also fairly clear that you would certainly fail to achieve as between parish and parish a fair apportionment of the burden, if it is to be assumed, that all parts of an undertaking, treated as a whole, ought to bear a proper part of the total liability to rates, particularly since many parts of an undertaking, such as a water undertaking or a dock undertaking, are of a nature which in themselves could not conceivably command any rent in a competitive market.

I shall have occasion to refer briefly hereafter to one or two of the other cases, but for the moment I will confine myself to the passage which I have read from the judgment of JENKINS, L.J., and from it proceed now to state the grounds on which I am led to the conclusion which I have stated. The statement in the judgment of JENKINS, L.J., is founded on earlier citations from the cases which he made, and is founded on the view that under modern rating law and practice a public utility undertaking, such as a water board or a dock undertaking, is *prima facie* rated on this profits basis. I think it hardly necessary to take time by stating what the basis is. It is sufficient to say that one gets for the whole undertaking a single figure representing, in effect, its annual earnings. As my Lord pointed out in the case to which I have alluded, there is no statutory sanction for that method of fixing liability for rates. It is a method whereby subject-matters, not themselves susceptible of treatment under s. 22 of the Act of 1925, are nevertheless made to bear a due proportion of a just liability. Although it is said from time to time that the method, having no statutory sanction, is likewise not sacrosanct so that it may be disregarded if special circumstances indicate that it should be disregarded, yet it seems now well established that it is *prima facie* the proper method of assessment for undertakings of this character. Something, I conceive, of a very exceptional character would be needed in order to exclude the application of the method. The idea which is fundamental to the method and underlies its application is twofold. First, that for rating purposes the sum of the various individual valuations on which individual rates will be paid to individual parishes will not in total exceed what is called the cumulo value, the single sum of earning capacity which I have mentioned; and, second, that there should be a fair apportionment among the various hereditaments in their various rating areas of the liability which at the end of all will be represented by a figure related to the cumulo sum. From those premises it seems to me to follow that, if the profits basis is to be applied at all in a case to which it is *prima facie* applicable, then there really is no room

- A for making material distinctions in treatment between individual hereditaments or between types of hereditaments among, say, the totality of indirectly productive hereditaments. The method for which counsel for the valuation officer contended seems to involve these stages in arriving at the result: First (and though I put it first I am not necessarily thereby saying that chronologically the process would take place first) one must find, as this is admittedly a dock undertaking, i.e., an undertaking which on the face of the Case Stated is appropriate for assessment on the profits basis, the cumulo sum, the annual value of the whole undertaking. This sum, which I will call £X, is a sum arrived at before deduction therefrom of the rates for which in the end the undertaking will be liable. Next any indirectly productive hereditament which may be suitable for valuation in accordance with the principles of s. 22 of the Act of 1925 is to be valued as though it was an hereditament occupied otherwise than as part of the public utility undertaking—as though, for example, it was an ordinary commercially owned and occupied hereditament. At this stage, therefore, it is necessary to disregard the cumulo value which has earlier been conceded or reached. Then, having got the valuation for the selected hereditament or hereditaments, the sums representing their annual value or values and the rates payable in respect of them are deducted from the cumulo value of £X, and the balance, if any—I emphasise those two words “if any” because it is possible that there will be no balance—will be called £Y, which counsel for the valuation officer referred to as “the net cumulo”. The net cumulo is then applied and apportioned among the remaining indirectly productive hereditaments (i.e., those which have not lent themselves to what is called the strict method of valuation) and also among the productive hereditaments, as though, first, there were no other indirectly productive hereditaments than those which were left after the first selection; and also, as I think, as though the so-called net cumulo were the original cumulo sum, the £X which was arrived at on a computation of the capacity of the whole undertaking. That, as I understand it, is the inevitable consequence of accepting the submission of counsel for the valuation officer and the result seems to me clearly liable to throw a disproportionate liability in respect of the total amount of rates payable by the undertaking on particular hereditaments in particular parishes. Since it might happen that the cumulo value, the profits basis figure, in an undertaking carrying on its affairs in a somewhat unresponsive world were either nil or a very small sum, the figure for the selected hereditament might easily swamp and exceed the cumulo and there would be merely a minus quantity for net cumulo. In any case, however, I am of opinion that, as this matter has developed and having regard to the sanctity this method of assessment has acquired, there is really no warrant on the cases for applying this hybrid method of attack.

- The earlier cases referred to (and I have said that I shall not take time by closely examining them), viz., *R. v. Mile End Old Town (Churchwardens & Overseers)* (2) and *R. v. West Middlesex Waterworks* (3), were cases decided before this method of assessment for public utility undertakings had acquired its form and more or less stereotyped shape. They were, as I think counsel for the British Transport Commission was entitled to say, really concerned with the method of apportionment, dividing up the total figures, which had been arrived at and which had been accepted in those cases, among the component parts. More important, however, for present purposes are the two cases in the House of Lords, *Metropolitan Water Board v. Chertsey Assessment Committee* (4) and *Kingston Union v. Metropolitan Water Board* (5). They were both cases relating to the Metropolitan Water Board, but no question has arisen that what is true as a matter of principle in rating a water undertaking is applicable, generally speaking, no less to a dock and canal undertaking. It is, I think, possible to take sentences from the speeches in those cases and to say that they seem to contemplate not merely a consideration of the question whether the profits basis should be

applied wholly or not at all, but whether, applying the profits basis, there is room within it for some variation in method. There are passages, for example, such as one I will read by way of illustration from the speech of LORD PARKER OF WADDINGTON in the *Chertsey* case (4), which the valuation officer thought lent some judicial support to his contention. LORD PARKER said, after referring to the practice of taking the profits basis method of assessment of water undertakings ([1916] 1 A.C. at p. 360):

"The origin of this rule is not very clear, but it may, I think, be explained as follows: In considering what the hypothetical tenant will pay by way of rent the company itself cannot be excluded as a possible tenant. If there are possible tenants other than the company, the annual rent may be estimated on a competitive basis, but if, as is generally the case, the company is the only possible person who would be likely to give any rent at all for the property, the competitive basis is excluded."

I think that that language was not directed at all to the sort of question which has been here raised; and I do not say it is not a significant and interesting question. LORD PARKER was, in my judgment, considering only whether the profits basis should be applied where the undertaking treated as a whole for rating purposes was occupying premises for the occupation of which there would be no competition in the ordinary course. Ten years later in the *Kingston* case (5), I think the sanctity (I will not say rigidity) of this method of assessment in the case of public utility undertakings was more emphasised, particularly in the speech of VISCOUNT CAVE, L.C. The language which he used, from which extracts have again been taken, makes it to my mind tolerably clear that VISCOUNT CAVE, L.C., was applying himself not to individual items in the total occupied property of the whole, but to the hereditaments taken all together. That is to my mind clear enough if one reads (as I shall not do) the whole passage in his opinion ([1926] A.C. at pp. 337 to 340). I will read enough, I hope, to make clear the line of the reasoning (*ibid.*, at p. 338):

"The mains and other works in any particular parish, taken by themselves, might conceivably produce no rent at all, for it is almost impossible to suppose that any person would wish to become the tenant of them; but the same hereditaments, if looked upon as part of a great undertaking extending over a large and populous area, might be quite indispensable to the undertakers (who must be regarded as possible tenants) and so might command an extortionate rent. In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the Act of 1836, began to assess water-works and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses [and certain other deductions] and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern. It was then necessary to distribute this rateable value among the various parishes into which the undertaking extended, and this was effected by dividing the hereditaments in each parish into indirectly productive assets (such as intakes, filter-beds, reservoirs, pumping stations and carrying or pumping mains) and directly productive assets (such as the service pipes which actually carried the water to the consumers), and by allowing to the parish a percentage on the structural . . . value of property of the former class contained in the parish, and a proportion of the remainder based on the

- A water revenue arising there. Thus, a series of assessments was reached which, while giving to each individual parish a fair proportion, based upon the hereditaments which it contained and the revenue which it produced, of the total rateable value, did not in the aggregate exceed the rental which the undertakers or any other possible tenants might be expected to pay for the whole undertaking in any year."
- B Although I agree, of course, that LORD CAVE's mind was not directed to the point now raised or the arguments in support of it, still it does seem to me that his formulation of the justification for the profits basis really excludes, or at any rate ought to be treated as excluding, exceptions of the kind suggested by the valuation officer, whereby one would, while applying the profits basis for other purposes, first of all, in effect extract by selection certain suitable premises altogether
- C from the undertaking. In an earlier passage in LORD CAVE's speech, he made use of a phrase to which I will allude, and I do so because counsel for the valuation officer referred to it. It was where LORD CAVE, L.C., spoke (*ibid.*, at p. 338) of the origin of this rule, and said that in this class of case it was necessary for rating experts and the courts to have recourse to hypotheses of a more or less violent character. It was the argument, and an attractive argument, if I may
- D say so, for the valuation officer that it is contrary to principle to have an hypothesis, and particularly an hypothesis of a violent character, when the facts do not call for any hypothesis at all. I follow the argument, but I think for my part that when one has once adopted a method of assessment for something which is proper to be regarded for rating purposes as a single unit and as a dock
- E undertaking, as is admittedly the case here, there is no room for having the best of both possible worlds.
- I conclude my references to authority first by reading another passage in the judgment of JENKINS, L.J., in *Metropolitan Water Board v. Hertford Corpn.* (1) where, before referring to LORD CAVE's speech, JENKINS, L.J., said ([1953] 1 All E.R. at p. 1055):
- F "Nevertheless, the 'profits basis' has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is *prima facie* the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocate such departure."
- G With that sentence I respectfully entirely agree. In the preceding sentence JENKINS, L.J., said (*ibid.*):
- "The manner of applying its general principles, no doubt, admits of variation to suit the peculiarities of individual cases, and, no doubt, there may be cases in which there are special circumstances sufficing to justify its total exclusion."
- H It was said that the first part of the sentence I have last read clearly intimated that one might, without excluding the application of the profits basis altogether, apply it with modifications, such as the extraction for the purpose of separate assessment of particular hereditaments which were suitable for such extraction. Though JENKINS, L.J., was properly and naturally reserving himself against the effect of a too dogmatic statement of the practice and the law, I do not think
- I that he was contemplating, not so much a modification of the profits basis, but an application of it, at the same time as an application of a quite different method, in regard to one and the same subject-matter, viz., the undertaking of a public utility undertaking. It is at that point that, as the authorities stand, it is impossible for us to go with the argument of the valuation officer. It may be, as counsel for the British Transport Commission conceded, that in arriving *inter se* at the proper proportion of the sum to be borne for rating purposes by the indirectly productive hereditament one may, instead of taking a percentage

of capital value, adopt a method of competitive tenancy or the assumed product of a competitive tenancy. That, however, is another matter. I think, as I have said, that the adoption for the undertaking as a whole of the profits basis negatives the extraction for separate assessment on a wholly different basis of individual hereditaments. A

Secondly, I refer to the case to which junior counsel for the valuation officer referred in the course of his reply, *Mersey Docks & Harbour Board v. Birkenhead Overseers* (6), a case decided in 1873. In that case it appears to have been true that as regards certain warehouses the court assented to their assessment on what is now the s. 22 basis, while the other assets of the harbour board were assessed according to something corresponding with the profits basis. In the first place, however, the full weight and significance of the profits basis method of assessment had not been apprehended in 1873. Moreover it may well have been on the facts that the circumstances relating to these warehouses, particularly the fact that they were from time to time let to other persons by the harbour board, justified the view that they represented an undertaking distinct in many respects from the undertaking of the docks and harbour board properly so called. At any rate, in the light of later authorities I do not think that *Mersey Docks & Harbour Board v. Birkenhead Overseers* (6) could justify this court in adopting in face of the later decisions the argument here put forward on behalf of the valuation officer. I therefore think on this main point that the view of the tribunal was correct. B C D

A second point was intimated on behalf of the British Transport Commission which was, if I understood it correctly, to this effect, that since these offices had been prior to 1948 on the railway list when they were railway hereditaments within the wide definition of the Railways (Valuation for Rating) Act, 1930, s. 1, so, if they were put on any list at the present time, they could be only put on with the same valuation for rating purposes as they had previously borne. Such, it was said, was the effect, not express but implicit, of s. 89 (6) of the Local Government Act, 1948. In the view which I take it is unnecessary to express a final view on that point, but as at present advised I confess I am not disposed to accept it; and it would have the effect apparently, as counsel for the valuation officer observed, that if these offices having ceased to be railway hereditaments had then been occupied by some commercial undertaking of an ordinary character, still they would, if put on the list at all, have been put on at their old railway figure. That does not appear to me to be either sensible or contemplated. I need say no more on that point, for, as I have already said, I think the tribunal rightly decided the main argument, and I would dismiss the appeal. E F G

JENKINS, L.J.: I agree, and find nothing I can usefully add.

ROMER, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted. H

Solicitors: *Solicitor of Inland Revenue; M. H. B. Gilmour* (for the British Transport Commission).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

Re A SOLICITOR.

[COURT OF APPEAL (Denning and Parker, L.JJ., and Roxburgh, J.), April 4, 5, 22, 1955.]

B

Solicitor—Costs—“Contentious business” or non-contentious business—Lump sum or itemised bill—Lump sum bill submitted for costs incurred before commencement of proceedings—Particulars in lump sum bill—Solicitors’ Remuneration Order, 1883, art. 2 (c) and Sch. 2, as substituted by the Solicitors’ Remuneration Order, 1953 (S.I. 1953 No. 117), art. 2.

C

Following matrimonial difficulties which had caused her to live apart from her husband, a client in March, 1953, consulted a firm of solicitors. The solicitors advised her on offers of financial provision made to her by her husband, advised her on subsequent negotiations in relation thereto, advised her to have a petition for judicial separation prepared for filing at short notice in case she decided to institute proceedings, took a proof of evidence from her, employed inquiry agents, instructed counsel to prepare a draft petition, in consultation with her caused it to be re-drafted, and on her approval of the revised draft had it engrossed. The client withdrew her instructions from the solicitors in July, 1953, and instructed another firm who filed a petition, in substantially the same form as that originally drafted, in December, 1953. In September, 1953, the original solicitors delivered a lump sum bill which contained a detailed description of the work which they had done. The client applied for delivery of an itemised bill of costs. It was conceded that if part of the business to which the bill related was contentious business the bill was not a good bill.

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Held: (i) whether business was contentious or non-contentious must be determined by its nature and not solely by the questions whether litigious proceedings had been commenced and the business had been done in those proceedings; the true test was whether, if the case went to trial, remuneration for the business (even though done before the litigation began) would be allowed on a party and party taxation in the proceedings; and, judged by that test, part of the business to which the bill in the present case related was contentious business and therefore the bill was a bad bill.

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(ii) on the assumption that the work done was wholly non-contentious business, the bill would be a good bill under the Solicitors’ Remuneration Order, 1883, Sch. 2, as substituted by the Solicitors’ Remuneration Order, 1953, since it contained a summarised statement of the work done, sufficient to tell the client for what she was being asked to pay.

Decision of GERRARD, J. ([1955] 1 All E.R. 257) affirmed.

H

I

[**Editorial Note.** The whole of the work to which the lump sum bill of costs related was transacted after February, 1953, and thus, if the work had been non-contentious business, would have been business within the scope of the Solicitors’ Remuneration Order, 1953, which applies to business transacted after February, 1953. If business is wholly non-contentious, a lump sum bill may be delivered for a fair and reasonable amount under Sch. 2 to the Solicitors’ Remuneration Order, 1883; and the remedy of a client wishing to question the amount is to require the solicitor to obtain a certificate of its reasonableness from the Law Society or to have the bill taxed by the court. The certificate cannot be required if the lump sum has been paid or taxed.

For the Solicitors Act, 1932, s. 56, s. 82 (2), see 24 HALSBURY’S STATUTES (2nd Edn.) 49, 73.

For the Solicitors’ Remuneration Order, 1883, and the Solicitors’ Remuneration Order, 1953, see 20 HALSBURY’S STATUTORY INSTRUMENTS 195, 209.]

Cases referred to:

- (1) *Pécheries Ostendaises (Soc. Anon.) v. Merchants’ Marine Insurance Co., Ltd.*, [1928] 1 K.B.750; 97 L.J.K.B. 445; 138 L.T. 532; Digest Supp.

- (2) *Frankenburg v. Famous Laskey Film Service, Ltd.*, [1931] 1 Ch. 428; 100 A L.J.K.B. 187; 144 L.T. 534; Digest (Practice) 948, 4878.
- (3) *Re Morgan (R. P.) & Co.*, [1915] 1 Ch. 182; 84 L.J.Ch. 249; 112 L.T. 239; 42 Digest 256, 2879.
- (4) *Stanford v. Roberts*, (1884), 26 Ch.D. 155; 53 L.J.Ch. 338; 50 L.T. 147; 48 J.P. 692; 42 Digest 232, 2648.

Appeal.

The solicitors appealed against an order of GERRARD, J., dated Jan. 11, 1955, and reported [1955] 1 All E.R. 257, dismissing an appeal from an order of Master HARWOOD dated Dec. 16, 1953, for the delivery of a bill of costs to a former client. The client and her husband lived in South Africa for some years until February, 1953, when, following difficulties between them she left for England, arriving in March. She consulted the solicitors about her matrimonial troubles. The solicitors advised her to negotiate a financial settlement but, against the possibility of the negotiations failing to fructify, that it would be in her interest to have ready a petition for judicial separation which, in the event of her deciding to institute proceedings, could be filed at short notice and served on the husband on one of his periodical visits to this country. They took a proof of evidence from her, employed inquiry agents to watch the husband and consulted counsel. They instructed counsel to prepare a draft petition which was settled on June 3, 1953, and which was based on allegations of cruelty and prayed a judicial separation, the custody of the children of the marriage, alimony pending suit and permanent alimony for the client and the children. After consideration of the draft by the client with the solicitors, they had the petition re-drafted by counsel on July 9, 1953, certain allegations of adultery being added which were based partly on the agents' inquiry. On its approval by the client they caused it to be engrossed so that proceedings could be launched at any moment if the client gave the necessary instructions. During this time they were advising the client on offers of financial provision made to her on her husband's behalf and on subsequent negotiations in relation thereto. On July 14, 1953, the client decided to terminate the retainer of the solicitors and retained another firm, who conducted negotiations with the husband with respect to financial provision for the client, also employed inquiry agents to watch the husband and afforded guidance to the client in considering the engrossment of the amended draft petition settled by counsel, which was treated as a draft of the petition for judicial separation which she had decided in December, 1953, to file. Several very minor alterations were made in three of the first twenty-eight paragraphs, an allegation was added of adultery in London in October, 1953, and the prayer was amended by praying for the discretion of the court to be exercised in the client's favour. The petition was filed on Dec. 23, 1953, and service was effected on the husband during a visit to England on Dec. 26, 1953. He entered an appearance under protest, objecting to the jurisdiction of the court.

On Sept. 3, 1953, the appellant solicitors delivered to the client a document in the form of a lump sum bill of costs, which contained a very detailed description of the work they had done on her behalf and a statement of their disbursements, but which was not an itemised bill of costs in the traditional form. Their right to present a bill in that form was challenged by the client, who on Dec. 16, 1953, obtained an order from Master HARWOOD for the delivery of an itemised bill of costs. The solicitors appealed to the judge in chambers, and at the hearing on Feb. 10, 1954, GERRARD, J., was asked to decide two questions, viz., whether, having regard to the Solicitors' Remuneration Order, 1953, (i) the document was a good bill and (ii) the court could compel the delivery of a bill (i.e., a traditional itemised bill of costs). The question whether any of the business to which the lump sum bill of costs related was contentious, with the consequence that the Order of 1953 would not apply, was not argued. At the end of the hearing an adjournment was granted to enable the judgment to be

A delivered in open court with a view to the decision being reported. At a further special hearing GERRARD, J., informed counsel for the parties that on further consideration he did not think it clear that all business to which the lump sum bill related was non-contentious business. It was agreed that he should be furnished with the history of the case on affidavit and should be asked to consider whether the whole of the business to which the document related was in fact non-contentious business, it being conceded that, if any part was not, the document did not come within the Solicitors' Remuneration Order, 1953. This part of the case was argued on Nov. 24, 1954. GERRARD, J., also agreed to include in his judgment his reasons for his conclusion, which he had already indicated, that the document would be a good bill on the assumption that the whole of the business to which it related was non-contentious business. He gave a reserved judgment on Jan. 11, 1955, holding that the document was a good bill on the assumption that the whole of the business to which it had related had been non-contentious business, but that part of the business was contentious business, with the result that the client was entitled to an itemised bill. The solicitors appealed. It was conceded that, if part of the business to which the bill related was contentious business, the bill was not a good bill.

D *Sir Hartley Shawcross, Q.C., and Colin Duncan for the solicitors.
Maurice Lyell, Q.C., and J. M. Shaw for the client.*

Cur. adv. vult.

Apr. 22. The following judgments were read.

E DENNING, L.J.: The facts of this case are fully set out in the judgment of GERRARD, J., which is reported [1955] 1 All E.R. 257, and I need not repeat them again. They raise important questions about solicitors' costs. There is a great difference for solicitors between "contentious business" and "non-contentious business". A bill for contentious business must be made out item by item, with a separate charge against each item; but a bill for non-contentious business can be charged by a lump sum. The difference in the method of charging leads to a difference in the amount which the solicitor receives. F Non-contentious business is, I believe, more remunerative than contentious business.

Although the difference is so important to solicitors, there is no clear guidance to be found anywhere to enable the profession to distinguish between contentious business and non-contentious business. The Solicitors Act, 1932, evades the issue. In s. 81 (1) it says, what is obvious, that "non-contentious business" G includes conveyancing business; but this does not help to decide difficult cases. The section does not say what "contentious business" means or what "non-contentious business" means. We are thus left to find out for ourselves. Counsel for the solicitors asked us to draw a clear line for the guidance of the profession. We should have liked to accede to his request if we could. It seems to me if a clear line is to be drawn there is only one possible place for it, viz., the issue of H the writ or other originating process in the courts of law. All business before that date could be said to be non-contentious, and all business afterwards to be contentious. It would be very convenient if we could draw that line, but I do not think we are at liberty to do so, for the simple reason that it is not the line drawn by Parliament. The statutory distinction depends on the nature of the business—contentious or non-contentious—not on the time at which I it is done.

Let me test the position by taking a case where a client asks his solicitor to bring an action. The solicitor thereupon instructs counsel to draft the writ and the statement of claim to be served with it. If the action goes for trial, the costs of that work are recoverable as costs in the action. They are not disallowed simply because the work was done before the writ was issued. It is clearly contentious business. Now suppose that in that very case the solicitor had to take statements from witnesses so as to enable counsel to settle the statement of

claim. If the action goes for trial, the cost of that work would also be recoverable as costs in the action, see *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co., Ltd.* (1) and *Frankenburg v. Famous Lasky Film Service, Ltd.* (2). It also would be contentious business. A

Now suppose that, after the solicitor had done all that work, but before the writ was actually issued, the case was settled by the defendant paying the claim. Does the work take on a different character simply because the case was settled? Surely not. If it is contentious business if the case goes for trial, it is also contentious business if the case is settled before the writ is issued. The issue of the writ does not alter the nature of the business; nor should it alter the method or amount of the solicitor's charges. He should get the same reward for the same work, no matter whether the case goes for trial or is settled the moment before writ issued or the moment after it. B

So far there is no difficulty. But suppose that a solicitor asks counsel to advise on the prospects of success before he instructs him to settle the writ. Would the case to advise be contentious business or not? I can well see that in many cases a case to advise on the client's rights would be non-contentious business; see the opinion of Mr. R. S. Wright (afterwards WRIGHT, J.) dated Jan. 13, 1888, published in the Law Society's DIGEST (1923 Edn.), and also *Re R. P. Morgan & Co.* (3); but there are some cases where a case to advise may be contentious business. The taxing masters in their Practice Notes say that: C

"Case to advise. Before and during action may be allowed as between party and party if really useful and necessary, but sparingly", D

see the ANNUAL PRACTICE (1955), p. 2834. It seems to me that, in those cases where the costs of an opinion can be recovered against the other side, it must be contentious business. E

These illustrations persuade me that, where the work done before writ is such that, if the case went to trial, it would properly be allowed as against the other party on a party and party taxation, then it is contentious business, even though a writ is not in fact issued; but, if the work would not be allowed on a party and party taxation, it is not contentious business. I am aware that this test sounds vague and indefinite, but the managing clerks in solicitors' offices have a very good idea of what business will or will not be allowed on taxation, and I feel sure that they will be able to apply this test and say without difficulty what is contentious business and what is not. All work done in the cause itself after writ is, of course, contentious. F

Counsel for the solicitors said that, when no writ or other process was issued, there was no scale by which to charge for contentious business, and he pointed out that it might happen that a case was settled before it was decided whether it should be taken in the High Court or the county court. This is no doubt true, but I do not think it should give rise to any difficulty in practice. The taxing masters will act on analogy to R.S.C., Appendix N (ANNUAL PRACTICE (1955), pp. 2782 et seq.). They will tax the bill on the same footing as if a writ had been issued. In case of doubt whether it would have been a High Court or county court action, they will, I expect, give the solicitor the benefit of the doubt and allow him to charge on a High Court scale. G

Applying the principles which I have stated, I have no doubt that a good deal of the business contained in this bill was contentious business. The drafting of the petition for judicial separation and all the work connected with it was clearly work which would have been allowed on a party and party taxation. The solicitors should have delivered a separate bill of costs for all this contentious business, with detailed items and charges. Another bill should have been delivered for the non-contentious business, and that could have been for a lump sum. The bill which was in fact delivered was a bad bill, because it did not distinguish between the two and treated it all as non-contentious business, which was wrong. H I

- A I now proceed to consider the second point, which is this: Assuming that the work was all non-contentious, was the bill a good bill? Until the year 1920 a solicitor's bill, even for non-contentious work, had to be drawn in the traditional way, item by item, with a separate charge against each item. By the Order of 1920*, as re-enacted by the Order of 1934, a solicitor was authorised to charge a gross sum for non-contentious business, in lieu of detailed charges, but it was
- B provided that the client could insist within six months on a detailed bill of charges, just as if no gross sum were permissible. In 1953 a new order, the Solicitors' Remuneration Order, 1953, was made, which made great alterations in the method of charging for non-contentious business. The solicitor is now entitled, under Sch. 2 of the Solicitors' Remuneration Order, 1883, as substituted by the Order of 1953, to

- C "Such sum as may be fair and reasonable, having regard to all the circumstances of the case . . ."

This, I think, means a lump sum as before, but, whereas previously the client could afterwards insist on a detailed bill of charges, he now has no right to have the lump sum split up into items. He is, however, given a valuable new right.

- D He can require the solicitor to put the bill before the Law Society, so that the Law Society can see whether the sum charged is fair and reasonable. If it is fair and reasonable, they will certify accordingly; or, if not, they will say what the proper sum should be. We were shown the form of application issued by the Law Society when this procedure is invoked. It seems to be well designed to enable the matter to be properly investigated. The solicitor has to give to the
- E Law Society full details of all the work he has done, the time spent by himself, his assistants and his clerks respectively, and all the material circumstances. The form contains a questionnaire in which the solicitor has to set out all the particular circumstances specified in the Order of 1953. The investigation is held without any expense to the client, and it is a great protection for him. The only drawback about it is that the client has no right to see the details which the
- F solicitor gives to the Law Society, and we were told that the client was not allowed to see them. He is not, therefore, in a position to challenge their accuracy. This drawback is not so serious as it might at first sight appear, however, because the client still has the right to have the bill taxed by the taxing master, and the new order (i.e., the Solicitors' Remuneration Order, 1883, Sch. 2, proviso (d), as substituted by the Solicitors' Remuneration Order, 1953) expressly says that

- G "... it shall be the duty of the solicitor to satisfy the taxing master as to the fairness and reasonableness of his charge."

The taxing master can therefore call for all the details just as the Law Society could, and the taxing master will no doubt see that the client and his new advisers have full opportunity of considering these details, so that the client

H can challenge them, if he so desires.

- Such being the effect of the new order, the question is: what must a solicitor's bill for non-contentious business now contain? It need not contain detailed charges as it used to do before 1920. Nor need it contain all the details which the solicitor will have to give, if required, to the Law Society or the taxing master. But I think that it must contain a summarised statement of the work done,
- I sufficient to tell the client what it is for which he is asked to pay. A bare account for "professional services" between certain dates, or for "work done in connection with your matrimonial affairs" would not do. The nature of the work must be stated, such as advising on such and such a matter, instructing counsel to do so and so, drafting such and such a document, and so forth. Tried by this

* The Solicitors' Remuneration Act General Order, 1920 (S.R. & O. 1920 No. 1015) was revoked and superseded by the Solicitors' Remuneration (Gross Sum) Order, 1934 (S.R. & O. 1934 No. 548) which in turn was revoked by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117).

test, I am of opinion that the bill delivered by the solicitors in this case would have been a good bill if it had been all non-contentious business. It fails, however, because it was not all non-contentious. Part of it was contentious business. Two separate bills should have been delivered to cover the two kinds of business.

I find myself in agreement with GERRARD, J. The appeal must be dismissed.

PARKER, L.J.: The first question is whether any part of the work covered by the bill of Sept. 3, 1953, relates to contentious business. If it does, then it is conceded that it is not a good bill. The expressions "contentious business" and "non-contentious business" first appear in relation to solicitor's remuneration generally in the Solicitors Remuneration Act, 1881. That Act provided for the making of general orders for remuneration in relation to non-contentious business. Everything, by s. 2 of that Act, was treated as non-contentious business except

"business in any action, or transacted in any court, or in the chambers of any judge or master and not being otherwise contentious business."

Thus, while not defining contentious business, it recognised that there is contentious business which is not business in any action or transacted in any court or in the chambers of any judge or master.

Pursuant to that Act, the Solicitors' Remuneration Order, 1883, was made. Oddly enough, the wording of the order did not follow the wording of the Act by excluding from its ambit all contentious business but excluded only business in any action or transacted in any court or in the chambers of any judge or master*. Accordingly, read alone, the order purported to cover business coming within the words† "being otherwise contentious business". I say "read alone", because the order could not cover a wider field than that allowed by the Act, and could not, therefore, cover business within that expression.

In 1932 the Solicitors Acts, 1839 to 1928, were consolidated by the Solicitors Act, 1932. Far from taking the opportunity to define "contentious business", Parliament merely provided by s. 81 that

" 'Contentious business' includes any business done by a solicitor in any court . . . "

As I have mentioned, that Act was a consolidating Act, and I am quite satisfied that by that inclusive definition the Act did not purport to convert whatever was already covered by the expression "being otherwise contentious business" into non-contentious business. Section 56 provided power to make general orders for non-contentious business, and by s. 82 (2) the Order of 1883 was to be treated as an order under and for the purposes of the Act. The position was thereby preserved under which the order on its face, though not in truth, covered business which comes within the expression "being otherwise contentious business". What then is covered by that expression? It is urged on behalf of the solicitors that contentious business means business in which there is a litigious contest. There must be, it is said, two parties between whom there is a lis, and accordingly, unless and until a writ or other process has been issued, the business remains non-contentious, even though the solicitor has the client's instructions to launch proceedings. Only thus, it is said, can a hard and fast line be drawn which will enable the solicitor to determine on what basis to prepare his bill. It is further pointed out that, if business prior to the proposed action were classed as contentious business and proceedings were not in fact instituted,

* The relevant terms of art. 2 of the Solicitors' Remuneration Order, 1883, are—" . . . the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, is to be regulated as follows . . . "; see 20 HALSBURY'S STATUTORY INSTRUMENTS 196.

† I.e., these words in s. 2 of the Solicitors Remuneration Act, 1881, now repealed.

A there is no measure laid down for determining the remuneration. The order covering non-contentious business would not apply, and, since no proceedings were instituted, R.S.C., Ord. 65 and Appendix N would be inapplicable. On the basis of this argument, the only suggestion put forward is that the expression "being otherwise contentious business" might be a reference to arbitrations or other proceedings in which there is some form of lis.

B For the client it is contended that it is not the time when the work is performed, but the quality of the work, the kind of business performed, which is the determining factor. This was the view taken by the learned judge, and I agree with him. It seems to me that the expressions "non-contentious business" and "contentious business", when used in the Acts and the orders, are referring to the nature of the work. If the commencement of proceedings had been

C intended to be the determining factor, how easy it would have been to say so in the definition section of the Act of 1932. Moreover, it is to be observed that conveyancing matters are classed as non-contentious business, even if the work is done during proceedings, cf. *Stanford v. Roberts* (4), which again points to the nature of the work being the test. Further, any contrary view would

D lead to the absurd result that the solicitor would be entitled to different remuneration for identically the same work, depending on whether the claim was settled the day before or the day after proceedings were launched. Again, it is to be observed that, in a taxation under R.S.C., Ord. 65 of admittedly contentious business, the master has a discretion under r. 27 (29) of the order to allow costs incurred before the issue of the writ, cf. *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co., Ltd.* (1). As ATKIN, L.J., said ([1928] 1 K.B.

E at p. 762):

"It is quite obvious that those costs are not limited to costs incurred after the writ has been issued. Costs incurred before action brought are allowed every day to a limited extent, as appears by the taxing master's Practice Notes, which, though not binding, govern the practice. I am not at all sure that the conventions fixed by the masters are not too narrow, but they may be very wise, because they deal with the costs of this kind which are commonly in dispute; but their discretion as to costs certainly extends beyond that. The taxing master has discretion in every case to decide whether the costs incurred before the action were necessary or proper for the attainment of justice; and the costs the taxing master has allowed in the present case may very well be included in that expression. A very good example of this was put in argument: it was a case of an accident happening owing to a railway bridge breaking down, when the railway bridge has to be replaced forthwith and the state of the bridge is said to be the cause of the action. In such a case it is essential that there should be an immediate inspection by skilled witnesses of the state of that bridge. In those circumstances the taxing master might well hold that such costs incurred before the issue of the writ were necessary for the attainment of justice, because the actual facts to be ascertained from such an inspection could not be ascertained at a later date; and of course the taxing master in coming to a conclusion would have to consider the probability of the defendant disputing liability."

I This again points to the view that the date of the issue of the writ is not the determining factor. Nor do I think that the fact that no statutory measure exists for determining the remuneration leads to a different interpretation. If a claim is settled before the issue of the writ, the taxing master could and no doubt would tax the bill for the preliminary work according to the same measure as he would have had to employ under the rules, if the proceedings had actually commenced.

No doubt this view is not so convenient to solicitors in that there is no hard

and fast line for determining whether, when business is performed, it is non-contentious or contentious. Each case will depend on its own special facts, but I suggest that some guide can be found in the current practice of taxing masters. If the business performed is such that, under that practice, masters would allow the cost under Ord. 65, r. 27 (29), should proceedings ensue, then I think that it would be proper to treat the business as contentious business. I see no reason why in practice this should not afford a sufficient guide. A

Finally, reference was made to *Re R. P. Morgan & Co.* (3). In that case NEVILLE, J., decided that the work of drawing a case for counsel to advise in contemplation of litigation was non-contentious business. I have no doubt that that case was rightly decided on its own facts and indeed, applying the guide suggested above, the Masters' Practice Notes show that the cost of such work is only sparingly allowed. As I read his decision, he was not saying that in all cases the date of the commencement of proceedings is the determining factor. B

Turning to the facts of the present case, I cannot do better than quote from the judgment of the learned judge ([1955] 1 All E.R. at p. 265): C

"I think that I have to ask myself what was the nature of the business on which the first solicitors were then engaged, and to decide on its proper description. It was the collection of information and the taking of all steps, even to the engrossment of a petition, necessary to launch proceedings hostile to the husband at the moment the client gave the word, the background to this work being that differences between the client and her husband had resulted in her leaving the matrimonial home and South Africa at his suggestion. It seems to me that it is impossible without doing violence to language to describe that business as non-contentious." D

I agree with that passage. Accordingly if, as I think, the determining factor is the nature of the work, it is clear that some part of the work covered by the bill of Sept. 3, 1953, is contentious business. E

So far as the second question is concerned, I have nothing to add to what has been said by DENNING, L.J. I would dismiss the appeal. F

DENNING, L.J.: ROXBURGH, J., authorises me to say that he has read the two judgments which we have delivered, and agrees with them.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Bull & Bull* (for the solicitors); *Forsyte, Kerman & Phillips* (for the client).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A

HUGHES v. McGOFF AND VICKERS, LTD.

[LIVERPOOL ASSIZES (Ashworth, J.), February 4, 7, 8, 1955.]

B

Factory—Building operation—Factory under construction—Installation of electrical apparatus—“Construction . . . of a building”—Working platform not closely boarded—Failure to provide toe-boards—Workman employed by sub-contractors killed by pipe falling from platform—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 2 (1), reg. 4, reg. 22, reg. 24 (1).

C

Master and Servant—Duty of master—Provision of safe system of working—Workman employed by sub-contractors killed by pipe falling from platform of scaffolding—Scaffolding erected by other sub-contractors—Gaps between boards of platform and no toe-boards to platform.

D

The defendants who were electrical contractors were employed as sub-contractors to instal electrical apparatus in a large workshop which was under construction and which was intended to be used for making jet aircraft or their component parts. The work to be done by the defendants involved the installation of conduit pipes, which were to be fixed to the steelwork, and this required the use of scaffolding, which was supplied and erected by a company specialising in that work. The scaffolding was used not only by the defendants' workmen but also by other workmen who were engaged on the work of construction which was going on, and the scaffolding had to be moved from time to time as the work proceeded along the length of the building. There were three tiers of scaffolding, the lowest, or third tier, being about thirty feet above the floor level. The boards forming the platform of the third tier were not laid uniformly flush against each other and in places there were gaps between them varying from one to three inches. On the outer side of the platform were vertical upright scaffold tubes, but the incline of the platform was inwards rather than outwards. There were no toe-boards. An electrician employed by the defendants placed on the platform a piece of steel piping, some twelve feet long and a little more than an inch in diameter, which was to be used as one of the conduit pipes. About an hour later the pipe fell from the platform on to H., a workman employed by the defendants, who was on the floor of the building, and fatally injured him. The reason for the fall was not known, but there was no negligence on the part of the electrician, who had been placing pipes in a similar position without any accident for a period of over three months. In an action against the defendants, under the Law Reform (Miscellaneous Provisions) Act, 1934, for damages in respect of the death of H., it was contended that the gaps in the platform-boards and the failure to provide toe-boards constituted breaches of the Building (Safety, Health and Welfare) Regulations, 1948, and of the defendants' duty at common law to provide a safe system of work.

H

Held: (i) the work on which the defendants were engaged was an integral part of the construction of a building, within reg. 2 (1) of the regulations of 1948, and the regulations were applicable to that work.

Elms v. Foster Wheeler, Ltd. ([1954] 2 All E.R. 714) applied.

I

(ii) the defendants were in breach of reg. 24 (1) in that they had failed to provide toe-boards, and, as that breach could have been, and probably was, the cause of the accident, the defendants, in the absence of evidence to show that the accident was not so caused, were liable in damages for breach of statutory duty to H.

Principle stated by SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* ([1945] 2 All E.R. at p. 549, letter C) citing a statement of LORD GODDARD, in *Lee v. Nursery Furnishings, Ltd.* ([1945] 1 All E.R. at p. 390) applied.

(iii) the defendants were also in breach of reg. 22, in that the platform

was not closely boarded, but, on the facts, the failure to provide close boarding was not the cause of the accident.

(iv) as the scaffolding had not been provided by the defendants, but had been used by them and their workmen for some time, the defendants were not liable at common law for failure to provide a safe system of work merely because the platform-boards had spaces between them and there were no toe-boards.

[As to a master's duty to provide a safe system of work, see 22 HALSBURY'S LAWS (2nd Edn.) 187-190, paras. 313-317; and for cases on the subject, see 34 DIGEST 194-198, 1583-1623.]

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 2 (1), reg. 4, reg. 22 and reg. 24, see 8 HALSBURY'S STATUTORY INSTRUMENTS 210, 212, 218 and 220.]

Cases referred to:

- (1) *Elms v. Foster Wheeler, Ltd.*, [1954] 2 All E.R. 714.
- (2) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- (3) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.

Action.

The plaintiff was the father of Owen Hughes who died as the result of an accident during the course of his employment by the defendants. The plaintiff claimed damages for the benefit of the estate of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of his death, the claim being based on negligence at common law and breach of statutory duty. The facts appear in the judgment.

A. Logan Petch for the plaintiff.

Andrew Rankin for the defendants.

Cur. adv. vult.

Feb. 8. **ASHWORTH, J.:** On Mar. 23, 1953, Owen Hughes, son of the plaintiff, met his death during the course of his employment by the defendants at premises at Bootle. He was then twenty-three years old, and his wages at the time of his death were £7 4s. 8d. a week. The defendants, McGoff and Vickers, Ltd., are electrical contractors, and at the material time they were sub-contractors to the company known as William Moss & Sons, Ltd., in respect of electrical apparatus due to be installed in a very large workshop then under construction by William Moss & Sons, Ltd. for English Electric, Ltd. The intended use was for making jet aircraft or their component parts, and the task entrusted to the defendants was described by Mr. Vickers, their director, as being the fitting of electric lighting, power and light switches, laying out of cables, and the installation of distribution boards, and he described it as a very big job. The work involved the installation of conduit pipes which were to be fixed to the steelwork by means of saddles, the conduit pipes being mainly of a diameter of something slightly over one inch.

I have referred to the building as being large. It was in fact some 1,028 feet long, and on Mar. 23, 1953, it was not complete, a matter which may be important. It had not been handed over to English Electric, Ltd. None of that company's work was being undertaken, and at the material time various tradesmen apart from the defendants' own employees were engaged on jobs. The evidence showed that these other tradesmen included joiners, plumbers, labourers, and what were described as bearers.

The work on which the defendants were engaged required the use of scaffolding, as, indeed, did the work of some of these other tradesmen. The scaffolding was supplied and erected by the company known as Scaffolding (Great Britain), Ltd., who had—and I quote this—"men there all the time shifting the scaffolds as

- A and when required." The explanation of that piece of evidence was that the scaffolding was, in the main, suspended from the roof beams, and as the electric work and other work proceeded lengthwise down the building the scaffolding had to be moved. The scaffolding was used not only by the defendants' employees but also by the joiners, and on Mar. 23 those joiners were putting insulating boards on the roof. According to one of the defendants' employees, Mr. Colliet,
- B who gave evidence before me, there was a great deal of coming and going on the scaffold all the time.

- Although some of the details as to the manner in which the deceased met his death are still a mystery, certain facts are to my mind clear, and I propose to set them out in alphabetical form. (a) At about 8.30 a.m. on the morning of Mar. 23, Mr. Colliet, an electrician employed by the defendants, received from
- C his apprentice mate, Mr. Murrant, a length of steel piping. The length was about twelve feet and it was to be used as one of the conduit pipes to which I have already referred. (b) Mr. Colliet was then on the lowest tier of three tiers of scaffolding, and he was then about thirty feet above the floor level. (c) Mr. Colliet placed the length of piping lengthwise along the platform. (d) The platform consisted of boards supported by horizontal cross pieces of scaffolding,
- D the gap between the cross pieces being between three feet six inches and four feet. The platform itself was between five and six feet wide. (e) The boards forming the platform were not laid uniformly flush the one against the other, and there were gaps in places varying from one to three inches. There was no direct evidence as to the existence of a gap at the place where the pipe was laid. (f) The space between the boards forming the third tier and those forming the second
- E tier was about three feet vertically, and there was not room for a man to stand upright at the place where the pipe was laid. (g) On the outer side of the third tier there were vertical upright scaffold tubes at horizontal intervals of about three feet six inches to four feet. (h) The incline of the platform on the third tier was inwards rather than outwards.

- The actual cause of the deceased's injury and death was the fall of the length
- F of pipe to which I have referred, and this fall occurred at about 9.30 a.m., namely, about one hour after it had been placed on the platform by Mr. Colliet. According to one witness, its fall was said to be vertical, and by that I mean that the pipe was on end when it was descending, but the cause of its fall has been, throughout this case, and still is, a mystery. One description of the fall was given by Mr. Murrant, who at that moment was working on the topmost
- G of the three tiers, Mr. Colliet being then on the second tier. [HIS LORDSHIP reviewed the evidence of Mr. Murrant, who said that the piece of piping fell between two planks of the lowest tier, and not at the side of the platform. HIS LORDSHIP continued:] In my view it is not possible to draw the inference that the pipe descended in that way, and I reject the evidence of Mr. Murrant, although in doing so I make no criticism of his demeanour as a witness or his
- H manner in giving evidence. I think that it is one of those cases where a witness has reconstructed the accident and is giving evidence of what he thinks must have happened rather than of what he saw happen.

- Nevertheless, I accept the fact that the pipe fell from the third tier, and fell on to the deceased. That introduces this extremely difficult problem: How did it come to fall? There is a possibility that some other workman may have
- I inadvertently knocked the pipe off, but I feel bound to say that I regard that as no more than a possibility. There is no evidence to support it, and, once again, I think it inherently unlikely that, if, indeed, the pipe was knocked off so as to fall down on to the unhappy young man below, the person responsible would not have been traced, or, indeed, would not have made some effort to call out a warning. That leaves me irresistibly compelled to draw the conclusion that the pipe fell from the inner side of the platform, that it had rolled down this very slight incline on to the inner side of the platform and in some way, which remains

wholly unexplained, had succeeded in penetrating through a gap between the edge of the boards and whatever may have supported it on that inner side, and so descended to the ground. A

The claim put forward on behalf of the plaintiff is based partly on an allegation of negligence against Mr. Collict, partly on an allegation of negligence against the defendants as employers, and partly on an allegation of a breach of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145). B
So far as the claim based on the negligence of Mr. Collict is concerned, I find against it. I was impressed by Mr. Collict. He was a man who, giving evidence, appeared to me to be still labouring under the grief and embarrassment of his recollection that in some sense he may have been the cause of the deceased's death, but he gave his evidence fairly and, in my view, he was not negligent in placing that pipe along those boards since he had, over a space of at least three C
months, placed a pipe in a similar position without mishap to anyone. It is true that he had been made aware of an accident on the other side of the scaffolding, but the circumstances were not described and I have no reason to suppose that it was exactly similar. In my view, it is important to keep in mind that this length of piping was twelve feet, and that by laying it lengthwise on the boards he was putting it in a position where it could be supported, not D
merely by the boards, but also by three vertical cross pieces, and I accept Mr. Collict's evidence that when he so laid it down he himself had no reason whatever to think that it was in an unsafe position.

Secondly, it is said that there was an unsafe system of work. I reject that claim also. The scaffolding was not provided by the defendants, but it had been used by them and their workmen for some time, and I cannot, for my part, see that, E
apart from the building regulations, they were to be charged with liability for an unsafe system of work merely because the platform-boards may have had spaces between them or because there were no toe-boards on them. It is, in my view, important to keep quite distinct the liability imposed by the regulations and that imposed by common law.

I shall now deal with the claim under the Building (Safety, Health and Welfare) F
Regulations, 1948, and this claim gives rise to three separate questions: (a) Do the regulations apply? (b) Was there a breach? (c) Was the breach a cause? The answer to the first of these questions involves a consideration of reg. 2 (1), which reads as follows:

"These regulations shall apply to the following operations where undertaken by way of trade or business or for the purpose of any industrial or G
commercial undertaking . . . namely, the construction, structural alteration, repair or maintenance of a building . . ."

When one approaches the problem of construing that paragraph, I think it is important to keep in mind the fact that the regulations apply, not to persons, nor to premises, but to operations. The question comes down to this: What H
was the nature of the operations which were being carried out at the material time? Did such operations fall within the words "construction . . . of a building"? The building was one of considerable height, of a very large size, and it was one which, in my judgment, obviously required electrical installations. For reasons which I will give in a moment, it is obviously desirable that, in a problem of this sort, one should not be tempted to stray outside the particular facts of particular cases, and the Court of Appeal have so laid it down in *Elms v. Foster Wheeler, Ltd.* (1). I would only say that, while I consider that the installation of electric lighting in this particular building formed part of the construction of the building, it may well be that some form of lighting, for example the installation of special lighting in a film studio, might not form part of the construction of a building. In this case I have come to the conclusion without I
hesitation that the work on which the defendants were engaged was an integral part of the construction of that building.

A It is perhaps pertinent to note that in *Elms v. Foster Wheeler, Ltd.* (1) what were being installed were four large steam generating plants consisting of boilers which, when assembled, reached the height of something over a hundred feet. It was not a case of the defendants carrying out what I have described as an integral part of the building, although, as the case shows, the work involved was the completion of the very task for which the building was originally designed.

B In other words, the present case is, to my mind, a stronger case of the applicability of the regulation than *Elms v. Foster Wheeler, Ltd.* (1) is. In that case, SOMERVELL, L.J., quoted ORMEROD, J., as follows ([1954] 2 All E.R. at p. 715):

C “The learned judge put it in this way: ‘I have to decide on the facts of this case whether it is right to say here that the defendants were engaged on the construction of a building or whether they were merely putting something into a building which had been, or was in the process of being, constructed.’ He decided, having seen the model of the plant which is before us and on the evidence, that the defendants were engaged on the construction of a building and the regulations, therefore, applied. I agree with that.”

D Those words show that the test applied by ORMEROD, J., was whether the defendants were engaged on the construction of a building or whether they were merely putting something into a building. ROMER, L.J., appears to have taken the matter somewhat further. Having agreed with the other lords justices that it was quite impossible to say in a general way that the building regulations applied on the one hand and did not apply on the other hand to work which included the installation of plants because it must depend on the circumstances of each particular case whether such an operation attracted the regulations or not, he went on to state the manner in which, in his view, the question might be posed. He said ([1954] 2 All E.R. at p. 717):

E “I think that in the present case the question which may be posed is whether at the time of the accident a building was being constructed and whether the defendants were contributing to the construction of that building. I say ‘contributing’ because it is quite plain to my mind that the words in reg. 2 (1) ‘the construction . . . of a building’ should be read ‘the construction of a building or any part thereof’.”

F Later in his judgment ROMER, L.J., said (*ibid.*, at p. 718):

G “The question then arises, did the work which the defendants undertook form part of that operation? The evidence showed, and I think the learned judge found, that what the defendants did was to make a contribution to the construction of the power station inasmuch as they were installing the essential apparatus which it was the object of the outer walls and roof to house and shelter and which was indeed united to those walls as well as to the foundations of the structure.”

H In my view, whether one applies the broader test indicated by ROMER, L.J., or the somewhat narrower test adopted by SOMERVELL, L.J., approving ORMEROD, J., the present case falls within the regulations. As I have already mentioned, the building was not complete; the construction was not complete; joiners were still engaged on the roof; and in my view it is quite impossible to say that the defendants’ task in this case was merely to put something into a building which had been or was in the process of being constructed, as opposed to their being engaged on the construction of a building. I therefore hold that the building regulations did apply to the work on which the defendants were engaged, relying for that purpose on reg. 4* when read with reg. 2.

I * Regulation 4 reads: “It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him . . .”

Assuming, therefore, that the regulations apply, was there a breach? Counsel for the defendants, in the course of a wholly admirable argument which gave me great help, conceded that if the regulations were applicable the evidence did disclose a breach or breaches. Regulation 22 requires that

"Every working platform from which a person is liable to fall more than six feet six inches shall be—(a) closely boarded, planked, or plated . . ."

On the evidence, this platform was not closely boarded. Regulation 24 (1) provides:

"Subject to paras. (3), (4) and (5) of this regulation, every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided . . . with toe-boards up to a sufficient height being in no case less than eight inches and so placed as to prevent so far as possible the fall of persons, materials and tools from such platform or place."

There were no toe-boards at the material place, and there were gaps.

In my view, it is clearly established that the defendants were in breach of the regulations. That does not decide the matter, because counsel for the defendants went on to contend that, assuming the breach, it was not shown that the breach was in any sense a cause of the fatal injury to the deceased. So far as the breach of reg. 22 is concerned, namely, the failure to provide close boarding, I accept his submission. On the findings which I have made, it is quite clear that that breach was not the cause of the accident, because I have found that the pipe did not descend between the planks. There remains, however, the breach of reg. 24 (1). It is said that nobody saw this pipe roll, and that the absence of toe-boards played no effective part in the unhappy event, but on that issue I was referred to the decision of the Court of Appeal in *Vyner v. Waldenberg Bros., Ltd.* (2). The written judgment of the court was delivered by SCOTT, L.J. After saying that the judge, at the trial, found that there had been a number of breaches by the defendants with regard to both the riving knife and the guard of a circular saw, SCOTT, L.J., said ([1945] 2 All E.R. at p. 549):

" . . . the judge indicated that, if the case stopped there, it would mean judgment for the plaintiff. We agree with him. But we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty. As LORD GODDARD said when presiding in the Court of Appeal in *Lee v. Nursery Furnishings, Ltd.* (3) ([1945] 1 All E.R. at p. 390): 'The only point that has given me some hesitation in this case is whether or not the evidence was sufficient for us to say that it was due to this gap or breach of the regulation that the accident happened. I have already said that one difficulty in the case is the evidence which the young lady gave herself, in which on certain points obviously she was mistaken. In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident. I think here that the evidence is clear enough on one point . . . ' We therefore assume that something unexpected did happen, and that it was that which caused the plaintiff's left hand suddenly to go forward and come into touch with the descending teeth. But that is just the sort of case where Parliament has intended the employer to bear the risk, and it is obviously one which, as Parliament realised, by the practice of insurance is distributed over the cost of the articles supplied and thus enters into the consumer's price."

A Applying the principle laid down in those two cases, it seems to me, not only that it is open to me to find that the breach of reg. 24 was a cause of this accident, but also that I am driven to that conclusion in the absence of any other explanation. I therefore hold that the answer to the third question is that the breach was a cause of this accident, and that, if there had been toe-boards at the material spot, the probability is that the pipe would never have fallen. The claim, therefore, succeeds.

B The question of damages arises. I cannot help saying that there is something artificial in the assessment of money for the benefit of the estate of a young man like the deceased. It is a task which the law imposes on a court. It is difficult to perform, but fortunately, as time has gone on, guidance has been given in the amounts awarded in other cases so as to enable one to form some general idea as to the appropriate standards. I have taken fully into account all that counsel for the plaintiff has said in urging me to award a substantial sum, but in my judgment the appropriate figure in this case is £350, in addition to an admitted liability of £42 6s. 6d. for funeral expenses. There will be judgment for £392 6s. 6d.

D Solicitors: *Rowley, Ashworth & Co.*, Manchester (for the plaintiff); *Geoffrey Warhurst & Co.*, Liverpool (for the defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

E

SMITH v. PORT LINE, LTD.

[COURT OF APPEAL (Denning and Parker, L.JJ., and Roxburgh, J.), March 29, 30, 1955.]

F Dock—Loading and unloading—Signaller to be employed—Crane driver able to see into hold of lighter at relevant time—View of gunwale obscured—Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 43, proviso (i).

Factory—Regulations—Breach—Dock—Signaller to be employed—Crane driver able to see into hold of lighter at relevant time—View of gunwale obscured—Docks Regulations, 1934 (S.R. & O. 1934 No. 279), reg. 43, proviso (i).

G A mobile crane was loading bales into the hold of a lighter alongside a quay. When the crane was facing towards the lighter, i.e., when the rope came over the square of the hold, the driver could see everything in the hold clearly, but, when it turned round towards the quay or lengthways along the quay, his view into the hold and on the gunwale was obstructed by a pillar of the crane. No signaller was provided. During the loading, a lighterman walked along the gunwale and into the arc of the swing of the crane and, without negligence on the part of the crane driver, was struck by a set suspended from the crane, as it slewed round, and suffered injury. The lighterman brought an action against the owners of the crane for damages for breach of statutory duty under reg. 43 of the Docks Regulations, 1934*, to provide a signaller as required by the regulation. The defendants contended that the case fell within proviso (i) to the regulation which excluded the regulation from applying.

I **Held:** the loading of a set into the hold of a barge was within proviso (i) to the regulation if the crane driver had a clear and unrestricted view of the hold at the time when he lowered the set into it; and as, on the facts, the crane driver had such a view at that point of time in the present case the regulation did not apply and the defendants were not in breach of any statutory duty under it.

* The relevant terms of the regulation are at p. 299, letters B and E, post.

Ashworth v. J. McGuirk & Co., Ltd. ([1943] 2 All E.R. 446) distinguished. A
Appeal allowed: cross-appeal dismissed.

[**Editorial Note.** The case is reported on the question of the effect of proviso (i) to reg. 43 of the Docks Regulations, 1934. The crane driver's view of the gunwale and hold were obscured when the crane was slewed towards the quay. The fact, however, that the decision shows that an action for damages for breach of statutory duty under the regulation will not lie, where a barge is being loaded, if the accident happens to a man on the quay or a gunwale, provided that the crane affords the driver a clear view of the hold of the barge when the crane is facing the hold and lowering goods into it, does not have the consequence that no action for damages for injury by the crane to a man on a quay or gunwale will lie. The consequence is merely that the remedies for such injuries lie in negligence at common law. The crane driver must take reasonable care not to injure people on the quay or gunwale; see per DENNING, L.J., at p. 300, letter A, post. B

For the Docks Regulations, 1934, reg. 43, see 8 HALSBURY'S STATUTORY INSTRUMENTS 172.] C

Case referred to: D

- (1) *Ashworth v. McGuirk (J.) & Co., Ltd.*, [1943] 2 All E.R. 446; [1944] K.B. 1; 112 L.J.K.B. 641; 169 L.T. 308; 2nd Digest Supp.

Appeal and Cross-Appeal.

The defendants, who were owners of a mobile crane, appealed and the plaintiff, a lighterman, cross-appealed, against a judgment of DEVLIN, J., dated Jan. 21, 1955, for the plaintiff in an action for damages for negligence and for breaches of the Docks Regulations, 1934, reg. 43. The plaintiff alleged that, as a result, inter alia, of the failure to have a signaller stationed to direct the operator of the crane under reg. 43, the plaintiff was struck by a set suspended from the mobile crane and injured. DEVLIN, J., held that there was no negligence on the part of the defendants, or the crane driver, their servant, at common law, but that there was a breach of reg. 43 of the Docks Regulations, 1934: but he found the plaintiff guilty of contributory negligence and gave judgment for the plaintiff for £1,814, i.e., one half of the damages, which he assessed at £3,000 with £628 special damages. The defendants appealed, and the plaintiff cross-appealed against the finding that the defendants by their servant were not negligent. E

Montague Berryman, Q.C., and *W. G. Wingate* for the defendants. F
C. J. A. Dougherty, Q.C., and *I. F. Reuben* for the plaintiff. G

DENNING, L.J. : This case raises a question as to the proper conduct of cranes in the docks. An accident took place on July 17, 1952, in the London Docks, in the following circumstances. A lighter was alongside the quay being loaded with sacks of wool. A mobile crane was on the quay picking up bales and transferring them into the lighter. The after part of the barge was filled with these bales and the forward part had yet to be loaded. The lighterman in charge of the lighter was Mr. William David Smith. He was standing at the stern, when he had occasion to go forward. He walked along the gunwale, and talked to some of the men who were down in the lighter receiving the bales. His object was to tell them to take one of the bales and fill up a space in the after part. As he was talking to them, the crane slewed round, and struck him. He was standing in the very arc of the crane. He was thrown into the barge and was injured. He now brings this action against the owners of the crane, claiming, first, that their crane driver was negligent; secondly, that the crane was not suitable for the work; thirdly, that there was a breach of the Docks Regulations, 1934, reg. 43, because no signaller was employed. H

I

- A [HIS LORDSHIP referred to the evidence, held that there was no ground for holding that the crane driver was negligent, or that the defendants were negligent in that the crane was not suitable for the purpose for which it was being used, and continued:] The third issue raises a question of general importance. DEVLIN, J., has held that, under the Docks Regulations, 1934, a signaller should have been employed, and that on that account the defendants should be held liable. If that decision is right, it means that signallers will have to be employed on nearly every occasion when barges are loaded or unloaded in the ports of this country.
- B

It all depends on reg. 43. The operative words are these:

- C "When cargo is being loaded or unloaded by a fall at a hatchway, a signaller shall be employed, and where more than one fall is being worked at a hatchway, a separate signaller shall be employed to attend to each fall."

- (I stop to say that the word "hatchway" is defined in the definitions clause in the regulations as meaning the whole space within the square of the hatches from the top deck to the bottom of the hold.) Subject to the proviso, infra, those operative words apply to all the ships, great and small, which come to the ports of this country. The object is clear. When ships are being loaded and unloaded by cranes, the load or set goes into the hold below the deck out of the sight of the crane driver so that he cannot see what is happening. In those circumstances, this regulation requires that a signaller shall be employed. There must be a man to give signals to the driver to tell him when to raise or lower, and
- D
- E give any other proper direction.

But there is a proviso dealing with barges and lighters:

- "Provided—(i) that this regulation shall not apply in cases where a barge, lighter or other similar vessel is being loaded or unloaded if the driver of the crane or winch working the fall has a clear and unrestricted view of those parts of the hold where work is being carried on."
- F
- The object of that exception is clear. It is this. In the case of a barge or lighter, which is little more than one large hold, one need not have a signaller if the driver has a clear and unrestricted view of those parts of the hold where work is being carried on. In other words, if he can see where the set is going within the hold, he need not have a signaller, for the very good reason that the crane driver himself can see what is happening and can take steps accordingly for the safety of the men. In the great majority of barges and lighters, the crane driver can see into the hold and see all that is going on, so that a signaller is not necessary. That is the reason for the proviso.
- G

- The judge has held that this proviso does not apply unless the crane driver has a clear and unrestricted view, not only of the hold itself, but also of any adjoining places where people are likely to be, either approaching the danger area, or going from it, such as, for instance, the gunwale or the quay. This crane was so constructed that, when it was facing towards the lighter, taking cargo into or out of the hold, the driver could see everything in the hold quite clearly: but, when it was turned round towards the quay or lengthways along the quay, the driver could not then see everything in the hold or anyone on the gunwale, because there was a pillar on the crane which obstructed the view. The judge held that this meant that the proviso did not apply and that there ought to have been a signaller.
- H
- I

I cannot agree with the judge's interpretation of the proviso. In my judgment all that is necessary in order to bring the proviso into play is that the crane driver should have a clear and unrestricted view of "those parts of the hold where work is being carried on". I think this means only the hold itself, and not the adjoining places like the gunwale or the quay. The effect of the proviso is that the crane driver when he brings the crane round facing the lighter, ready to

raise or lower the set, must have then a clear and unrestricted view of the square of the hold where work is being carried on, and he must keep that view for all the time that the crane is facing that way. So long as he has such a view, he can work on his own without a signaller. In working the crane, he must take all reasonable care of people who may be on the gunwale or on the quay, but that is a duty imposed by the common law and not by the regulations. A

On the evidence including the photographs, it is quite clear that this crane driver, whenever the rope came over the square of the hold, had a clear and unrestricted view of all the parts of the hold where work was being carried on. The proviso was therefore satisfied. There was no need for a signaller and there was no breach of the regulations. My conclusion is that there was no fault on the part of the defendants or their driver, but the sole fault was that of the plaintiff himself. B
The appeal should be allowed and the cross-appeal dismissed. C

PARKER, L.J. : I agree with all that my Lord has said, and I would only add this. The main body of reg. 43 is perfectly general in its terms—a signaller must be employed to attend to each fall at a hatchway. The proviso, however, excuses the provision of a signaller in the case, *inter alia*, of a barge, if, and only if,

“ the driver of the crane or winch working the fall has a clear and unrestricted view of those parts of the hold where work is being carried on.” D

That immediately raises two questions:—(i) Of what must the driver have a clear and unrestricted view ? (ii) At what point or points of time must he have such a view ? In regard to the first question, it seems to me that the words themselves are explicit, viz., that he is to have a view of those parts of the hold where work is being carried on. No doubt this is intended to embrace, not only the very spot where the set goes down on to the bottom of the hold, but a reasonable area around, where the men in the hold will be; but I find it impossible to extend the area beyond that. No doubt it could have been provided, and it might well have been reasonable to provide, that the driver should have a clear and unrestricted view, not only of the part of the hold that was being worked, but of the whole area which might form a danger area in the course of the whole operation of taking up the sets from the quay and lowering them into the hold; but the words here seem to me to confine the area, as I have said, to that part of the hold which is being worked. I also think that a consideration of the main body of the regulation is decisive of the point. A signaller is required when a fall is worked at a hatchway, not elsewhere. If the loading was on deck, or from deck, no signaller would be necessary under this regulation, but it is only when the cargo is being loaded or unloaded by a fall at a hatchway. Accordingly, when one comes to the proviso, it seems to me that it would be natural to provide that a signaller is not required when the driver has a view down the hatchway. That is all that the regulation and the proviso is concerned with. E F

Again, as regards the second point, it seems to me that, in this context, the point of time at which the driver is to have a clear and unrestricted view is when the part of the hold in question is about to become, or has become, a danger area; or in other words, once the set on the sling on the fall is over the hatchway. It seems to me that, to provide for the driver to have a clear and unobstructed view of the hold when he has got his back to it, and is perhaps taking up cargo from the quay, would be perfectly idle; and, again, I think a reference to the wording of the main body of the regulation assists this interpretation, because, as I have said, the point of time and place is shown by the words: “ when cargo is being loaded or unloaded by a fall at a hatchway ”. In other words, I think that this proviso is considering only the safety of the men working in the hold, and not all of the men, wherever they may be, who are connected with the process of loading or unloading. If the safety of those in the hold is adequately provided for through the driver having a clear and unrestricted view, the regulation does not apply. G H I

- A If that is correct, then it seems to me to be clear on the facts of this case that there has been no breach of the regulation. Once the point of time is reached when the set becomes situated over the hatchway, the driver will have slewed his crane and will have a clear and unobstructed view through the front window, and not through the front window plus the side window, or plus the small slit of window which also faces towards the front. Accordingly, in my view there has
- B been no breach of the regulation, because the regulation itself, by reason of the proviso, does not apply.

- C Counsel for the plaintiff referred us to the decision of this court in *Ashworth v. J. McQuirk & Co., Ltd.* (1). In that case a man, a docker, engaged in unloading on the quay, was injured when sacks from a sling were brought from a ship and lowered on to the platform where he was working, and there was no signaller there at the time. It was assumed that there had been a breach of the regulation in that there was no signaller, despite the fact that cargo was not at the time being loaded or unloaded by a fall at a hatchway, but in fact on the quay. It was assumed that the regulation applied. The argument dealt merely with the question of whether the defendants had fulfilled their obligation by entering into a contract of employment with a signaller, or whether it was
- D necessary, in order that they should fulfil their obligation, for them to secure that a signaller was there at all times. In my view that decision did not deal with this point, and the matter was not argued.

- E So far as the cross-appeal is concerned, I have nothing to add to what my Lord has said, and accordingly, I would allow the appeal and dismiss the cross-appeal.

ROXBURGH, J. : I agree.

Appeal allowed. Cross-appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Botterell & Roche* (for the defendants); *Bryan O'Connor & Co.* (for the plaintiff).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

QUELCH v. PHIPPS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pearce, J.J.), April 28, 1955.]

Street Traffic—Accident—Failure to report—Passenger falling from omnibus—Omnibus not at authorised stopping place—Accident “owing to the presence of a motor vehicle on a road”—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 22 (1).

By the Road Traffic Act, 1930, s. 22: “If in any case, owing to the presence of a motor vehicle on a road, an accident occurs . . .” the driver of the vehicle must, in certain circumstances, report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence of the accident.

The respondent, a bus driver, slowed down at a road junction as the traffic signals were at red. Before he stopped, the signals changed to green. A passenger waiting to get off the bus, notwithstanding warnings by the conductor, stepped off the platform as the bus was crossing the junction and fell and injured himself. When the bus stopped at the authorised stopping place the other side of the junction, the conductor told the respondent about the accident. The respondent did not report the accident to the police, but the conductor did so more than twenty-four hours later.

Held: on the true construction of s. 22 (1) the section did not apply unless there was some direct connection between the motor vehicle and the happening of the accident; on the facts, the accident occurred owing to the presence of a motor vehicle on a road and, therefore, the enactment applied and the respondent was under a duty to report the accident.

Appeal allowed.

[As to the duty to report a road accident, see 31 HALSBURY'S LAWS (2nd Edn.) 675, para. 998.

For the Road Traffic Act, 1930, s. 22, see 24 HALSBURY'S STATUTES (2nd Edn.) 595.]

Case referred to:

- (1) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the justices for the City of Oxford in respect of their adjudication as a magistrates' court sitting at Oxford. On Dec. 7, 1954, the appellant Leonard Quelch, preferred an information against the respondent, Harry Dennis Phipps, charging that on Nov. 14, 1954, in the City of Oxford, he being then a person driving a certain motor vehicle, namely, an omnibus, and an accident having then occurred whereby injury was caused to a certain person named Aubrey Kingsmill Brown owing to the presence of the motor vehicle on a road there called High Street, and that not having given his name and address to any person having reasonable grounds for so requiring, he did not report the accident at a police station or to a police constable within twenty-four hours of the occurrence thereof, contrary to the Road Traffic Act, 1930, s. 22. The information was heard on Dec. 23, 1954, and the following facts were found. At about 7.20 p.m. on Nov. 14, 1954, the respondent was driving an omnibus on High Street, Oxford. The omnibus slowed down as it approached the junction of High Street and Longwall Street, because the traffic signals at the junction were red, but the omnibus did not stop at the traffic signals because they changed to green before it was necessary to do so. While the omnibus was proceeding across the junction, a passenger, notwithstanding warnings by the conductor, stepped off the platform and fell forward onto the road, thereby injuring his right knee and sustaining a bruise and a cut over his right eye. The omnibus stopped at an authorised stopping place about sixty yards beyond the traffic

A lights, where the conductor informed the respondent that a passenger had sustained a cut over one eye. The conductor then walked back to the scene of the accident and took the passenger home, but did not give him his own or the respondent's name or the number of the omnibus. The respondent did not see or speak to the passenger at or immediately after the time of the accident, and did not know an accident had occurred until told about it by the conductor at the stopping place. At about 9.0 a.m. on Nov. 16, 1954, the conductor reported the accident at the Oxford City police station. The respondent failed to report the accident at a police station or to a police constable within twenty-four hours of the occurrence.

It was contended on behalf of the appellant that the respondent was a driver for the purposes of the Road Traffic Act, 1930, s. 22, that he knew an accident had occurred in which a person had been injured and that, in the circumstances, it was his duty to report the accident which was attributable to the presence of the vehicle on the road, by virtue of s. 22 (2), he having failed to comply with s. 22 (1). It was contended on behalf of the respondent that the accident occurred as a result of the passenger alighting, despite the conductor's warnings not to do so, and not owing to the presence of a motor vehicle on the road, and that such an accident was not an accident which a driver was under a duty to report under s. 22 (2). The fact that the respondent had no personal knowledge of the accident at the time thereof, and did not know of it at all until told of it by the conductor at the next stop was relied on.

The justices were of the opinion that, whilst in the ordinary meaning of the word this was undoubtedly an accident, and also that, in the widest possible sense of the words, it could be contended that it occurred owing to the presence of the motor vehicle on the road, it was not an accident within the meaning of the section. They were of the opinion that "accident", within the meaning of the section, was an accident involving some kind of collision, either between two vehicles or between a vehicle and a person or animal, and the occurrence under consideration in the present case was, in essence, no different from the case of a would-be passenger who might run after an omnibus in a futile attempt to board it whilst it was on the move, and who, in the process, fell down and injured himself in the road. They were further of the opinion that the section, being a penal section, must be construed strictly, and that any doubt in its construction must be resolved in favour of the respondent. They, therefore, dismissed the information and the appellant now appealed.

F. Whitworth for the appellant.

M. R. Nicholas for the respondent.

LORD GODDARD, C.J. : This is a Case Stated by justices for the City of Oxford. The charge is based on s. 22 of the Road Traffic Act, 1930, which provides:

"(1) If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle. (2) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, he shall report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence thereof."

[His LORDSHIP stated the facts and continued:] We have to see whether or not that sort of accident comes within the words of the section. If it does, an

offence has been committed. The justices would, I have no doubt, grant an absolute discharge in a case of this sort. Section 22 (1) says: A

“ If in any case, owing to the presence of a motor vehicle on a road, an accident occurs . . . ”

As a matter of construction the only thing which we can possibly lay down is this, that there must be some direct, not indirect, cause or connection between the motor vehicle and the happening of the accident. There would not be a sufficient connection, I think, to take the trenchant illustration given by PEARCE, J., that, if a person about to cross a road sees a motor car coming, changes his mind and steps back instead of going on, and happens to knock down a pedestrian, in such a case the accident is nothing to do with the driver of the motor car. Here the accident happened owing to the man getting off the bus. He got off the bus while it was in motion and, although no one suggests that the respondent was in any way to blame and that this man has any cause of action against the owners of the omnibus, yet it is impossible to say that the accident did not occur owing to the presence of a motor vehicle on the road. It was a case of a man getting out of a motor vehicle on the road. B C

The Case must, therefore, go back to the justices with an intimation that the case was proved. To prevent any further discussion on the matter, or possibility of a further Case in a matter of this sort, it seems to me clear that the doctrine we laid down in *Harding v. Price* (1) does not apply. In that case we said that if a person genuinely did not know that an accident had occurred because it occurred behind the driver or behind the car, the section did not apply. The driver must, at any rate from a common-sense point of view, know that the accident occurred and in most cases would know. In this case the respondent did know; he knew it had happened immediately after it happened because his conductor told him. Therefore, I think there was a duty to report. Whether Parliament envisaged such a case as this is another matter, but I do not think we can limit the words in this way, and, with some regret, we must allow this appeal. D E

HILBERY, J. : I, too, think that it is impossible for us to limit the words of s. 22 (1) in the way in which the justices sought to limit them. The words of s. 22 (1), which my Lord has already stated are: F

“ If in any case, owing to the presence of a motor vehicle on a road, an accident occurs . . . ”, G

then the driver shall report the accident within twenty-four hours. The justices sought to limit those words “ owing to the presence of a motor vehicle on the road ” as they said, to an accident involving some kind of collision whether between two vehicles or between a vehicle and a person or animal. There is no real ground for putting that limit on the words. The limit which I should have thought must be put on the words is only this, that they indicate that the presence of the motor vehicle on the road must be something more than a mere *sine qua non*, that there must be a cause or connection between the accident and the presence of the motor vehicle on the road. H

For those reasons, I agree with the judgment proposed by my Lord.

PEARCE, J. : I agree. I

Appeal allowed. Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. J. A. Astley*, Oxford (for the appellant); *Pattinson & Brewer*, agents for *Cecil Bartram & Rogers*, Oxford (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

KNOTT v. KNOTT.

[WINCHESTER ASSIZES (Sachs, J.), March 28, 29, 30, 1955.]

Divorce—Cruelty—Coitus interruptus—Frustration of maternal instinct.

The husband and wife were married in 1942. The wife was then not quite seventeen and the husband was twenty-two years of age. She was of a sensitive disposition, more liable than most people to be affected by events, and greatly wanted to have children. The husband was insensitive to the point of recklessness and did not want children. After marriage the husband and wife had no home of their own but lived with her parents; there were long separations between the spouses due to the war, from which the husband returned in 1945. During the ensuing years the husband often acted in an aggressive manner towards the wife and there were quarrels between them. In 1946 the wife was ill with tuberculosis. In 1953 the husband left the wife who refused to follow him and continued to live at her parents' home. By that time she was in a poor state of health. Throughout substantially the whole period of the marriage the husband had withheld full sexual intercourse and had practised coitus interruptus against the wife's will. The husband had received no warning from any doctor that the continuance of this practice would injure the wife's health. The wife petitioned for a divorce on the ground of cruelty.

Held: the husband's conduct, viewed as a whole, amounted to cruelty and, further, the refusal by the husband to allow his wife to have a child and the practice of coitus interruptus in disregard of whether it injured her health or not, coupled with apparent injury to her health resulting therefrom, amounted to cruelty even though the husband had not been warned by doctors of the potential result of the unnatural practice.

Per CURIAM: for a man deliberately and without good reason permanently to deny to a wife who has a normally developed maternal instinct a fair opportunity of having even a single child is of itself cruelty when injury to her health results and when the husband adopts a course of conduct which preserves to himself a measure of sexual enjoyment (see p. 309, letter F, post).

[**Editorial Note.** In three reported cases where petition has been made for divorce on the ground of cruelty based on the practice of coitus interruptus (*White (otherwise Berry) v. White*, [1948] 2 All E.R. 151; *Walsham v. Walsham*, [1949] 1 All E.R. 774; *Cackett (otherwise Trice) v. Cackett*, [1950] 1 All E.R. 677) there has been evidence that the husband has been warned by doctors of potential injury to the wife's health resulting from a continuance of the practice. In the present case that element is lacking, but the court considered it sufficient to establish cruelty that in continuing the practice and refusing to let the wife have children the husband acted without regard to the effect of his conduct on her health and knowing that her health was in fact deteriorating from one cause or another, as distinct from having acted with knowledge that the practice of coitus interruptus would injure her health.

Distinction has been drawn as regards cruelty as a ground of divorce between cases where the husband was unwilling to have children and where the wife was unwilling; the present case may accordingly be compared with *Forbes v. Forbes* (see p. 311, post) where it was the wife who was reluctant.

As to cruelty in relation to divorce, see 10 HALSBURY'S LAWS (2nd Edn.) 650, para. 955; and for cases on the subject, see 27 DIGEST (Repl.) 299, 2439-2441.]

Cases referred to:

- (1) *Galler v. Galler*, [1954] 1 All E.R. 536; [1954] P. 252; 118 J.P. 216.
- (2) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.
- (3) *White (otherwise Berry) v. White*, [1948] 2 All E.R. 151; [1948] P. 330; [1948] L.J.R. 1476; 27 Digest (Repl.) 281, 2258.

- (4) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 27 Digest (Repl.) 338, 2804. A
- (5) *Synge v. Synge*, [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; 27 Digest (Repl.) 446, 3781.
- (6) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest (Repl.) 280, 2253.
- (7) *Fowler v. Fowler*, [1952] 2 T.L.R. 143; 3rd Digest Supp. B
- (8) *Bravery v. Bravery*, [1954] 3 All E.R. 59.
- (9) *Walsham v. Walsham*, [1949] 1 All E.R. 774; [1949] P. 350; [1949] L.J.R. 1142; 27 Digest (Repl.) 299, 2440.
- (10) *Cackett (otherwise Trice) v. Cackett*, [1950] 1 All E.R. 677; [1950] P. 253; 27 Digest (Repl.) 281, 2259.
- (11) *King v. King*, [1952] 2 All E.R. 584; [1953] A.C. 124; 3rd Digest Supp. C
- (12) *Cooper v. Cooper*, [1954] 3 All E.R. 415; 119 J.P. 1.
- (13) *Ivens v. Ivens*, [1954] 3 All E.R. 446.
- (14) *Lang v. Lang*, [1954] 3 All E.R. 571.
- (15) *Hadden v. Hadden*, (1919), *The Times*, Dec. 5.

Petition for divorce.

The wife petitioned for a divorce on the ground of the husband's cruelty. The facts appear in the judgment. D

Conrad Oldham and Deirdre McKinney for the wife.

L. Brooks for the husband.

SACHS, J. : In this case the parties were married on Dec. 26, 1942. The husband was then twenty-two years of age, and in the army, and the wife was then very young, not quite seventeen. There is no issue of the marriage. At that time, according to the evidence, the wife was a happy, healthy and lively young girl. At the outset her husband, being in the army, was not with her all the time; she saw him only on his leaves and those leaves were spent at the wife's parents' house where they had a bedroom, and had to share the other accommodation. In June, 1944, the husband took part in the Normandy operations and in July, 1944, he was captured as a prisoner of war. In April, 1945, he was released and came home. In August that year the wife had to go into Linford Hospital with tuberculosis, and was there for some eight months. In May, 1946, she came out and came back home. Then ensued a period of some seven years until March, 1953, when the husband left the wife's parents' house, and the wife refused to follow him. Now as regards the wife's state of health at the time the marriage broke up the evidence shows that she was, so far as nerves were concerned, in a very poor way. She was prone to night-mares, palpitations, and other nerve troubles, and indeed, about that time her state was sufficiently bad for her almost to be carried about, she could not walk properly, and her hands were shaking; she had a great number of the symptoms of nervous trouble. The question here is: was this change in any material degree caused by any act of the husband which could be properly described as cruelty? E

The wife on her side alleges cruelty in three compartments. The first of those compartments alleges matters in relation to their sexual relations, and these allegations are to be found in paras. 7, 8, 10, 14, 16, 17 of the petition. Those paragraphs contain allegations, first, that the husband throughout the marriage would not have normal and full sexual intercourse; secondly, that throughout the marriage in their marital relations the husband practised coitus interruptus against the wife's will; and thirdly, that he would not let her have a child. That is the main outline of the sexual allegations. F

There was a further set of allegations in the petition that the husband acted provokingly and aggressively in the quarrels between them in his criticisms of his wife; and there was a third, and more miscellaneous catalogue of allegations which included meanness and that he was not willing to make a home for himself and his wife in such a way that they could be said to be "on their own". G

- A The wife says that because of all this conduct not only was her health affected but also she became unhappy and could not live with him, and I have no doubt that that was true, and that she was terribly unhappy. Later on, when she was being cross-examined, she said that about the time the husband left the parents' house she did not want to live with him, and that applied to whether it was in her parents' home, or in some other place, or at all. This state of affairs
- B the wife attributes to the husband's cruelty in the way she has alleged in her petition.

The husband's case, on the other hand, is that coitus interruptus only took place after December, 1946. He asserts that the reason for that practice at that time was that he considered it unwise to have children, having regard, in part, to the wife's state of health, and, in part, to the question of tuberculosis.

- C On his side he alleges that the quarrels and difficulties arose substantially because there was no privacy in the house of the wife's parents, and that the household was in fact dominated by the wife's mother. He attributes the symptoms of ill health which the wife was displaying to, in effect, the aftermath of her tuberculosis.

- [HIS LORDSHIP considered the demeanour and testimony of the witnesses, finding that the wife was a sensitive young woman, likely to be submissive and that, on the other hand, the husband was insensitive and careless and reckless as to the wife's wishes. HIS LORDSHIP determined that in all matters of conflict between the testimony of the husband and of the wife he must reject the evidence of the husband and accept that of the wife, regarding that as evidence carrying conviction within the standard required by *Galler v. Galler* (1). HIS LORDSHIP continued:] With that background I turn to the allegations of cruelty themselves. First of all I am going to deal with the category which relates to the allegations of meanness. I accept the wife's evidence that the husband was far from generous, but, to my mind, nothing the wife said established cruelty itself, or anything which could be fairly taken into account with other matters, in the words used by LORD TUCKER in *Jamieson v. Jamieson* (2) ([1952] 1 All E.R. at p. 888) as amounting in the aggregate to cruelty. I am not disposed to regard as constituents of cruelty the allegations that the husband would not form a home for the wife immediately after the wife's return from hospital.
- D
- E
- F

- Next, I turn to examine the sexual allegations. I will then deal with the question of the oppressive quarrels. The wife's inherent characteristics, being very sensitive to atmosphere and being a worrying type, have to be considered in conjunction with the fact that she was emotional, that is, according to the medical evidence, she was one who was liable to have her nervous system affected by events, and to be more affected by them than others would be. I do not understand that to mean that she would give strident effect to her emotions in an hysterical way. She was a young lady whom I regard as submissive, and one who would rather submit than risk a row.
- G
- H

- I have to consider the sexual matters not only in the light of the necessity of any charge having to conform to *Galler v. Galler* (1), but also in the light of the fact that when it comes to marital intimacies one has to act with special care in matters in which corroboration can hardly be expected. The husband was a man who was insensitive to the point of recklessness to the feelings of his wife, a man who did not want children. In that regard I accept the wife's evidence that he neither liked them nor wanted them, and I reject what he said in re-examination. It was, I think, at the very outset of their married life, at a stage when the young wife knew very little about sexual matters—in fact, nothing—that he carried out this practice of coitus interruptus; and I accept the wife's evidence that she never had full sexual intercourse with this man. I also accept the evidence that there were occasions when he would satisfy himself between her thighs. That, then, was the state of affairs, that throughout their married
- I

life the husband could and, in fact did, satisfy himself, and then left his wife unsatisfied and frustrated. Against this state of affairs the wife protested. A

[HIS LORDSHIP reviewed the evidence of the husband and refused to accept that there had been a period of rest from sexual intercourse on the advice of a doctor or that the husband had had fears on the ground of the wife's tuberculosis, but held that the reason why the husband practised coitus interruptus was that he did not wish to have children and that the husband knew of the wife's state of health and yet was prepared to ride rough-shod over her. HIS LORDSHIP continued:] The husband was a man who was disappointed in his wife. I think he was disappointed that she had had this illness, disappointed that she had taken to glasses, disappointed with her lassitude, and that she was not so lively as she had been; and to that was the added irritation of being kept in a house where he no longer wanted to be, and he vented on his wife his resentment at that disappointment and irritation in the form of quarrels against her, and I think to some extent, whether he realised it or not I am not so sure, he took it out of his wife by denying her things and frustrating her maternal instinct. B C

I do not think it is established that it was the lowering of her resistance by the husband's pre-1945 actions which exposed her to tuberculosis. It is possible that it had some slight effect as regards that, but I am not prepared to hold that that was established. On the other hand, it is clear that when the wife came out of hospital she was in a state of arrested tuberculosis, and in that state any play on her emotions, and any undue effect on her nervous state induced by her husband's coitus interruptus or by her being denied a family or by his pressing quarrels on her, would have a bad effect on her, not only of itself in causing a nervous state, but also in lowering her resistance so as to induce a grave risk of further tuberculosis. D E

I am not prepared to accept the husband's evidence that he did not realise that his wife's health was deteriorating before his eyes. He could see that just as well as could his wife's mother, unless he deliberately shut his eyes, and I do not think he did that. He could not have failed to realise that this deterioration had as part of its origin these quarrels I have referred to, quarrels which came after sexual intercourse but such intercourse as was not what she wanted, quarrels which he had pressed to a point where she broke down and began to cry. I will deal separately with coitus interruptus and with the denial of children later. F

I turn to the law. As counsel for the wife has pointed out to me there is a passage in WILLMER, J.'s judgment in *White (otherwise Berry) v. White* (3) ([1948] 2 All E.R. at p. 156, letter A) where the judge stated that a husband must take his wife as he finds her. That has been put in different words by LORD TUCKER in that well-known passage in his judgment in *Jamieson v. Jamieson* (2), where he refers ([1952] 1 All E.R. at p. 887, letter H) to the need in matters of cruelty to judge every act in relation to, amongst other things, the state of affairs implicit in the physical or mental condition or susceptibilities of the innocent spouse. The position in relation to the law of cruelty of the linked problems of unreasonable refusal of sexual intercourse against the will of one of the spouses, the practice of coitus interruptus where one spouse is unwilling or of the use of other devices to avoid the procreation of children against the will of one spouse, is not free from difficulty. Unreasonable refusal of intercourse does not constitute desertion (*Weatherley v. Weatherley* (4)) but was held in *Synge v. Synge* (5) to constitute sufficient cause for one spouse to leave another. The use of contraceptives against the will of one of the spouses does not prevent the marriage from having been consummated (*Baxter v. Baxter* (6)) and if a husband is the unwilling spouse it does not as against him constitute cruelty, even if it endangers his health, in the absence of express intent by the wife to cause him misery (*Fowler v. Fowler* (7) in which DENNING, L.J., indicated the difference between an unwilling husband and an unwilling wife). None the less in *Baxter v. Baxter* (6) it G H I

A is indicated ([1947] 2 All E.R. at p. 892, letter C) that the use of contraceptives may in certain circumstances form a link in the chain for some other claim for relief, which has been interpreted in a later decision* as including reference to charges of cruelty. Again, in *Bravery v. Bravery* (8), in 1954, three judges of the Court of Appeal were of opinion that as against the wife it would be a cruel act for a husband to submit himself to sterilisation without good medical reasons, unless the wife were a consenting party.

B As regards coitus interruptus there are three cases, *White (otherwise Berry) v. White* (3), *Walsham v. Walsham* (9), and *Cackett (otherwise Trice) v. Cackett* (10), in which this practice was held to be cruelty, where practised on an unwilling wife in face of protests to the husband, and where a doctor had warned the husband of the potential ill effect on the wife. In the present case no warning of the likely effects of what he was doing was given to the husband by the doctor, and, in substance, the wife's protests as regards coitus interruptus really related to the fact that she was thus prevented from having children. It was urged by counsel for the husband that even if the husband's actions were the cause of detriment to his wife's health (and so I have held them to be) the husband did not know this was due to coitus interruptus or to his refusal to let his wife have a child. I have earlier indicated that I rejected the husband's evidence as to the wife's deterioration in health not being apparent to him, and I take the view that he was quite well aware that this deterioration was taking place and was in part caused by the quarrels and by the wife not being allowed to have children, and that to that extent it stemmed from his persisting in coitus interruptus.

E I am not prepared to hold that his wife's deterioration in health was due to an active intent to injure his wife. I do hold that in determining to continue with coitus interruptus and in refusing to let his wife have children he was "reckless" of the effect on his wife and that his conduct was "inexcusable", to use the expression employed by LORD NORMAND in *King v. King* (11) ([1952] 2 All E.R. at p. 586, letter F); and I hold that this determination to some degree stemmed from his disappointment in his wife which he thus vented on her.

F If the point is free from authority in the sense that I am entitled to form my own opinion in the same way as a jury would of what, to adopt the words that HODSON, J. used†, "can properly be described by the English word 'cruel' in its ordinary meaning", I would hold that for a man deliberately and without good reason permanently to deny a wife who has a normally developed maternal instinct a fair opportunity of having even a single child is of itself cruelty when injury to her health results and when the husband adopts a course which preserves to himself a measure of sexual enjoyment. In this case the refusal to allow the wife to have a child, and the conduct accompanying it, had been persisting for many years and had all the essential ingredients of permanence. My conclusion is based on the simple ground that such a refusal is a deliberate act contrary to the laws of nature and one which any reasonable husband must realise is likely to affect his wife's health. Permanent and unreasonable starvation of the maternal instinct may, to my mind, be of itself a cruel thing. Nothing in the books seems to preclude me from coming to this conclusion, and both counsel, after due research, have cited no direct authority in point. Indeed I am fortified in the conclusion which I have stated above by the decision in *Bravery v. Bravery* (8), which appears to show that, even though both parties may obtain physical satisfaction, yet, so far as the woman is concerned, the permanent deprivation, against her will, of the opportunity of having children must have been the point leading to the court's unanimous expression of opinion on the issue to which I have referred above.

A fortiori, I consider it to be cruelty where there is a refusal by the husband to

* *Rice v. Raynold-Spring-Rice* ([1948] 1 All E.R. 188).

† In *Cackett (otherwise Trice) v. Cackett* (10) ([1950] 1 All E.R. at p. 681, letters C-D).

allow his wife to have a child and that refusal is accompanied by persistent adoption by the husband of a non-natural form of intercourse, that is coitus interruptus, to which the wife is unwilling. There is the added element, and that a serious one, that injury to the wife's health results from the very practice itself, and is an injury which may be distinct from that caused by starvation of the maternal instinct. Indeed it is injurious to health in a more direct manner than any method of sexual relationship which allows the wife to have all satisfaction short of satisfaction of the maternal instinct. That is the combination of circumstances which has arisen in the present case. A B

The three authorities on coitus interruptus are all cases in which the husband had been affirmatively warned by doctors of the potential results of that practice, but that affirmative warning made it unnecessary for the judges concerned in those cases to consider whether knowledge of potential injury to health could not be imputed from other sources, or to consider the separate question of how far the nature of the act was one which was or was not cruel apart from deliberate intent to inflict misery. It is with that in mind that I look at the reference of WILLMER, J., in *White (otherwise Berry) v. White* (3) to "cold, calculated cruelty" ([1948] 2 All E.R. at p. 156, letter A), and to WALLINGTON, J.'s judgment in *Walsham v. Walsham* (9) where he said ([1949] P. at p. 352; [1949] 1 All E.R. at p. 775): C D

"Some women, however, may be so constituted that their health is not affected by repeated partial intercourse, such as coitus interruptus, while other women . . . enter into the marriage state hoping to fulfil . . . one of the most important functions of matrimony, viz., the bearing of children. When the latter class of women are denied the normal means of child bearing and their sexual functions are abused by frequent coitus interruptus, especially when it follows substantial periods of complete denial of intercourse, their health (both bodily and mental) is likely to be affected. In my opinion the present case falls within the latter category. I am quite satisfied by the wife's evidence that the husband's conduct was such as he was determined to follow, and in fact followed, regardless of what he knew would be the injurious consequences and regardless, also, of her repeated protests and requests that intercourse should be normal and proper. He has, therefore, been guilty of cruelty within the accepted definition of that expression as applied to cases of alleged cruelty in these courts." E F

Further, on this question of express intent I have referred to the recent cases of *Cooper v. Cooper* (12), *Ivens v. Ivens* (13), and *Lang v. Lang* (14). In *Cooper v. Cooper* (12) KARMINSKI, J., in delivering judgment at the request of the President, said ([1954] 3 All E.R. at p. 423): G

". . . the actual intention is . . . a circumstance of peculiar importance because that which is intended hurts more, but that conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty." H

KARMINSKI, J., quotes the following words from the judgment of SHEARMAN, J., in *Hadden v. Hadden* (15):

"I do not question he had no intention of being cruel but his intentional acts amounted to cruelty."

In *Bravery v. Bravery* (8), DENNING, L.J., referred to the act of sterilisation and said ([1954] 3 All E.R. at p. 67): I

"It was, indeed, aimed at her, because it was done so as to prevent her having another child. It was likely to injure her health, and did in fact do so."

In this state of the law it seems open to me to hold that the course of conduct pursued by the husband in the present case in relation to sexual matters was cruel. In my view it did constitute cruelty and that of itself would entitle the wife to a decree.

- A One is not, however, limited to one compartment in this case, or to one single charge of cruelty. I now turn to the quarrels and the question of their effect on the wife's health. The evidence was established that the husband's method of conducting an argument in which he was in the wrong, was one which resolved itself into putting undue pressure on the wife. When the wife was
- B in the witness-box speaking of these matters one got somehow a particularly clear impression of how she felt herself to be overborne and reduced to tears by the way in which he conducted these quarrels: it was a method which the husband clearly realised would result in the wife breaking down under the stress to which she was manifestly subjected. He knew that in her then state of health she must not be subjected to stress, and therefore it seems in those circumstances his acts were inexcusable or unpardonable and so were
- C a cruel form of conduct. They had in fact had the results to which I have referred. It was something in the particular circumstances of this case which differentiates it from the ordinary run of domestic quarrels. Having considered both aspects of the wife's case separately, the proper course is to take them in the aggregate, and to look at the picture as a whole. Doing that I see a wife who greatly desired children, and the conduct of her husband was such that it pressed
- D hard on her, and so pressed that his conduct had results which were visible to him, and by conduct I refer to the various allegations of sexual matters, and also to the quarrels which I have dealt with in some detail previously. He persisted in that conduct, and in my view, taken in the aggregate, there is no doubt that that conduct amounted to cruelty in the common use of that word; accordingly there will be a decree for the wife on her petition.

E *Decree nisi granted.*

Solicitors: *G. A. Mooring Aldridge & Brownlee*, Bournemouth (for the wife); *D'Angibau & Malim*, Bournemouth, agents for *Rothera, Sons & Langham*, Nottingham (for the husband).

[*Reported by* CONRAD OLDHAM, Esq., *Barrister-at-Law.*]

F **FORBES v. FORBES.**

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), April 1, 4, 1955.]

Divorce—Cruelty—Wife's cruelty—Persistent refusal to allow conception of child—Intentional acts of wife—Injury to husband's health.

- G If a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, and the deprivation reduces him to despair and affects his mental health, the wife is guilty of cruelty.

H The parties were married in 1945. Prior to the marriage the wife had never raised any objection to having children, and she knew that the husband was particularly fond of children. After the marriage the wife insisted on the use of contraceptives; at first their use by the husband was reluctantly consented to by him but later the wife herself used them. The husband attempted to persuade the wife to agree to have a family, but she made various excuses and avoided discussion on the subject as far as possible. On occasions she taunted the husband about his desire to have children. By 1950, as a result of the wife's refusal to have normal sexual intercourse, their relationship had become strained. In February, 1953, the wife for the first time definitely refused to have children, saying "No, never, I want to be free to have my liberty". In November, 1953, the parties separated. At that time the husband was in a bad state of health as result of the wife's persistent refusal to have children. On Dec. 28, 1954, the husband presented a petition for divorce on the ground of the wife's cruelty. The petition was

I undefended.

Held: the wife's conduct in insisting on the use of contraceptives and refusing the husband the chance of a child caused injury to his mental

health; her conduct was intentional in that she pursued it although she knew that her persistence was causing him anxiety and misery; accordingly she had been guilty of cruelty and the husband was entitled to a decree: observations of LORD MERRIMAN, and of LORD TUCKER in *Jamieson v. Jamieson* ([1952] 1 All E.R. at pp. 880, 887) applied; *Fowler v. Fowler* ([1952] 2 T.L.R. 143) distinguished.

[**Editorial Note.** This case may be compared with *Knott v. Knott* (p. 305, ante), where the course of conduct pursued by the husband was attributable to his wish to avoid having children. In *Fowler v. Fowler* ([1952] 2 T.L.R. 143) a distinction was drawn between cases where the wish not to have children was the wife's and cases in which that wish was the husband's. In the former class of case the wife's conduct may spring from fear of the consequences to her, and thus may not amount to cruelty owing to the absence of any element of intent aimed against the husband. This distinction remains, although in the present case the evidence was held to justify a finding of cruelty.

As to cruelty on the part of the wife, see 10 HALSBURY'S LAWS (2nd Edn.) 650, para. 955 note p.; and for cases on the subject, see 27 DIGEST (Repl.) 307, 308, 2538-2552; and for cases on the subject of intention presumed from acts, see *ibid.*, 296, 2415, 2416.]

Cases referred to:

- (1) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest (Repl.) 280, 2253.
- (2) *Walsham v. Walsham*, [1949] 1 All E.R. 774; [1949] P. 350; [1949] L.J.R. 1142; 27 Digest (Repl.) 299, 2440.
- (3) *White (otherwise Berry) v. White*, [1948] 2 All E.R. 151; [1948] P. 330; [1948] L.J.R. 1476; 27 Digest (Repl.) 281, 2258.
- (4) *Cackett (otherwise Trice) v. Cackett*, [1950] 1 All E.R. 677; [1950] P. 253; 27 Digest (Repl.) 281, 2259.
- (5) *Fowler v. Fowler*, [1952] 2 T.L.R. 143; 3rd Digest Supp.
- (6) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 1952 S.C. (H.L.) 44; 116 J.P. 226; 3rd Digest Supp.
- (7) *Cooper v. Cooper*, [1954] 3 All E.R. 415; 119 J.P. 1.
- (8) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 27 Digest (Repl.) 366, 3027.
- (9) *Kelly v. Kelly*, (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest (Repl.) 298, 2434.
- (10) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 27 Digest (Repl.) 296, 2415.
- (11) *Hadden v. Hadden*, (1919), *The Times*, Dec. 5.

Petition for divorce.

This was a petition by a husband for divorce on the ground of his wife's cruelty. The petition was undefended.

The parties were married on Nov. 10, 1945, according to the rites of the Church of England. The husband was then twenty-six years of age and the wife was a few months older. From the beginning of their married life she delayed the having of children, at first on the grounds that they should wait until they were older and had a home of their own, as they were then living in her mother's house. The wife insisted on contraceptives being used for marital intercourse; at first they were used, though reluctantly, by the husband, but later the wife used contraceptives herself on all occasions of intercourse taking place. The wife, when putting off the husband's suggestions that they should have children, would at times taunt him with his desire for a family by the use of such phrases as "you only want to prove your manhood" or "didums want to be a father". The husband complained to the wife of her reluctance to have children and constantly endeavoured to persuade her to have a family. By 1950 relations between them had become strained owing to the wife's reluctance to have children. In this year the husband had a short affair with another woman,

A of which the wife was ignorant, but in respect of which the court was asked to exercise its discretion. In February, 1953, the wife first stated a definite refusal ever to have children by the husband. In September, 1953, the wife told the husband that she was going to leave him, and in November, 1953, they separated, he moving to live at Atworth. The wife applied to the magistrates by summons for a maintenance order against the husband on the ground of desertion and wilful neglect to maintain. In these proceedings both parties gave evidence, she maintaining that she had never refused free marital intercourse and stating on oath that she had no fear of childbirth and was prepared to have a child. The husband gave evidence of her abstention from free marital intercourse and refusal to have children. The magistrates held that there had been a refusal of free intercourse by the wife, that the spouses parted by consent, and dismissed the summons. On Dec. 28, 1954, the husband presented a petition for divorce, which was duly served on the wife, who took no action in relation thereto.

J. Stirling for the husband.

MR. COMMISSIONER LATEY, Q.C.: The main ground of the husband's case is that the wife consistently refused to allow free intercourse with the object of avoiding conception, and insisted on precautions which were obnoxious to him, with the result that that course of conduct on her part undermined his health. This court always has to see that cruelty as alleged comes within the well-established definition—that is to say, conduct by the accused spouse of such a character as to have caused damage to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger. The court has to be careful to watch that the range of grounds of divorce is not extended to cover mere incompatibility and such falling away from the ordinary mutual relations of husband and wife as do not come within that definition of cruelty. Nor must one ignore the fact that in undefended suits the court usually hears only one side of the case. Having heard the evidence and the extremely useful and able arguments of counsel, and having considered the authorities cited, I have come to the conclusion that the husband has established his case. [HIS LORDSHIP stated the facts and referred to the proceeding before the magistrates, saying that it was essential in a case like the present to become acquainted with all the circumstances available and that he had therefore admitted the shorthand transcript of those proceedings as evidence, and continued:] The issue before me now is not quite the same as the issues which the magistrates had to decide, but nevertheless the question of the refusal of the wife to render ordinary intercourse and to make possible conception was fully ventilated before them. In substance the husband gave the same evidence on that point as he has in this court. Among other things he said that he gave his wife ample opportunity of joining him in his flat at Atworth. The wife's story, put shortly, was that she never refused free intercourse and in fact it often took place. She maintained that her husband was under-sexed, though she was not, and that he was lacking in affection to her. She said that she was prepared to have a child and had no fear of childbirth. The magistrates held that there was a refusal of intercourse by the wife, and an eventual agreement to separate, and they dismissed the summons.

I The husband presented his petition on Dec. 28, 1954, and the petition clearly set out the case which has been elaborated at considerable length in evidence. It was duly served on the wife, and she has not thought fit to take any action whatever. In a case like the present I do not think there is much doubt that she could have secured security for costs of any defence. Although she has not thought fit to take any action, that does not necessarily mean that she has not got a case; but her case was fully presented at the magistrates' court. There the magistrates had the advantage of seeing both parties, and it is obvious from their decision that they accepted the husband's story and not the wife's.

I have seen the husband only, and I am satisfied that I can believe every word he says. I am satisfied that he has not exaggerated his case and that he has told the truth, not only about his wife's attitude but also about the reaction on his own well-being. The husband told me that he had got into a bad state of health, but that the tension under which he had been living gradually diminished after the final parting with his wife in the autumn of 1953. For this I had the corroboration of his sister, and of his landlord, who described the husband's tense and emotional state when he first went to Atworth. The husband's solicitor described the husband's distraught condition during the proceedings before the magistrates, how he broke down and wept twice and was suffering from a tremendous strain. Apparently the husband did not go to a doctor because when on two occasions the wife suggested that he should see a psychologist owing to his restless condition, he retorted that it was no use as the cause of his condition was manifest to her, as it was to himself.

I am satisfied that the injury to his mental health was caused in the main by the wife's persistent refusal to be a wife to him in the full sense, (i) by her insistence on contraceptives, and (ii) by refusing him the chance of a child. Quite apart from the exhortation in the solemnization of matrimony that, first, Christian marriage was ordained for the procreation of children, I cannot ignore the fact that it is a natural instinct in most married men to propagate the species and to bear the responsibilities and enjoy the comforts of their own children. If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health, I entertain no doubt that she is guilty of cruelty within the definition on which this court always acts.

Counsel has offered me a useful review of the authorities dealing with this matter. The question of the refusal of free intercourse is considered in *Baxter v. Baxter* (1), on an issue of wilful refusal in nullity. There a wife insisted on the use of a contraceptive and the husband reluctantly acquiesced. When he petitioned for nullity on the ground of wilful refusal, it was held that the marriage had been consummated by the process of intercourse employed, but LORD JOWITT, L.C., in his speech said ([1947] 2 All E.R. at p. 892):

"... the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief."

In *Walsham v. Walsham* (2) it was held that a husband's abstention from marital intercourse for varying intervals modified by occasional acts of coitus interruptus contrary to the wife's wish adversely affected the wife's health and constituted cruelty. And there were similar decisions in *White (otherwise Berry) v. White* (3) and *Cackett (otherwise Trice) v. Cackett* (4). In the present case, it is a wife's abstention that is in question, and counsel has drawn my attention to an authority in the Court of Appeal, which on the face of it might seem to run counter to the general proposition which I have just stated, namely, *Fowler v. Fowler* (5). The principle stated in the headnote is this ([1952] 2 T.L.R. 143):

"Where a wife refuses to have children and refuses to have sexual intercourse, except on the understanding that the husband prevents conception, with a consequential injury to the husband's health, the wife is not guilty of cruelty unless her conduct is intended to inflict misery on her husband."

Counsel has dealt with that case in detail. Personally, I do not think that that paragraph conveys the effect of the decision of the judges. In that case, as in the present, the wife refused intercourse except with a contraceptive, and equally it was shown in that case that the husband desired a child. In that case the wife put forward as an excuse for not having a child in the early years the unsettled conditions caused by the war; later having had a womb operation

- A she urged that it was unsafe for her to conceive a child, and still later she changed her mind and claimed that they could not afford a child. The commissioner, His Honour JUDGE ESSENHIGH, held that the husband's "anxiety state" could not be attributed to the wife's attitude, and dismissed the petition. The Court of Appeal held that there was no cruelty unless the wife by her conduct intended to inflict misery on her husband. DENNING, L.J., held (*ibid.*, at p. 148) that such
- B an intention could easily be inferred if a husband took contraceptive measures against the wife's will, but that that was not necessarily so vice versa because a wife's conduct might be attributed to fear of consequences to herself, without any intention to injure her husband.

- C How far intention should be considered an ingredient of cruelty has been discussed recently in a number of cases before the higher tribunals, and I do not propose to traverse this somewhat thorny path. I will content myself with the statement of principles laid down by the House of Lords in *Jamieson v. Jamieson* (6) and so lucidly summarised recently in *Cooper v. Cooper* (7). In the particular passages which seem to me relevant to the present case, LORD MERRIMAN said ([1952] 1 All E.R. at p. 881):

- D "In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. In *Mackenzie v. Mackenzie* (8) LORD WATSON said ([1895] A.C. at p. 409): 'I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent.' Likewise in *Kelly v. Kelly* (9), to which
- E I shall recur later, because it is the leading case in England on the subject of cruelty without physical violence, LORD PENZANCE in his judgment in the full court said (L.R. 2 P. & D. at p. 72): 'He says that he does not desire to injure her, and it has never been asserted that he does.'"

- And then LORD MERRIMAN went on to refer to a citation by TUCKER, L.J., in *Squire v. Squire* (10) ([1948] 2 All E.R. at p. 54) and a citation from a judgment of F SHEARMAN, J., in *Hadden v. Hadden* (11) (quoted by TUCKER, L.J. (*ibid.*, at p. 53)):

" 'I do not question he had no intention of being cruel but his intentional acts amounted to cruelty.' "

- G That, to my mind, is the shortest and clearest way in which any judge has put the principle that is to be acted on. There were other passages, by LORD NORMAND and LORD REID, the former going particularly to support the passage I have read by LORD MERRIMAN; LORD REID perhaps in not quite such a strong way; and there is a passage by LORD TUCKER which seems to me to be very much to the point. LORD TUCKER said ([1952] 1 All E.R. at p. 887):

- H "Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies."

- I There has been a number of cases in which guidance has been given on the question of intention, but in this particular case I find that the wife knew very well what she was doing to her husband in the course of her persisting in evasion and refusal. In *Fowler v. Fowler* (5) both HODSON and DENNING, L.J.J., emphasise the wife's fear of childbirth, and it was also emphasised that the wife was never warned by the husband of the effect of her refusal on his health*. The essential distinction in the present case is that the husband was constantly complaining

* Compare, on this point, *Knott v. Knott*, p. 305, ante.

to her of her course of conduct, and using all reasonable means to change her attitude, and that she was well aware that she was causing him extreme anxiety and misery by her persistence in refusing any opportunity of conception. Knowing his feelings, knowing that the practice she insisted on was repulsive to him, and that his desire for fatherhood had become an obsession, a legitimate obsession, and taunting him as she did, she cannot in my view be acquitted of the intention to pursue her policy of abstention, whatever the result to him. Moreover, as I have already said, she definitely stated on oath in the magistrates' court that she had no fear of childbirth. In those circumstances, I find that the wife has been guilty of cruelty to the husband, and in the exercise of my discretion I pronounce a decree nisi in his favour.

Decree nisi.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. G. Smith & Co.*, Melksham, Wiltshire (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

Re ARNOULD (*deceased*). ARNOULD *v.* LLOYD AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), April 20, 21, 1955.]

Will—Omission—Gift until specified age—Whether absolute gift to be implied.

By his will a testator appointed the plaintiff to be his executor, and after making other specific bequests provided as follows—"All other money belonging to me I wish to be up in trust for my four grandchildren [naming them] until each reaches the age of twenty-five years . . ." It having been held that this disposition constituted a specific and not a residuary gift, the question arose what interests the grandchildren took under the disposition.

Held: a gift of the capital to the four grandchildren would not be implied, because there was no context in the will which required such an implication; accordingly each named grandchild was entitled to an equal share in the income of the property until he or she attained the age of twenty-five years, the income and capital of his or her share then being undisposed of.

Re Hedley's Trusts (1877) (25 W.R. 529) followed.

[As to gifts by implication, see 34 HALSBURY'S LAWS (2nd Edn.) 427-429, paras. 473, 474; and for cases on the subject, see 44 DIGEST 1250, 1251, 1268, 1269, 10777-10790, 10961-10968.]

Cases referred to:

- (1) *Newland v. Shephard*, (1723), 2 P. Wms. 194 (24 E.R. 696); 9 Mod. Rep. 57 (88 E.R. 313); 44 Digest 195, 236.
- (2) *Atkinson v. Paice*, (1781), 1 Bro. C.C. 91; 28 E.R. 1005; 44 Digest 1267, 10946.
- (3) *Peat v. Powell*, (1760), Amb. 387 (27 E.R. 258); 1 Eden, 479 (28 E.R. 771); 44 Digest 1258, 10865.
- (4) *Hale v. Beck*, (1764), 2 Eden, 229; 28 E.R. 886; 44 Digest 1269, 10963.
- (5) *Re Hedley's Trusts*, (1877), 25 W.R. 529; 44 Digest 1268, 10960.
- (6) *Wilks v. Williams*, (1861), 2 John. & H. 125; 5 L.T. 445; 70 E.R. 997; 44 Digest 1269, 10966.
- (7) *Fonnereau v. Fonnereau*, (1745), 3 Atk. 315; 26 E.R. 983; 44 Digest 1268, 10962.
- (8) *Re Tottenham*, (1946), 115 L.J.Ch. 170; 174 L.T. 367; 2nd Digest Supp.

Adjourned Summons.

The plaintiff, Thomas Norton Arnould, applied by originating summons for the determination of the question whether, on the true construction of the will of Herbert Thomas Arnould and of the gift therein contained of all other money belonging to the testator to be up in trust for his four named grandchildren, each of the said grandchildren (a) took a vested interest in the property passing under such gift; or (b) took an interest in such property contingently on attaining the

A age of twenty-five years; or (c) took an interest in the income of such property until he or she attained the age of twenty-five years or died under that age. By his will dated Sept. 5, 1954, the above-named testator, after appointing the plaintiff to be his executor and making certain specific bequests to the first defendant, Annie Maud Lloyd, provided as follows:

B "All other money belonging to me I wish to be up in trust for my four grandchildren: Norton Arnould. Adrian Williams. Garry Bufton and Cheryll Bufton. until each reaches the age of twenty-five years . . ."

The four named grandchildren were the second, third, fourth and fifth infant defendants to the summons respectively. The sixth defendant was the testator's widow. The testator died on Sept. 5, 1954, without having revoked or altered his will which was duly proved by the plaintiff on Nov. 2, 1954.

C G. A. Grove for the plaintiff.

The first defendant did not appear and was not represented.

J. L. Arnold for the second, third, fourth and fifth infant defendants.

H. E. Francis (with him F. W. Mulley) for the sixth defendant.

D UPJOHN, J.: I have now to determine the true meaning of the following short paragraph in the testator's will:

"All other money belonging to me I wish to be up in trust for my four grandchildren: Norton Arnould. Adrian Williams. Garry Bufton and Cheryll Bufton. until each reaches the age of twenty-five years . . ."

E I have already construed the meaning of the phrase "All other money" which having regard to the peculiar definition of the word money to be found in the will I have held to be a specific gift of certain assets forming part of the testator's estate and not a general residuary gift. It is also to be observed that in the original will there is a full stop after the name Norton Arnould, after the name Adrian Williams and after the name Cheryll Bufton; but I do not think that I can treat them as full stops because if I gave them that significance it would make nonsense of the will and therefore I shall treat them as commas.

F The point which I have to determine, which is a point of some difficulty, is whether the words of the paragraph which I have read constitute a gift to these four grandchildren of the income of the money until each attains the age of twenty-five years, the corpus then being undisposed of, or whether the words constitute a gift to them of the corpus of the money on attaining the age of twenty-five years with a gift of the income in trust in the meantime. There is in the will no gift of the corpus to the grandchildren, unless a gift of corpus upon the attainment of twenty-five years is to be implied and the question is, therefore, whether I can imply such a gift.

G There is no doubt that if the court were to have regard to the earlier authorities, and to them alone, the court would not feel any great difficulty in implying a gift of corpus in circumstances such as I have here; but it is equally without doubt that the earlier authorities have subsequently been the subject of not inconsiderable criticism. I do not propose to refer to all of them, for the position in my judgment is sufficiently set out in JARMAN ON WILLS (8th Edn.), vol. 2, p. 682, where the following passage appears:

H "In *Newland v. Shephard* (1), an absolute gift of real and personal estate to the testator's grandchildren was implied from a direction to the trustees to apply the 'produce' and interest for their maintenance and benefit during minority. But the decision has been questioned. In *Atkinson v. Paice* (2), *Peat v. Powell* (3), and *Hale v. Beck* (4), absolute interests were implied from gifts to trustees in trust for A until he should attain twenty-one. But these three cases seem to be of doubtful authority. In *Re Hedley's Trusts* (5) a testatrix gave her residue to a trustee upon trust for her daughter till she should attain the age of twenty-one or marry, and it was held by HALL, V.-C., that there was no implied gift of the capital to her."

I

The first authority which I propose to examine is that of *Wilks v. Williams* (6), which was strongly relied on by counsel for the second, third, fourth and fifth defendants in support of his submission that there was in this case a gift of corpus to the grandchildren. The headnote reads as follows (2 John. & H. 125):

"Testatrix, having by her will directed the trustees, who were also the executors of her will, to invest the residue of her property in the funds, left the interest to two nieces to be paid to them half-yearly, and, at their decease, 'the half-yearly dividends to be continued to their children till they came to the age of twenty-one years'. She then 'constituted and appointed' the said executors trustees for the said nieces and their children. All the children of a deceased niece had attained twenty-one. Held, that they were entitled absolutely to the moiety given to her for life."

SIR WILLIAM PAGE WOOD, V.-C., after expressing some doubts as to the correctness of the decision in *Newland v. Shephard* (1) in discussing *Fonnereau v. Fonnereau* (7), said this (2 John. & H. at p. 129):

"Here the testatrix desires her trustees to invest the principal money, constituting the residue of her property, in the funds. She then leaves the interest to her nieces, Fanny Williams and Rebecca Wilks, to be paid to them half-yearly. At their decease 'the half-yearly dividends are to be continued to their children, till they come to the age of twenty-one years'. And then comes this passage: 'I constitute and appoint Benjamin Hill and George Dace trustees for the said Fanny Williams and Rebecca Wilks and their children'; and the testatrix appoints Hill and Dace executors of her will. That is much stronger in favour of the construction, for which the plaintiffs contend, than anything in *Newland v. Shephard* (1). In *Newland v. Shephard* (1) there was a mere devise upon trust for the grandchildren until twenty-one. But here the testatrix directs all the residue of her property to be invested by Hill and Dace; she places the whole of that residue in their hands, and then constitutes and appoints the said Hill and Dace 'trustees' (trustees, that is, of the entire residue) 'for the said Fanny Williams and Rebecca Wilks, and their children'. It is clear that, upon these words alone, without the intermediate bequest of the dividends until the children should attain twenty-one, there would have been an absolute gift for the testatrix' nieces and their children. In an independent sentence the testatrix appoints Hill and Dace executors of her will. In the absence of the clause constituting them trustees for the nieces and their children it would have been their duty to pay the dividends, as directed, until the children attained twenty-one. The insertion of that clause, therefore, must be looked upon as emphatic, and as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue."

So here, argues counsel, the expression "I wish to be up in trust" means that the capital was to be held in trust until the children respectively had attained the age of twenty-five years and then it was to be transferred to them.

The next case is *Re Hedley's Trusts* (5). The headnote is as follows (25 W.R. 529):

"A testatrix, after directing payment of debts and legacies, gave all the residue of her estate and effects to a trustee upon trust for her daughter till she should attain the age of twenty-one years or marry, whichever should first happen, and appointed the trustee sole executor of her will. Held, that there was no implied gift of the capital to the daughter on her attaining twenty-one or marrying."

SIR CHARLES HALL, V.-C., begins his judgment in this way (*ibid.*, at p. 530):

"I do not think, in the present state of the authorities, I can hold that there is enough to give the capital fund beneficially to this person after attaining the age of twenty-one years or marrying. But for authority there

A could not be a doubt suggested. In the present mode of construing wills, we must take the words as we find them, and give effect to them; we must not guess at them or create complications. The fund is given to the trustee, and the only way of giving it to limit his interest to correspond with the interest of the petitioner until attaining the age of twenty-one years, would have been to give it until the child attained twenty-one or married. But that would be inconsistent with the provisions before me for paying debts and capital sums out of it, which is a sufficient reason to account for the corpus being vested in the trustees. That distinguishes it from anything that has been referred to."

B The learned Vice-Chancellor then criticised *Newland v. Shephard* (1) and pointed out that in the case before him it was a trust of residuary real and personal estate and he was being asked to disinherit one of the co-heiresses. He then examined the later authorities, saying that there was some peculiar circumstance in every one of them and after examining *Peat v. Powell* (3) and *Hale v. Beck* (4) he dealt with *Wilks v. Williams* (6) to which I have already referred and he quoted the passage from the judgment of SIR WILLIAM PAGE WOOD, V.-C., which I have already cited (2 John. & H. at p. 129). He continued (25 W.R. at p. 530):

C "Upon that I make this observation—that the Vice-Chancellor seems to have relied for his judgment upon that ultimate part, apparently not being willing to rely on or considering, as far as I can see, that without that ulterior clause he could hold a mere direction to pay income till twenty-one as amounting to a direction to pay the income till twenty-one upon trust, and as from that time, though not so expressed, by implication a trust for the person after attaining twenty-one. It seems to me that I must really give effect to what is now well settled as the rule of construction:—not to insert words or employ words which are not to be found, but to give effect to the clear ordinary meaning of the terms implied. So construing this will, there seems to be nothing in it whatever in the shape of beneficial interest except to the person named, and for her benefit, until attaining twenty-one."

F That case was cited to WYNN-PARRY, J., in *Re Tottenham* (8). The learned judge says this (174 L.T. at p. 368):

G "The matter appears to me ultimately to be one purely of construction. Mr. Wigglesworth has referred me to a convenient statement of the general principle which must guide the court in such matters as this, which appears from the judgment of HALL, V.-C., in *Re Hedley's Trusts* (5). It appears quite clearly from the Vice-Chancellor's judgment that the court is not entitled to depart from the strict letter of the will, unless there is some context to enable the court to do so."

H In the will before WYNN-PARRY, J., there was ample context which compelled him to come to the conclusion that a gift of corpus was intended although not so expressed.

I In that state of the authorities, I think it is my duty to apply the ordinary rule of construction, and that is that I must not insert or read into the will words which are not there unless the context requires me to do so. Applying that principle, it seems to me that I cannot, without doing violence to the language the testator has used, imply a gift of corpus to these four grandchildren. It is quite true that there are certain elements of distinction between this case and *Re Hedley's Trusts* (5). This was a specific gift and not a gift of residue; there is no question of disinheriting the heir, but the gift will be undisposed of. In principle, however, although I have a strong suspicion that I am not carrying out the real intentions of the testator, it seems to me that he has not used language which is appropriate to carry a gift of corpus to the grandchildren and I must declare accordingly.

[After further discussion, HIS LORDSHIP indicated that he would make a declaration to the effect that on the true construction of the will each of the grandchildren took an equal share in the income of the property until each attained the age of twenty-five, and that when any grandchild attained that age, the income and capital of his share became undisposed of. HIS LORDSHIP gave liberty to apply in the event of any grandchild dying under the age of twenty-five years.]

Declaration accordingly.

Solicitors: *Ward, Bowie & Co.*, agents for *Scobie & Beaumont*, Hereford (for the plaintiff); *T. D. Jones & Co.*, agents for *D. J. Treasure & Co.*, Blackwood (for the second, third, fourth, fifth and sixth defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

JOHN W. GRAHAME (ENGLISH FINANCIERS), LTD. v. INGRAM AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.JJ.), April 21, 1955.]

Moneylender—Memorandum—Loan to joint and several borrowers—Copy of memorandum sent to only one borrower—Moneylenders Act, 1927 (17 & 18 Geo. 5 c. 21), s. 6 (1).

The three defendants and one W.G. jointly and severally borrowed the sum of £100 from the plaintiffs, who were licensed moneylenders, and on Aug. 25, 1952, each of the four signed a memorandum of the contract and a promissory note promising to pay that sum and interest thereon. Two days later the plaintiffs sent a copy of the memorandum to W.G., and they also sent a second copy to him with the intention that he should pass it on to E.I., one of the defendants. E.I. did not receive a copy of the memorandum within seven days of the making of the contract, and the other two defendants never received a copy. After the death of W.G., the plaintiffs brought an action to enforce the contract against the defendants.

Held: the defendants and W. G. having borrowed the money jointly and severally, each was a "borrower" within s. 6 (1) of the Moneylenders Act, 1927, and, under the sub-section, (a) a copy of the memorandum should have been sent to each of the borrowers, and (b) the copy should have been sent to each borrower personally, the sending of the copy to an agent of a borrower being insufficient; accordingly the plaintiffs had not complied with the requirements of s. 6 (1) and the contract was not enforceable against the defendants.

Per CURIAM: under s. 6 (1) of the Moneylenders Act, 1927, service on one partner would not be, it seems, service on another partner (see p. 322, letter H, post).

Appeal dismissed.

[For the Moneylenders Act, 1927, s. 6 (1), see 16 HALSBURY'S STATUTES (2nd Edn.) 386.]

Case referred to:

- (1) *Eldridge & Morris v. Taylor*, [1931] 2 K.B. 416; 100 L.J.K.B. 689; 145 L.T. 499; Digest Supp.

Appeal.

The plaintiffs appealed from an order of His Honour JUDGE CHARLESWORTH, at Sunderland County Court, dated Mar. 1, 1955.

The plaintiffs, who were licensed moneylenders, claimed the sum of £88 17s. 11d., as balance of principal and interest due to them from the defendants under a promissory note dated Aug. 25, 1952. The promissory note and a memorandum of contract, of the same date, were signed by each of the three

- A defendants and by a fourth person, Mr. Godfrey, who had since died. The amount of the loan was £100, and by the memorandum of contract Mr. Godfrey and the defendants jointly and severally promised to pay that sum, together with interest thereon at the rate of seventy-five per cent. per annum, by consecutive monthly instalments of £10 each, the first instalment to be paid on Sept. 25, 1952. Ten instalments had been paid, and the unpaid sum of £88 17s. 11d. became due on Nov. 5, 1953.

B The learned county court judge found that the defendants and Mr. Godfrey had jointly and severally borrowed the money from the plaintiffs, that a copy of the memorandum of contract had not been received by the first defendant, Mr. Ingram, within seven days of the making of the contract, and that the second and third defendants, Mrs. Ingram and Mrs. Godfrey, had never received a copy. The learned judge held that each of the defendants was a "borrower" within the meaning of s. 6 (1) of the Moneylenders Act, 1927, and was entitled to a copy of the memorandum under the sub-section, and, accordingly, he gave judgment for the defendants.

D. L. Wickes for the plaintiffs.

- D *J. R. Johnson* for the defendants.

SIR RAYMOND EVERSHED, M.R.: I will ask PARKER, L.J., to deliver the judgment of the court.

- PARKER, L.J.:** This is an appeal from a judgment of His Honour JUDGE CHARLESWORTH, sitting at Sunderland County Court, whereby he dismissed a claim brought by the plaintiffs, who are licensed moneylenders, against the three defendants, Mr. and Mrs. Ingram and Mrs. Godfrey.

E Quite shortly, what happened was that in August, 1952, Mr. Godfrey (who has since died) desired to borrow some money. The plaintiffs' representative was not prepared to lend him the money on his promissory note alone, and he interviewed the wife, Mrs. Godfrey (who is the third defendant), Mrs. Godfrey's sister F (Mrs. Ingram) and her husband, Mr. Ingram, and he persuaded them to be parties to the contract of borrowing. Thereupon those four people signed a contract whereby they jointly and severally promised to pay to the plaintiffs the sum of £100 which was advanced to Mr. Godfrey, and interest at certain rates. Having signed that memorandum of contract, they also signed a promissory note, dated the same date, promising to pay that sum and interest.

- G At the trial the defendants raised, first, the point that the memorandum of contract which was signed did not express the true terms of the bargain in that Mrs. Godfrey and Mr. and Mrs. Ingram were merely sureties. As regards that, the learned county court judge accepted the evidence of the plaintiffs' representative, Mr. Rickleton. He found that the evidence of the defendants was wholly unreliable, and he held that the three defendants, together with Mr. Godfrey, H as the memorandum states, jointly and severally borrowed this money. The point was further taken by the defendants, however, that the provisions of s. 6 (1) of the Moneylenders Act, 1927, had not been complied with in that the four borrowers, being joint and several borrowers, had not all received a copy of the memorandum.

- I The facts as found by the learned judge in that regard are as follows. He found, as I have stated, that the four parties named signed the memorandum, and had it in front of them on Aug. 25, 1952. He found that two days later, on Aug. 27, 1952, a copy of the memorandum was sent to Mr. Godfrey, and to Mr. Godfrey alone. The learned judge also found, I think, that a second copy was sent by the plaintiffs to Mr. Godfrey on the same date with the intention that he should pass it on to Mr. Ingram; but the judge was not satisfied that Mr. Godfrey had passed it on to Mr. Ingram, or that, if Mr. Godfrey had passed it on, he had done so within the period of seven days required by s. 6 (1) of the Act of 1927.

He found that neither Mrs. Godfrey nor Mrs. Ingram ever received a copy, and, accordingly, he dismissed the claim. A

Before us counsel for the plaintiffs has taken two points. He said, first, that the learned county court judge overlooked the fact that in the memorandum which the parties signed they gave an acknowledgment at the foot of it in these terms:

"The above note or memorandum which we have read, and of which we acknowledge to have received a true copy, was signed before the principal sum was advanced and the security stated above was given." B

It is to be observed that it is not there stated, as required by s. 6 (1) of the statute, that there had been delivered to the borrowers, or sent to them, and to each of them, a copy of the memorandum. Secondly, it was said (and this is the real point) that, where there was more than one borrower, as in this case, it was sufficient if a copy of the memorandum was sent or delivered to one of those borrowers, and that, as the learned judge found, a copy was in fact sent to Mr. Godfrey. The words of s. 6 (1) of the Act of 1927 are as follows: C

"No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender . . . shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract . . ." D

I confess that for my part, on reading those words, it seems plain that where, as here, there is more than one borrower, because they are borrowing jointly and severally, a copy must be sent to each borrower. The object of s. 6 (1), as I understand it, is that the borrower should have this protection, that he should know the terms on which he has borrowed the money and have in his possession a copy of those terms. E

There is no authority on the point, but it is to be observed that in *Eldridge & Morris v. Taylor* (1), SCRUTTON, L.J., in commencing his judgment, drew attention to the stringency of the regulations in regard to moneylenders. He said ([1931] 2 K.B. at p. 418): F

"For reasons which appeared to it satisfactory, Parliament has put moneylenders under the strictest regulations, and it is not for us to consider whether that policy is right or not. Section 6 of the Act of 1927 provides that certain contracts for the repayment of money lent and certain securities for the repayment of money lent shall be invalid unless a note or memorandum of the contract is made and signed personally by the borrower, and unless a copy thereof is delivered or sent to him within seven days of the making of the contract. Parliament has apparently thought that the borrower should be protected by having in his possession a copy of the writing he has signed." G

Finally, it is to be borne in mind that it is the borrower himself to whom the copy of the memorandum is to be sent, and, from the wording of s. 6 (1), it would appear that sending it to an agent of the borrower is insufficient. Accordingly, although for certain purposes one partner may be the agent of his other partners, nevertheless it seems to me that under s. 6 (1) service of a copy on one partner would not be service on the other. For those reasons the learned county court judge came to a correct conclusion, and this appeal will be dismissed. H

Appeal dismissed. I

Solicitors: *Gibson & Weldon*, agents for *S. H. Mincoff*, Newcastle-upon-Tyne (for the plaintiffs); *Torr & Co.*, agents for *Wilford, Speeding & Hanna*, Sunderland (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

SMITH v. VEEN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pearce, J.J.), April 28, 1955.]

B

Harbour—Pilot—Compulsory pilot—Home trade ship—Ship regularly engaged in home trade—Voyage outside home trade limits—Whether home trade ship—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742—Pilotage Act, 1913 (2 & 3 Geo. 5 c. 31), s. 11 (4), (5).

C

A ship which was regularly engaged in trading within the home trade limits as laid down by the Merchant Shipping Act, 1894, s. 742, sailed from a port in the United Kingdom on a voyage to Oslo, which was beyond those limits. She was going first to a port in Holland, which was within the home trade limits. She proceeded from the United Kingdom port without a licensed pilot on board and without displaying a pilot signal.

Held: if a ship, even though regularly engaged in trading within the home trade limits, went on a voyage to a port outside those limits, on that voyage she ceased to be excepted as a "home trade ship" within the Pilotage Act, 1913, s. 11 (4), and must carry a pilot.

D

Appeal allowed.

[As to ships exempted from compulsory pilotage, see 30 HALSBURY'S LAWS (2nd Edn.) 939, para. 1301; and for cases on the subject, see 41 DIGEST 910, 911, 8032-8043.]

For the Merchant Shipping Act, 1894, s. 742, see 23 HALSBURY'S STATUTES (2nd Edn.) 732; and for the Pilotage Act, 1913, s. 11, see *ibid.*, 842.]

E

Case referred to:

(1) *The Sutherland*, (1887), 12 P.D. 154; 56 L.J.P. 94; 57 L.T. 631.

Case Stated.

F

This was a Case Stated by justices for the Borough of Gravesend in respect of their adjudication as a magistrates' court sitting at Gravesend. On Oct. 22, 1954, the appellant, Sidney Rawlings Smith, preferred three informations against the respondent, Van der Veen, the master of the m.v. Adara a motor vessel of two hundred and seventy-eight gross tons registered in Groningen, Holland, charging that, on Aug. 27, 1954, in the estuary of the River Thames and within the London Pilotage District, he navigated the Adara (not being an excepted ship) between Sheerness and the limit of the London Pilotage District in circum-

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stances in which pilotage was compulsory, (i) but without being under the pilotage of a licensed pilot of the district after such a pilot had offered to take charge of the ship, contrary to the Pilotage Act, 1913, s. 11 (1) and (2) and the London Pilotage (Amendment) Order, 1937 (S.R. & O. 1937 No. 1122), schedule, para. 3; (ii) but failed to display a pilot signal and to keep the signal displayed until a licensed pilot came on board, contrary to the Pilotage Act, 1913, s. 43 (1) and (3); (iii) but failed to give the charge of piloting the ship to a licensed pilot of the district after such pilot had offered his services as a pilot, contrary to the Pilotage Act, 1913, s. 44 (1) and (3). The informations were heard on Dec. 22, 1954, and the following facts were found. By cl. 1 (2) of Part 9 of Bye-Laws, Rules and Regulations made pursuant to the Pilotage Act, 1913, s. 11 (4), by the pilotage authority of the London Pilotage District, and which came into force on

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Aug. 1, 1914, home trade ships of less than three thousand five hundred tons gross tonnage trading otherwise than coastwise were, when not carrying passengers, exempted from compulsory pilotage in the London Pilotage District. The Adara sailed from Strood, Kent, on Aug. 27, 1954. She was not carrying passengers and was bound for Oslo but was going first to Ymuiden in Holland to take on stores. Oslo was a port beyond, but Ymuiden was a port within, the limits (hereinafter called "the home trade limits") set out in the Merchant Shipping Act, 1894, s. 742, with reference to the definition of "home trade ship". The respondent employed the services of a licensed pilot of the London Pilotage

I

District from Strood because he was not familiar with the passage from Strood to Sheerness, but caused the pilot to disembark at Sheerness after he had offered his services as pilot up to the Sunk. The Adara proceeded from Sheerness without a licensed pilot on board and without displaying a pilot signal. A

Prior to Aug. 27, 1954, the Adara had been regularly engaged in trading within the home trade limits and on July 1, 1954, the Pilotage Department of Trinity House granted in respect of the Adara a certificate of exemption from compulsory pilotage addressed to the Collector, Customs House, London, which was stated on its face to remain in force for sixty days, provided the vessel neither carried passengers nor traded outside the home trade limits during that period. B
It was admitted by the appellant that there was no statutory authority for the issue of such certificates. On Mar. 1, 1932, the Pilotage Department of Trinity House drew up and issued revised "working arrangements" in connection with the Pilotage Act, 1913, s. 11 (5), as regards exemptions from compulsory pilotage of home trade vessels. These "working arrangements" were expressed to come into force on Mar. 15, 1932, and provided (inter alia): C

"3. A regular home trade vessel trading to a port other than a port in the British Isles or on the Continent of Europe between the River Elbe and Brest inclusive is compulsory inwards on her first subsequent voyage to a port in the British Isles and exempt outwards if outward bound on a home trade voyage." D

It was admitted by the appellant that the "working arrangements" had no force of law, but had been agreed between the shipping industry and the Pilotage Authority purely as a matter of convenience.

It was contended on behalf of the appellant that, as the Adara was bound for a port outside the limits defined in the Merchant Shipping Act, 1894, s. 742, for a "home trade ship", she was not an excepted ship within Part 9 of the Bye-Laws, Rules and Regulations made by Trinity House on Aug. 1, 1914, under the Pilotage Act, 1913, s. 11 (4); and further, that a vessel on a "foreign" voyage carrying goods to a non-home trade port could not be classed as a "home trade" vessel, and, once a foreign trade element appeared, then the ship lost any previous exemption it might have had. It was contended on behalf of the respondent (i) that the Adara was regularly engaged in the "home trade" and was, therefore, an excepted ship, which exception was not forfeited on an occasional outward journey to a non-home trade port; (ii) that para. 3 of the "working arrangements" was a correct and reasonable interpretation of the law by not requiring a regular home trade vessel to take a pilot on its outward journey to a non-home trade port but only on its return to a port in the British Isles; (iii) that the definition of "home trade ship" in the Merchant Shipping Act, 1894, s. 742, was not exhaustive but merely inclusive of the type of trade defined in the section; and (iv) that the object of pilotage was to provide for safe navigation and that it would be oppressive and unreasonable to require a vessel regularly engaged in the home trade to carry a pilot on an outward voyage to a port outside the home trade limits. E F G H

The justices dismissed the informations and the appellant now appealed.

J. V. Naisby, Q.C., and H. E. G. Browning for the appellant.

Ashton Roskill, Q.C., and Basil Eckersley for the respondent.

LORD GODDARD, C.J. : This is a Case Stated by the justices for the Borough of Gravesend and raises a somewhat interesting and important point under the Pilotage Act, 1913. I recognise the careful way in which this Case is drawn and the consideration which the justices have given to it, though we have to differ from them; and I rather regret that this point has to be tested by means of a prosecution before a court of summary jurisdiction from whose decision an appeal lies to this court, on which our decision is final. Speaking for myself, I do not feel any doubt about the matter, but in a case of this great importance it would be more satisfactory if it could be appealed, but it cannot. I

A The informations, which were laid against the respondent, the master of a Dutch ship, charged offences against the Pilotage Act, 1913, and all the three informations really raise the same point. The question is whether the ship was exempted from the requirements of the Act and the London Pilotage (Amendment) Order, 1937, so that she need not carry a pilot on the particular voyage on which she was engaged.

B Section 11 (4) of the Pilotage Act, 1913, which is an Act which repealed the old pilotage sections in the Merchant Shipping Act, 1894, and re-enacted the requirements with regard to pilotage, provides:

C “A pilotage authority may by bye-law made under this Act exempt from compulsory pilotage in their district any of the following classes of ships, if not carrying passengers, up to such limit of gross tonnage in each case as may be fixed by the bye-law, that is to say:—(i) Ships trading coastwise; (ii) Home trade ships trading otherwise than coastwise; (iii) Ships whose ordinary course of navigation does not extend beyond the seaward limits of a harbour authority, whilst navigating within those limits or within such parts thereof as may be specified in the bye-law . . .”

D So that, if a ship is a home trade ship, she is exempted. Then we have to find what is a home trade ship, and to do that we have to turn to s. 742 of the Merchant Shipping Act, 1894, which is to be read together with the Pilotage Act, 1913*, and by that section “home trade ship” includes

E “every ship employed in trading or going within the following limits; that is to say, the United Kingdom, the Channel Islands, and Isle of Man, and the Continent of Europe between the River Elbe and Brest inclusive.”

For reasons into which I need not go, those are what are called home trade ships and a home trade ship is one “employed or going within the following limits”. This ship, the justices find, had been regularly employed within the home trade limits. On the particular occasion on which it is said the respondent was guilty of these offences she was on a voyage from London to Oslo, but was intending to, and did, call at Ymuiden, a Dutch port which is within the home trade limits on her way to take in stores. Therefore, two things are said, first, that she was on a voyage within the home trade limits because she was going to call at a port within the home trade limits; secondly, that once she acquired the character of a home trade ship she could not lose it until she had ceased habitually to trade or regularly to trade within the home trade limits.

F To find a construction which would enable justices to see at once whether a ship ought to be carrying a pilot or not would be far preferable, as it seems to me, to leaving it to justices to consider at considerable length whether they thought a ship had lost a character she had once acquired. For otherwise justices on either side of the River Thames might decide in different ways. It is highly desirable to give a construction to these sections which leaves no doubt on the subject and, as a matter of construction, I think that the position is reasonably clear. Section 742 of the Merchant Shipping Act, 1894, provides:

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“‘Home trade ship’ includes every ship employed in trading or going within the following limits . . .”

I This ship was not going within “the following limits” because she was going to Oslo. If one could say that a ship is going within the limits because she is going to a port on the French coast and that, therefore, she need not carry a pilot; and if she is then to be at liberty to go on to America or Australia or elsewhere, the section would seem to have a very considerable gap left in it. It is necessary to see on what voyage the vessel is engaged at a particular time when it is alleged that she ought to have a pilot. The particular voyage here was London to Oslo, and the fact that the ship usually or regularly is employed only between ports in

* See the Pilotage Act, 1913, s. 62.

the United Kingdom and ports in the northern parts of Europe within the home trade limits does not seem to me to indicate, if the ship is going to a port outside those limits, that she is a ship that is going within the limits. A

Reliance has been placed on s. 11 (5) of the Pilotage Act, 1913, which is in these terms:

"For the purposes of this section, a ship which habitually trades to or from any port or ports outside the British Islands shall not be deemed to be trading coastwise, and a ship which habitually trades to or from any port outside the home trade limits shall not be deemed to be a home trade ship, by reason only that she is for the time being engaged on a voyage between ports in the British Islands . . ."

I do not think that I can read that provision, which says that a certain ship shall not be regarded as a home trade ship if she is doing something outside the limits, as meaning that she is to be regarded as a home trade ship. There are two things that have to be found here: first of all, one has to find that the ship is a ship which is engaged in the home trade. But if, though engaged in the home trade, she sets off on a voyage which is not within the home trade limits, then she will have to carry a pilot because she is no longer engaged in the home trade. C D

I am glad to find that the construction which appeals to me in this matter evidently was the same as that which appealed to a very great Admiralty judge, SIR JAMES HANNEN, P., in *The Sutherland* (1), in construing very similar words in one of the earlier Acts, in which he said (12 P.D. at p. 156):

"I agree that because a vessel is generally engaged in trading to a port north of Boulogne, she would not be exempt if she were not at the time on a voyage of this character, but if a vessel is obliged for a temporary purpose to put into a port, she does not, on that account, cease to be so engaged."

I think that SIR JAMES HANNEN, P., there was taking exactly the same view of this matter as I take. E

For these reasons, I think that this appeal must be allowed, and the Case remitted to the justices to convict. F

HILBERY, J. : I agree.

PEARCE, J. : I agree.

Appeal allowed. Case remitted.

Solicitors: *Freshfields* (for the appellant); *Sinclair, Roche & Temperley* (for the respondent). G

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

PRACTICE DIRECTION.

Divorce—Costs—Taxation—Objection to taxing officer's decision. H

Probate—Costs—Taxation—Objection to taxing officer's decision.

Any party dissatisfied with the decision of a taxing officer of the Probate and Divorce Registry may in accordance with Ord. 65, r. 27, reg. 39, lodge formal written objections, which will be dealt with by a registrar. In order to save expense and delay, however, it is the practice of the registrars to hear informal references from the taxing officers on disputed items in unopposed taxations, or, by agreement, in opposed taxations. I

Practitioners wishing to take advantage of this procedure should at the end of the taxation merely request the taxing officer to refer the items about which they are dissatisfied to a registrar.

B. LONG,
Senior Registrar.

May 5, 1955.

A

NOTE.R. v. ASHFORD (KENT) JUSTICES, *Ex parte* RICHLEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pearce, JJ.), April 27, 1955.]

B

Certiorari—*Time for application*—*Extension of time*—*Application for leave to apply out of time*—*Notice to intended respondent*—R.S.C., Ord. 59, r. 4 (2); Ord. 64, r. 7.

Motion for order of certiorari.

C On Dec. 29, 1953, Kent justices sitting at Ashford adjudged the applicant to be the father of a child born to the respondent on Oct. 6, 1953, and ordered the applicant to pay the respondent a weekly sum for the maintenance and education of the child. During the hearing before the justices the applicant called a witness who stated on oath that at no time had he had sexual intercourse with the respondent. On Dec. 3, 1954, the witness was found guilty of perjury in respect of that statement. On Feb. 15, 1955, the applicant applied *ex parte* to the Divisional Court for leave to apply for an order of certiorari to bring up and quash the order of the justices dated Dec. 29, 1953, and for an extension of the time laid down by R.S.C., Ord. 59, r. 4 (2), within which the application for leave must be made. The Divisional Court extended the time and granted leave as sought. On Apr. 27, 1955, the applicant applied on motion for an order of certiorari. The court refused the application on grounds not material to this report which is confined to the procedural point to which the Lord Chief Justice referred, viz., that notice of an application for extension of time should be given to the person concerned to contend that time should not be extended*.

E

Frank Whitworth for the applicant.

J. H. Gower for the respondent.

F

LORD GODDARD, C.J.: There is one matter on which I want to say a word of general application with regard to orders of certiorari. R.S.C., Ord. 59, r. 4 (2), provides, as the Crown Office Rules had done for a long period, that applications for leave to apply for orders of certiorari must be made "not later than six months after the date of the proceeding" which it is sought to quash. The court has power under R.S.C., Ord. 64, r. 7, to extend the time and the present is a case in which it would be right to apply for the time to be extended; but a person who intends or is required to apply to the court for an extension of time must give notice to the person whom he would serve in the ordinary way and who would be affected if the order challenged were quashed.

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Thus an applicant for extension of the time limited by R.S.C., Ord. 59, r. 4 (2), must give notice to the person who in the ordinary way would be made respondent to the motion in order that he may be heard on the question whether or not it is a fit case in which to extend the time.

H

Solicitors: *Kingsford, Dorman & Co.*, agents for *Kingsford, Flower & Pain*, Ashford, Kent (for the applicant); *Lovell, Son & Pitfield*, agents for *Willmott, Elwell & Taylor*, Ashford, Kent (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

* Compare the application for an extension of time if an appeal is to be made out of time to the Court of Appeal (see R.S.C., Ord. 58, r. 15 (1), and notes thereto in ANNUAL PRACTICE, 1955, p. 1278); and as to the grounds for extending time for appealing, see 26 HALSBURY'S LAWS (2nd Edn.) 117n. Reasons for requiring an appellant to give notice of an intention to apply for an extension of time for appealing are stated by COTTON, L.J., in *Bradshaw v. Warlow* (1886), 32 Ch.D. at p. 406.

**R. v. GODALMING LICENSING COMMITTEE,
Ex parte KNIGHT AND ANOTHER.**

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Havers, JJ.),
May 2, 1955.]

Licensing—Licence—Jurisdiction of justices to grant new licence in substitution for current licence.

A licence for the sale of intoxicating liquor at hotel premises was granted in 1954 to continue until a date in 1957. The licence was subject to conditions. The holders of the licence applied in 1955 for a new annual licence free from some of the conditions, offering to surrender their existing licence. The licensing justices refused the application on the ground that they had no jurisdiction because a new licence could not be granted while the current licence was still in force and the current licence could not be surrendered for the purpose.

Held: a current licence could be surrendered and a new licence granted in its place, and, therefore, the licensing justices had jurisdiction to grant the application.

R. v. Taylor, R. v. Amendt ([1915] 2 K.B. 593) distinguished.

[As to duration of licences, see 19 HALSBURY'S STATUTES (2nd Edn.) 36, paras. 95-98; and for cases on the subject, see 30 DIGEST (Repl.) 37, 38, 284-291.]

Cases referred to:

- (1) *R. v. Taylor, R. v. Amendt*, [1915] 2 K.B. 593; 84 L.J.K.B. 1489; 113 L.T. 167; sub nom. *R. v. Taylor, Ex p. A.-G., R. v. Amendt, Ex p. A.-G.*, 79 J.P. 332; 30 Digest (Repl.) 37, 281.
- (2) *R. v. Corfield*, (1922), 128 L.T. 305; 86 J.P. 216; 31 Digest (Repl.) 77, 597.
- (3) *Carter v. Pickering*, [1949] 1 All E.R. 340; 113 J.P. 132; 30 Digest (Repl.) 85, 654.

Motion for mandamus.

The applicants, Francis Warnford Osborn Knight and Peggy Knight, were the proprietors of the Thorshill Hotel, Hindhead, Surrey, and the joint holders of a justices' licence in respect of such premises. On Feb. 10, 1954, the licensing justices for the licensing district of Godalming, Surrey, granted to William Edwin Jukes a justices' licence authorising him to hold an excise licence to sell by retail at the Thorshill Hotel any intoxicating liquor which might be sold under a spirit retailer's or publican's licence for consumption either on or off the premises on the conditions indorsed on the licence and subject to confirmation by the confirming authority from the date of such confirmation until July 5, 1957. The conditions indorsed on the licence were that no bar or bars for the sale of intoxicating liquor should be opened on the premises; that intoxicating liquor should be sold only to residents and their guests and to persons partaking of a bona fide meal on the premises or attending a function; that no intoxicating liquor should be sold for consumption off the premises; and that the monopoly value in respect of the licence for the term should be £105, payable by instalments of £35 on Oct. 1, in 1954, 1955 and 1956. The licence was duly confirmed by the confirming authority on Apr. 5, 1954. On Nov. 5, 1954, the applicants purchased the premises and on the same day, at the Transfer Sessions held at Godalming, the licensing justices for the district transferred the licence to the applicants. The applicants thereafter carried out extensive decorations and refurbishing of the premises and, on Mar. 2, 1955, at the second session of the General Annual Licensing Meeting for the district, applied for the grant of an annual licence in respect of the premises, such licence to be without conditions save as to monopoly value, and to be in substitution for the current licence which would be surrendered. The licensing committee held that it had no jurisdiction to grant the application, on the ground that the licence applied for could not be granted whilst the licence

A granted on Feb. 10, 1954, was in force, and that the latter licence could not be surrendered for the purpose.

The applicants now moved for an order of mandamus that the licensing committee should hear and determine their application for the grant of a full justices' licence in respect of the premises.

B *Harold Brown, Q.C.*, and *N. H. Curtis-Raleigh* for the applicants.

The respondents did not appear and were not represented.

LORD GODDARD, C.J., stated the facts and continued: The justices evidently took a great deal of trouble over the case, but in deciding that they had no jurisdiction they came to a wrong decision. I think that, perhaps, they were confused by some of the cases cited to them. In *R. v. Taylor, R. v. Amendt* (1), the circumstances were these. There were licences in force to which certain conditions were attached with regard to the payment of monopoly value. The applicants asked for another licence of exactly the same sort, but with a reduced monopoly value. The court said: "You cannot do that". I do not think that the court meant that the licence could not be surrendered and a new licence granted. If, however, the licence was to be exactly the same, but at a reduced monopoly value, the position was very different because the court could not reduce the monopoly value. The present case is different from *R. v. Taylor, R. v. Amendt* (1). The applicants are willing to surrender a restricted licence and apply for a new licence if the justices will accept the surrender of the restricted licence. That seems to be covered by the reasoning in *R. v. Corfield* (2), which shows that if a licensee, who is the holder of a licence with conditions attached, wishes to get rid of those conditions, his right course is to apply for a new licence and not a renewal of the old licence.

Another case to which attention has been called is *Carter v. Pickering* (3), which shows, by inference, that the court thought it was perfectly possible for a licensee to surrender an existing licence and ask for another licence, but pointed out that what had happened there did not amount to a surrender. The justices had refused to grant a new licence and the licensee wanted his licence back. A fellow licensee prosecuted him for selling beer without a licence. The licensee, however, had not surrendered his licence, but had offered to surrender it and the justices had refused to accept the surrender. HUMPHREYS, J., called attention to the fact ([1949] 1 All E.R. at p. 341) that the decisions in *R. v. Taylor, R. v. Amendt* (1), "are, no doubt, still good law, subject to the Finance Act, 1947, s. 73". That section is now reproduced in s. 7 of the Licensing Act, 1953, which, in its terms, clearly shows that a current licence can be surrendered and another licence granted in its place. Accordingly, I think that the justices were wrong and this matter must go back with a direction that they have jurisdiction to grant a new licence if they see fit.

H HALLETT, J.: I agree, and have nothing to add.

HAVERS, J.: I agree.

Order according

Solicitors: *Gibson & Weldon*, agents for *Burley & Geach*, Petersfield (for the applicants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

PAISNER AND OTHERS *v.* GOODRICH.

[COURT OF APPEAL (Denning, Romer and Parker, L.JJ.), March 23, 24, April 27, 1955.]

Rent Restriction—"Separate dwelling"—*Letting of rooms*—*Use of extra bedroom in common with landlord*—*Increase of Rent and Mortgage Interest (Restrictions) Act, 1920* (10 & 11 Geo. 5 c. 17), s. 12 (2).

A landlord let to a tenant four unfurnished rooms on the first floor of a large house "together with the use in common with the landlord of the back bedroom on the first floor", and the use in common with the landlord and others authorised by her of the bathroom and lavatories. The landlord refused to let the tenant use the back bedroom as provided in the agreement, but after the landlord's death the tenant was allowed to use it for her son when he came home on leave from national service. The plaintiffs, the persons entitled to the reversion expectant on the termination of the tenancy, brought an action for possession of the rooms.

Held (DENNING, L.J., dissentiente): as the premises let to the tenant included a dwelling room (viz., the back bedroom on the first floor) which was to be shared with the landlord, the premises let were not "let as a separate dwelling" within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and accordingly the plaintiffs were entitled to possession.

Neale v. Del Soto ([1945] 1 All E.R. 191) and dicta of ASQUITH, L.J., in *Llewellyn v. Hinson*, *Llewellyn v. Christmas* ([1948] 2 All E.R. at p. 96), of LORD PORTER in *Baker v. Turner* ([1950] 1 All E.R. at p. 839) and of SIR RAYMOND EVERSHEDE, M.R., in *Hayward v. Marshall*, *Winchester v. Sharpe* ([1952] 1 All E.R. at p. 669) applied.

Cole v. Harris ([1945] 2 All E.R. 146) distinguished.

Per ROMER and PARKER, L.JJ.: we are unwilling to add to the refinements of judicial interpretation of the Rent Restrictions Acts by holding that a sharing which is or may be by successive user displaces their operation although a concurrent sharing does not (see p. 334, letter F and p. 336, letters G & I, post).

Appeal dismissed.

[**Editorial Note.** In some of the authorities the word "essential" has been used to describe the living accommodation which, if shared, will suffice to exclude the operation of the Rent Restrictions Acts by preventing the premises being premises "let as a separate dwelling". Both ROMER and PARKER, L.JJ., emphasise that "essential" in this context is in contrast with "unimportant". The question is not whether the room is essential to the tenant, see, on this point, p. 334, letter A, and p. 336, letter G, post. They also refuse to distinguish, for the purposes of these Acts, between sharing, e.g., a kitchen, by successive use, viz., use at different times one after another, and concurrent sharing, viz., use together at the same time. Either use constitutes sharing; see, particularly p. 336, letter I, post.

As to dwelling-houses "let as a separate dwelling", see 20 HALSBURY'S LAWS (2nd Edn.) 312-315, paras. 369, 370. For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 1004; and for cases on the subject, see 31 DIGEST (Repl.) 640, 641, 7475-7483.]

Cases referred to:

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 31 Digest (Repl.) 646, 7508.
- (2) *Sutton v. Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 31 Digest (Repl.) 686, 7786.
- (3) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 31 Digest (Repl.) 646, 7509.

- A (4) *Cull v. Inland Revenue Comrs.*, [1939] 3 All E.R. 761; [1940] A.C. 51; 108 L.J.K.B. 879; 161 L.T. 173; sub nom. *Inland Revenue Comrs. v. Cull*, 22 Tax Cas. 603; 2nd Digest Supp.
- (5) *Morelle, Ltd. v. Wakeling*, [1955] 1 All E.R. 708.
- (6) *Llewellyn v. Hinson*, *Llewellyn v. Christmas*, [1948] 2 All E.R. 95; [1948] 2 K.B. 385; [1949] L.J.R. 291; 31 Digest (Repl.) 647, 7513.
- B (7) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401; 31 Digest (Repl.) 647, 7516.
- (8) *Kenyon v. Walker*, *Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 31 Digest (Repl.) 647, 7511.
- (9) *Winters v. Dance*, [1949] L.J.R. 165; 31 Digest (Repl.) 647, 7514.
- C (10) *Hayward v. Marshall*, *Winchester v. Sharpe*, [1952] 1 All E.R. 663; [1952] 2 Q.B. 89; 3rd Digest Supp.

Appeal.

The tenant appealed against an order, dated Jan. 13, 1955, made by His Honour JUDGE REGINALD CLARK, Q.C., sitting at Ilford County Court, in favour of the landlords in an action for possession of four rooms in a large house. The judge held that the tenant was not entitled to the protection of the Rent Restrictions Acts in respect of the rooms because the tenancy agreement provided that the tenant should also have the use in common with the landlord of a back bedroom, and the rooms were therefore not "let as a separate dwelling" within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

- E *P. J. H. Benenson* for the tenant.
G. Avgherinos for the landlords.

Cur. adv. vult.

Apr. 27. The following judgments were read.

- D DENNING, L.J.: In 1949 Mrs. Jaffe, the landlord, a lady of nearly seventy, owned a large house, No. 4, Mansfield Road, Ilford. Her family had left home and she wanted to find a tenant for some of the upstairs rooms. There were six rooms upstairs. The landlord had her own bedroom there and a spare bedroom for her visitors; but there were four other rooms upstairs, one of them being fitted up as a kitchen. She arranged to let these four rooms unfurnished to Mrs. Goodrich, the tenant, a widow who had a son and daughter. The son was doing his national service and the landlord agreed to let him sleep in her spare bedroom when he came on leave. The tenant moved in on Oct. 31, 1949, and three months later a tenancy agreement was signed whereby the landlord let to the tenant

"all those the four rooms now in the occupation of the tenant on the first floor . . . together with the use in common with the landlord of the back bedroom on the first floor"

- H on a weekly tenancy of £1 5s. a week; and it was further provided that the tenant should be entitled

"to the use (in common with the landlord and all others authorised by the landlord) of the bathroom and lavatories in the said house."

- I After the agreement was signed the landlord changed her mind about the spare bedroom. She refused to let the tenant use it at all. She kept it locked. When the tenant's son came on leave, he had to sleep in the morning room. This went on for more than four years until the landlord died on May 8, 1954. The son then started to use the back bedroom and has continued to use it on occasions since. The plaintiffs (being the persons entitled to the reversion expectant on the termination of the tenancy) have given the tenant notice to quit and now seek possession of the rooms. They say that the tenant is not entitled to the protection of the Rent Restrictions Acts because it was a case of "sharing" within

Neale v. Del Soto (1). They say that that case still applies so as to enable a landlord to evict a tenant who shares a house with the landlord: see s. 7 of the Landlord and Tenant (Rent Control) Act, 1949. A

The strange thing about this doctrine of sharing is that no one ever thought of it for the first thirty years of the Rent Restrictions Acts. I remember being engaged in many cases after the first war when a tenant of rooms in a house shared accommodation with the landlord, but no one suggested that on that account the tenant was not protected by the Acts. The case of *Sutton v. Begley* (2), is typical of the approach of the profession at that time. I cannot help thinking that that approach was more in keeping with the intention of Parliament than the recent sharing cases. It was the housing shortage which caused Parliament to intervene to protect tenants by the Rent Restrictions Acts. It is a cruel irony that the sharing of accommodation, which was forced on people by the housing shortage, was held by the courts to be a reason for evicting a tenant and exposing him to an extortionate rent. B C

The case of *Neale v. Del Soto* (1), which introduced the doctrine of sharing, is based entirely on the words of the statute "let as a separate dwelling". In that case there was a sharing of extensive accommodation, including the kitchen, and in fact the parties shared their meals in the kitchen and divided between them the work of preparing the meals. It could not be said that any part of the house was "let as a separate dwelling". The real substance of the matter was that there was a sharing of the house. There was much good sense behind the decision itself. No matter how acute the housing shortage, it was not right to force two housewives to share the same kitchen when they could not get on with one another. One or other would have to go; and of the two, the tenant, of course, had to go. D E

By contrast, in the subsequent case of *Cole v. Harris* (3), the landlord let to a tenant three rooms together with the use in common of a bathroom and a w.c. It was held that the three rooms were "let as a separate dwelling" and did not cease to be so merely because the tenant shared the bathroom and w.c. with others. The court saw that, if the doctrine of sharing were carried to such a length, it would deprive innumerable tenants of the protection which Parliament intended them to have. F

Those are the two leading cases, and the contest ever since has been whether the sharing falls on the *Neale v. Del Soto* (1) side of the line or on the *Cole v. Harris* (3) side. The cases are numerous and I need not refer to them except to say that many of the judges have suggested that it all depends on whether the shared accommodation is a living room or not. I accept that as a useful test but I do not think it should be regarded as decisive. If it were accepted as decisive it would mean that we have no longer to look at the words of the statute "let as a separate dwelling" but to the words of the judges "sharing a living room". I do not think that is a legitimate procedure. It is a misuse of the doctrine of precedent. When the judges of this court give a decision on the interpretation of an Act of Parliament, the decision itself is binding on them and their successors: see *Cull v. Inland Revenue Comrs.* (4), *Morelle, Ltd. v. Wakeling* (5). But the words which the judges use in giving the decision are not binding. This is often a very fine distinction, because the decision can only be expressed in words. Nevertheless it is a real distinction which will best be appreciated by remembering that, when interpreting a statute, the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not covered by previous decisions, the courts must be governed by the statute and not by the words of the judges. As LORD PORTER has pointed out: G H I

"Each case must be brought back to the test of the statutory words" see his address on CASE LAW IN THE INTERPRETATION OF STATUTES, p. 18.

A If a point should be reached where the words of the judges lead to a different result from the words of the statute, then the statute must prevail: because the judges have no right to supplant the words of the statute and would not wish to do so.

So in this case I accept that the decisions of this court bind us to hold that the sharing of a kitchen or kitchenette takes away the protection of the Act, whereas the sharing of a bathroom or w.c. does not. But there is no decision as yet about the sharing of a spare bedroom. It is a new situation which was not envisaged by the judges when they laid down the test of the "living room". We must get back to the statute itself and ask ourselves whether in this case a part of the house was "let as a separate dwelling". If it was, then the tenant is protected by the Acts, and he does not lose it because he shares some other part with the landlord. There can be no doubt about the answer. The four rooms on the first floor were "let as a separate dwelling", and the parties by their conduct showed that they were so let. For four and a half years the tenant lived in those four rooms as a separate dwelling, without any use of the back bedroom at all. The landlord kept it locked against her. I ask myself this question: Suppose that the landlord, a few months before her death, had sought to evict the tenant on the ground of "sharing"? No court would have listened to her for a moment. And why, I ask, should they do more for her successors in title? The truth is that this room has never been shared at all. During the landlord's lifetime she alone had the use of it. Since her death the tenant's son has used it. Applying the simple words of the statute, I have no doubt that in this case the four rooms on the first floor were "let as a separate dwelling" and the tenant is protected by the Acts in regard to them: and that she does not lose the benefit of the Acts simply because she also had a right to share the spare bedroom, the bathroom and the w.c. in common with the landlord. I would allow the appeal.

ROMER, L.J.: I have had the advantage of reading and considering the judgment which PARKER, L.J., has prepared and I find myself so fully in agreement both with the conclusions at which he has arrived and with the reasons on which those conclusions are based that I can deal with certain aspects of this case quite shortly. Subject only to the question whether the sharing between the landlord and tenant of the back bedroom in question was intended to be a concurrent or a consecutive user of the room, and the effect on the position if the user was intended to be consecutive, it appears to me that the state of affairs shown to exist in the present case is precisely within the "gist" of the *Neale v. Del Soto* (1) line of decisions as explained by ASQUITH, L.J., when delivering the judgment of this court in *Llewellyn v. Hinson*, *Llewellyn v. Christmas* (6) ([1948] 2 All E.R. at pp. 96, 97), and within the statement as to the effect of those decisions expressed by LORD PORTER in *Baker v. Turner* (7) ([1950] 1 All E.R. at p. 836 et seq.). It was sought on behalf of the tenant to escape from or distinguish those statements of the law (which are, of course, binding on us) on the ground that the bedroom was only placed at the partial disposal of the tenant as a spare bedroom and that, for that reason, coupled with the alleged fact that the room was not "essential" to her, there was no "sharing" within the *Neale v. Del Soto* (1) doctrine. As to this, however, the room was not described in the tenancy agreement as a "spare bedroom", and the evidence shows that the tenant wanted the use of it for her son when he should be home on leave and even more so when he should have finished his military service and could go and live with her. So far as this point is concerned, therefore, I cannot distinguish this particular bedroom from any other bedroom which a landlord agrees to share with his tenant. Then as to "essential" (a qualification which appears to have arisen somewhat fortuitously in relation to living accommodation in some of the more recent cases) I am unable to appreciate anything of significance, so far as the present case is concerned, that emerges from the addition of this word. The word excludes, I suppose, accommodation that is unimportant, but I imagine that all living accommodation in the

usually accepted sense is of importance to a tenant, not least a room which the tenant desires for sleeping purposes for himself or a guest. It was suggested that the fact that the landlord, in the years which preceded her death, prevented the tenant from using this particular room shows that the tenant did not really need the room. I cannot accept this, for there are plenty of things which a person needs but which he has to do without; and many people prefer to be deprived of legal rights rather than issue a writ to enforce them. A B

There remains, however, the question of concurrent user. The tenant's submission as to this is: (i) that it is a matter of necessary inference that the landlord and the tenant cannot have intended that the common use of this bedroom should be enjoyed concurrently, and (ii) that accordingly the principle of *Neale v. Del Soto* (1) does not apply, because only concurrent sharing falls within it. It may be conceded that, inasmuch as the landlord and the tenant were comparative strangers, and that in any case the room might, and probably would, be used by their respective guests, they in all probability contemplated that their respective rights of user should not be exercised simultaneously. I am not, however, prepared to hold that this element of itself ousts the *Neale v. Del Soto* (1) doctrine. The supposition that the question whether an intended sharing of accommodation is concurrent or consecutive is a relevant element in considering whether or not the doctrine applies appears to have first occurred to MacKINNON, L.J., in *Cole v. Harris* (3) ([1945] 2 All E.R. at p. 147). I am, however, unable to find that this question has in any later case been regarded as relevant or, indeed, that it has been in any way considered in subsequent cases. It is clear that MORTON, L.J., thought that consecutive user might constitute a sharing, for he more than once referred in his judgment in *Cole v. Harris* (3) to the sharing of a bathroom or a w.c. and only excluded such sharing from the *Neale v. Del Soto* (1) principle on the ground that bathrooms and lavatories do not constitute "living rooms"; and LAWRENCE, L.J., in his judgment in the same case, obviously saw no difficulty in the conception of sharing a w.c. or bathroom. Many a gloss has been put by judicial interpretation on the language of the Rent Restrictions Acts, and I am unwilling to add to their number by holding that a sharing which is, or may be, concurrent displaces their operation, although a consecutive sharing does not. In my opinion, accordingly, the submission of the tenant on this point cannot be accepted. C D E F

A further point taken by counsel for the tenant was that the right of user granted to the tenant under the tenancy agreement was of so uncertain a character that the court would not grant an injunction to prevent the lessor from attempting to interfere with the enjoyment of it; and that a right which is so indefinite as to be incapable of this protection cannot properly be regarded as amounting to a sharing. I think it is true that there would be considerable difficulty in framing such an injunction as I have mentioned, because the tenant cannot postulate that she is entitled to use the bedroom at any given time or on any particular day. Even assuming, however, that the remedy of injunction would not be open to the tenant if she was unreasonably prevented by her landlord from using the room at a time when she wanted it and the landlord did not, her right under the agreement is not one which, in my opinion, is of so vague a nature that the law would disregard it altogether; and if the court was satisfied that the tenant had been unreasonably and unwarrantably deprived of the use of the room, I see no reason why she should not be awarded such damages for breach of contract as she could prove that she had sustained. Moreover, it does not seem to me that there is any essential distinction, in point of uncertainty, between the tenant's right to use the bedroom and the right to the common use of a kitchen. G H I

I have therefore, though with regret, arrived at the conclusion that this appeal must be dismissed. I say with regret, because I feel that, were we able to approach this case unfettered by authority, my strong inclination would be to hold that the

A four rooms which were let to the tenant constituted a separate dwelling for the purpose of the Acts; and it seems to be a curious result that, although the tenant's right to share the bathroom and lavatories in the house (and she could scarcely get on without it) does not deprive her of the protection of the Acts, the less important right to use the bedroom does. However, such, in my judgment, is the effect as authoritatively expounded of the *Neale v. Del Soto* (1) series of decisions (unfortunate though it be) and I cannot for myself see a legitimate means of escape.

C **PARKER, L.J.** (read by ROMER, L.J.): The question to be determined is whether a part of a house was let to the tenant as a separate dwelling. There is no doubt that the four rooms on the first floor let to the tenant constituted in themselves a separate dwelling, but by the tenancy agreement she also obtained
"the use in common with the landlord of the back bedroom on the first floor."

D Prior to 1945, no one suggested that in such circumstances the right to use a room in common with the landlord affected the position. Beginning, however, in 1945 with *Neale v. Del Soto* (1), there has been a number of decisions of this court which show that the effect may be to constitute a sharing of the house rather than a letting of a separate dwelling. In *Llewellyn v. Hinson* (6) ASQUITH, L.J., in giving the judgment of the court said ([1948] 2 All E.R. at p. 96):

E "This court cannot consider whether *Neale v. Del Soto* (1) and its satellite cases were properly decided. It can only inquire what they, in fact, decided, and about this there can, in our view, be little doubt. The gist of those decisions is that where what the landlord under the agreement of tenancy parts with to the tenant consists of two things (a) exclusive possession of a room or rooms, plus (b) user, jointly with some one else, of another living room or rooms, then the tenant cannot say that he is the tenant of a
F 'house or part of a house, let as a separate dwelling'. The ratio is that the 'dwelling' of the tenant on the facts assumed consists of the totality constituted by (a) plus (b), and that part of the totality is not 'separately' let to him because the possession or user of it is to be shared by him with others, a state of affairs which is inconsistent with the word 'separately', and, indeed, with the word 'let', for both of these terms connote exclusive possession or enjoyment."

G This statement of the effect of the cases was quoted with approval by LORD NORMAND and LORD MACDERMOTT in *Baker v. Turner* (7) ([1950] 1 All E.R. at pp. 843 and 849, 850) and LORD PORTER said (*ibid.*, at p. 839):

H "The main results of decisions may, I think, be tabulated as follows:
(i) A portion of a house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord."

I It is true that the tenant in that case accepted the decision in *Neale v. Del Soto* (1) and the cases which followed it as correct, but, so far at any rate as this court is concerned, the principles to be deduced from the cases as enunciated by ASQUITH, L.J., and LORD PORTER are binding on us. It is accordingly, in my view, much too late to contend that the true test is whether the premises let, e.g., the four rooms in the present case, constitute a separate dwelling. As ASQUITH, L.J., pointed out in *Llewellyn v. Hinson* (6) ([1948] 2 All E.R. at p. 96), the ratio decidendi of the decision in *Neale v. Del Soto* (1) and its satellite cases necessitated a limitation which would exclude cases where the joint user was of some ancillary accommodation or facility such as a w.c., a bathroom, a boxroom or a coal cellar. Thus the operation of the rule has been limited to cases in which the joint user of a living

room has been given, e.g., a kitchen (*Neale v. Del Soto* (1), and *Kenyon v. Walker, Stevenson v. Kenyon* (8)) and a kitchenette (*Winters v. Dance* (9)), as opposed to the joint user of some ancillary accommodation or facility, for example, a w.c., and bathroom (*Cole v. Harris* (3)), or a right to draw water in the kitchen (*Hayward v. Marshall, Winchester v. Sharpe* (10)). No doubt as a means of drawing this distinction the word "essential" has crept in in connection with the living room. Thus the headnote in *Cole v. Harris* (3) stated that "if there was a sharing of essential living rooms" there would not be a letting of a separate dwelling-house; though MACKINNON, L.J., said ([1945] 2 All E.R. at p. 148) that these words formed part of MORTON, L.J.'s test in the same case, a reference to MORTON, L.J.'s judgment discloses no use of the word "essential" when he is stating what he says is the true test (see [1945] 2 All E.R. at p. 152, letter G). MORTON, L.J., in the same case, says ([1945] 2 All E.R. at p. 151, letter D):

"It cannot be that any sharing of any room, however unimportant, takes the property outside the operation of the Act."

Thereafter, the word "essential" has several times been used. Thus, in *Winters v. Dance* (9), TUCKER, L.J., said ([1949] L.J.R. at p. 169):

"I think that the basis of the decisions is that a room which is used for the primary purpose of cooking is a living room: it is essential to the life of the occupants of the premises and is a room in which, of necessity, at least one occupant of the premises spends an appreciable portion of his or her life . . ."

Again in *Hayward v. Marshall* (10) JENKINS, L.J., sets out the question in this form ([1952] 1 All E.R. at p. 667):

"Is that room [the use of which is shared] part of the essential living accommodation?"

It is to be observed, however, that the word does not appear in ASQUITH, L.J.'s review of the cases in *Llewellyn v. Hinson* (6) ([1948] 2 All E.R. at p. 96) or in any of their Lordships' speeches in *Baker v. Turner* (7).

In my opinion the use of the word "essential" is in contradistinction to "unimportant". Moreover, the test is purely objective. Is it part of the essential make-up of the house? cf. SIR RAYMOND EVERSHED, M.R., in *Hayward v. Marshall* (10) ([1952] 1 All E.R. at p. 669):

"The distinction rests rather on the view that the ordinary uses and purposes of a kitchen are essential manifestations of living or residence . . ."

The question is not whether the room is essential for the particular tenant. Viewed in this light it is, I think, impossible to say that the joint user of a bedroom does not make the Acts inapplicable.

It is, however, suggested that, in order that the Acts should not apply, the user to be shared must be a contemporaneous user and not a successive user. This conception was put forward and put forward alone by MACKINNON, L.J., in *Cole v. Harris* (3) ([1945] 2 All E.R. at p. 147), in contrasting the sharing of the user of a kitchen as opposed to the sharing of the use of a w.c. or a bathroom where, by their nature, the user would be successive. That was not, however, the reason for his decision because (at p. 148) he adopts MORTON, L.J.'s test of whether or not the room is a living room. In other words, he bases his decision, not on the nature of the sharing, but on the nature of the accommodation, and no one in any other case has sought to distinguish the nature of the sharing. Speaking for myself, I can see no difference for the purposes of the application of the rule between the ordinary sharing of the use of a kitchen with a contemporaneous user contemplated and a sharing of the use of a kitchen with an express provision for consecutive user, for example, at fixed times. The position, I conceive, might be different if the stipulation were for the exclusive use by the tenant for, say, the first three months in every year. In any event I should be loath at this late date to introduce what appears to me to be "an unwarrantable

A extra refinement" (cf. MORTON, L.J., in *Kenyon v. Walker* (8) ([1946] 2 All E.R. at p. 598)). The provision, however, in this case is for "the use in common with the landlord of the back bedroom". There is no express stipulation for exclusive user by the tenant for any period and indeed on the face of the agreement there is nothing to prevent a contemporaneous user. Accordingly, I have reluctantly come to the conclusion that the Acts do not apply and that the county court judge came to a correct decision. I say "reluctantly", because all one's sympathy is with the tenant who by the landlord's conduct was for a long time prevented from enjoying any use of the bedroom, and because apart from authority I should have had little doubt that what was let to her was a separate dwelling.

Appeal dismissed.

C Solicitors: *Richardson, Sowerby, Holden & Co.* (for the tenant); *Paisner & Co.* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

D

W. ROUGHT, LTD. v. WEST SUFFOLK COUNTY COUNCIL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.J.J.), April 26, 27, 1955.]

E *Compulsory Purchase—Compensation—Assessment—Compensation for disturbance of business—Premises used as factory—Temporary interruption of manufacturing operations—Loss of business profits—Whether sum deductible for income tax payable if profits had been earned.*

F Premises occupied by a manufacturing company were acquired by a local authority under a compulsory purchase order. The company was unable to find other suitable premises until some nine months later, and, in its claim for compensation in respect of the compulsory acquisition, the company claimed, among other things, compensation for disturbance based on loss of business profits in respect of specific contracts which it was unable to fulfil by reason of the temporary interruption of its manufacturing operations. The local authority contended that, in assessing the amount to be awarded in respect of this, there should be deducted an amount to represent the income tax which the company would have paid in respect of these profits if it had earned them.

G **Held:** the company was entitled to be put, so far as money could do it, in the same position as if the land had not been taken from it (dictum of SCOTT, L.J., in *Horn v. Sunderland Corpn.*, [1941] 1 All E.R. at p. 491, applied), and no deduction was to be made on the ground that the profits would or might have been liable to be brought into charge to tax, because the question of the tax liability of the company in respect of its trading profits was a question between the company and the Crown with which the local authority were not concerned.

H *Billingham v. Hughes* ([1949] 1 All E.R. 684) considered and applied.

I Appeal dismissed.

[**Editorial Note.** Matters of taxation are *res inter alios actæ* when the issue is one of the measure of compensation for loss between two persons, one of whom has taken the property of or done damage to the other: see per SIR RAYMOND EVERSLED, M.R., at pp. 342, 344, letters G, D, post. This principle is not confined to matters of tax. In actions for negligence causing personal injuries no account is taken of sums payable under insurance policies (see *Bradburn v. Great Western Ry. Co.* (1874), L.R. 10 Exch. 1). The principle has been

applied also in relation to entitlement to service pensions (see *Payne v. Railway Executive*, [1951] 2 All E.R. 910, 912). It may, however, be displaced by statute, and, for example, in cases of fatal accidents the position is modified in certain respects (e.g., pension prospects may be taken into account) by the Fatal Accidents Act, 1846, s. 2 (17 HALSBURY'S STATUTES (2nd Edn.) 5), while special provision has been made with regard to benefits under national insurance by the Law Reform (Personal Injuries) Act, 1948, s. 2 (25 HALSBURY'S STATUTES (2nd Edn.) 365).

As to the measure of compensation when loss of business results from disturbance on compulsory acquisition of land, see 6 HALSBURY'S LAWS (2nd Edn.) 43, para. 39, 10 HALSBURY'S LAWS (3rd Edn.) 163, para. 284; and for cases on the subject, see 11 DIGEST (Repl.) 126, 127, 164-168.

For the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 977.]

Cases referred to:

- (1) *Billingham v. Hughes*, [1949] 1 All E.R. 684; [1949] 1 K.B. 643; [1949] L.J.R. 1147; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.*, (1887), 12 App. Cas. 315; 56 L.J.P.C. 82; 11 Digest (Repl.) 249, 785.
- (3) *Horn v. Sunderland Corpn.*, [1941] 1 All E.R. 480; [1941] 2 K.B. 26; 110 L.J.K.B. 353; 165 L.T. 298; 105 J.P. 223; 11 Digest (Repl.) 127, 167.
- (4) *Fairholme v. Firth & Brown, Ltd.*, (1933), 149 L.T. 332; Digest Supp.
- (5) *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.*, [1946] 1 All E.R. 527; [1946] K.B. 356; 115 L.J.K.B. 379; 175 L.T. 89; 2nd Digest Supp.
- (6) *M'Daid v. Clyde Navigation Trustees*, 1946 S.C. 462; 2nd Digest Supp.
- (7) *Blackwood v. Andre*, 1947 S.C. 333; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the Lands Tribunal (C. H. BAILEY, Esq.) pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, on the requisition of the acquiring authority, West Suffolk County Council, on a claim for compensation following on the compulsory acquisition of premises forming part of a factory known as "The Maltings", situate at Brandon, Suffolk. The claimant company, W. Rought, Ltd., was the leaseholder of the premises, having the benefit of a lease of the premises for twenty-one years from Oct. 11, 1944, and used the premises for the storage of skins and for a process known as blowing fur. The premises were acquired under a compulsory purchase order made by the county council on Jan. 3, 1951, and confirmed by the Minister of Transport on June 9, 1951, and entry was effected on Oct. 6, 1952. The company did not acquire other premises until Midsummer, 1953, and as a result lost beneficial contracts. After negotiations between the company and the district valuer for the Board of Inland Revenue, on behalf of the county council, in regard to the company's claim for compensation in respect of its interests in the land taken, the matter was referred to the Lands Tribunal. The company claimed, among other things, compensation for the loss of profit in respect of specific orders caused by the temporary interruption of its manufacturing operations owing to its being dispossessed of the premises compulsorily acquired. The district valuer contended that, in respect of this claim, there should be deducted a sum representing the income tax which would have been paid by the company if it had in fact earned this profit. The tribunal took the view that, if there was a liability to tax on the amount awarded as compensation or any part thereof, that was a matter between the company and the Inland Revenue and had no relevance to the issue before the tribunal; and, if the Board of Inland Revenue thought that, as a result of the tribunal's decision, the company became liable to tax of some

A sort, that would be a matter for the board to take up with the company. Accordingly, the tribunal decided that the deduction of a sum representing income tax should not be made, and the tribunal made no decision on the subject of liability to tax by either party. The question for the decision of the Court of Appeal was whether the tribunal came to a correct determination in point of law.

B *Geoffrey Lawrence, Q.C.*, and *Harold Brown, Q.C.*, for the county council.
D. C. Walker-Smith, Q.C., and *M. L. M. Chavasse* for the claimant company.

SIR RAYMOND EVERSLED, M.R.: The question in this appeal is whether, the appellants, the West Suffolk County Council, having acquired compulsorily certain land and property of the respondent company, W. Rought, Ltd. (to whom I will hereafter refer as "the company"), and having become liable to pay to the company, *inter alia*, and in addition to the value of the land taken, compensation for the company's disturbance, based on deprivation of business profits which the company thereby incurred, the Lands Tribunal in assessing compensation should have taken some account of the additional taxes, particularly income tax, which the company would or might have become liable to pay, had the business profits been earned; or whether, as the Lands Tribunal held, the tribunal was bound, as a matter of law, to disregard altogether any such liability or possible liability.

The facts are few and not in dispute. The county council was engaged, in and after the month of October, 1952, on a scheme for widening and re-building a bridge over the Little Ouse River at Brandon in Suffolk. The company was entitled to a leasehold interest in and was in possession of certain buildings in proximity to the old bridge. As a necessary part of the bridge widening scheme, the county council, in the exercise of their statutory powers, duly acquired a substantial part of the company's premises. The company at all material times has carried on business as hatters' furriers and it used the premises in question (a) for the storage of skins and (b) for the process known as that of blowing fur. As a result of the acquisition by the council, the company had to find other premises, which it did in, but not before, Midsummer, 1953. During the period of nine months from October, 1952, to Midsummer, 1953, the company was without the premises acquired by the county council and without any other premises to take their place. As a result, the company said that it had lost three beneficial contracts. I am not concerned with the details of those contracts or with the validity of the tribunal's finding that the company had suffered loss, amounting in all to £11,600, in regard to those contracts. It is sufficient for the purposes of my judgment to take one of the contracts as an example, a contract which (as the tribunal found) the company would have been able to make, and would have made, with a firm known as Wilsons of Manchester for the supply of twenty-five thousand pounds of blown coney No. 1 fur, and which, after allowing for the cost and expenses incurred in connection with it (other than tax liability), would have yielded to the company a profit of £5,000.

The argument of the county council was to this effect. (i) If the £5,000 had been earned, then the company would have been liable to an additional amount of income tax by reason of the fact that its business profits would have been enhanced by that amount. (ii) Whether or not the company would have been liable to income tax in respect of that exact sum, the tribunal should, in any case, properly have made some estimate of the tax liability (if any) which the company would have incurred as a consequence of that contract, and, having found as a fact what the amount would have been, the tribunal should have reduced the compensation payable by the county council accordingly. (iii) Otherwise the company gets, in the end, more than it would have got in the way of business earnings if there had been no compulsory acquisition of the company's property. I add that, according to the argument of the county council, as things are the company will be under no liability whatever for tax in respect of the sum payable for compensation.

It is obvious that the point, as I have stated it, has, at least as a matter of first impression, some substance and reason in it. It is equally obvious that in the case where A, by reason of some breach of contract or tortious act on his part, has to pay B, by way of damages, compensation for the profits or earnings which B has in consequence lost, there is some reason and substance in the view that, if A is bound to pay the gross sum, without regard to the liability for tax, which B would have incurred had he enjoyed the profits or earnings, B is better off financially than he would have been if A had not broken the contract or not committed the tortious act. In *Billingham v. Hughes* (1), however, which was a case of negligence causing personal injuries, this court held that, in the case at any rate of a tortious act on the part of A no such diminution of liability was permissible. *Billingham v. Hughes* (1) is binding on this court, but the argument of counsel for the county council was that the principle of that case was not, in any event, applicable to compensation payable for disturbance by an acquiring authority. The learned counsel pointed out, first, that the acquiring authority is acting lawfully throughout and, therefore, ought not to be subject to any disability which might affect a wrongdoer; and, secondly, they observed that compensation for disturbance, though so described and though calculated in this case by reference to deprivation of business profits which would otherwise have been earned, is, in truth, no more and no less than part of the price paid for the acquisition of the land by the acquiring authority. On these grounds counsel for the county council contended that the present case is distinguishable from *Billingham v. Hughes* (1) and that we ought not to regard ourselves as governed by the latter.

For the second proposition stated by counsel for the county council there is ample authority. Under the old law, before the Acquisition of Land (Assessment of Compensation) Act, 1919, it was so stated and settled by the House of Lords in *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (2), and since the Act of 1919 the position has been held to be the same by this court in *Horn v. Sunderland Corpn.* (3). Counsel for the county council particularly relied on certain language in the latter case. I observe, however, first, that in the *Glasgow & South Western Ry. Co.* case (2) the question before the House was the amount of the stamp duty payable on a transfer of the property acquired. The question in *Horn v. Sunderland Corpn.* (3) I take from the second paragraph of the headnote ([1941] 2 K.B. 26), which says:

"Held, by the Court of Appeal (SIR WILFRID GREENE, M.R., and SCOTT, L.J., GODDARD, L.J., dissenting), that when land being used for agricultural purposes is ripe for building and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance shall only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land."

I now refer to certain passages in the judgments in that case on which counsel for the county council particularly relied. SIR WILFRID GREENE, M.R., said ([1941] 1 All E.R. at p. 484):

"Apart from injurious affection, the question which a jury under the Lands Clauses Acts and an arbitrator under the Act of 1919 has to answer is what price ought to be paid to the owner for the land which is being compulsorily acquired, price and compensation being the same thing under different names: *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (2). It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was in strictness no necessity to do this, since the price to be paid was a global sum."

A Then, later in his judgment, SIR WILFRID GREENE, M.R., said (*ibid.*, at p. 487):

"It was also said by counsel for the respondent [the claimant] that, if he was wrong in his contention, results would follow which the legislature could not have intended. As an illustration of his point, I may take the case of land which, at the time of acquisition, has a potential value as building land which gives it a value, say £11,000, rather higher than would have been the case if it had been purely agricultural, say £10,000. If by disturbance the owner suffers a loss of £2,000, and if nothing is to be awarded in respect of such disturbance, the owner will be damnified. The reasoning which appeals to me does not, however, lead to any such result. In such a case, the loss by disturbance, in my judgment, would be £1,000, and, if the owner moved to another farm costing £10,000 and spent or lost £2,000 in the process, he would be completely indemnified by receiving £11,000 for the value of the land and £1,000 for disturbance. If he received an additional £1,000 for disturbance, he would be receiving profit, not compensation."

I have read that second passage because it indicates forcibly what was the point to which the judgment of the Master of the Rolls was directed.

D There is this passage in the judgment of SCOTT, L.J. ([1941] 1 All E.R. at p. 491):

"The sums given even in some of the reported cases seem to predicate an almost punitive measure of damages for eviction by compulsion of law. In my view, there never was anything in [the Lands Clauses Consolidation Act, 1845] to warrant such indulgence to the dispossessed owner, and I know of no decision perpetuating any such generosity to the owner at the expense of the promoters which would be binding on us. Nor is there anything in s. 2 (6) of [the Acquisition of Land (Assessment of Compensation) Act, 1919] to compel us to follow a practice in either jury or arbitral assessments, if there was one, of giving to the dispossessed owner an amount of compensation which exceeds the total sum of his real loss arising from the acquisition. Such a practice would now, as it did before, contravene the basic principle of compensation."

SCOTT, L.J., went on to say (*ibid.*):

"This broad view is, I think, fully borne out by the detailed provisions of the Act of 1845. That Act was a consolidation of standard clauses usually inserted in private Acts, as appears from its title and preamble. It possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater."

I observe and venture to emphasise that which is obvious, namely, that the passages in the judgments which I have read and the judgments themselves are directed to the question which was in issue in that case and which I have read from the headnote. The matter with which we are concerned was never before the court or in the minds of SIR WILFRID GREENE, M.R., and SCOTT, L.J. I find it, therefore, impossible to fasten on such phrases as seem to indicate a strict limit in the way of compensation to the "real loss" suffered by the party whose land has been acquired as justifying the view for which the county council here contend in regard to tax. On the other hand, I observe and venture to read again the basis for compensation which was stated by SCOTT, L.J.—that the first leading feature of the Act of 1845 is "the [owner's] right to be put, so far as money can do it, in the same position as if his land had not been taken from him". But the proposition that compensation is part of the price which the

acquiring authority has to pay for or in respect of the acquisition of the land does not, in my judgment, really assist the county council at all. No doubt, in that respect the sum paid for compensation is different in quality from the sum paid for, say, damages for personal injury, but that difference in quality does not, in my opinion, lead necessarily or logically to the conclusion that in the former case, but not in the latter, account may be had of, or allowance made for, income tax or for the liability to income tax which the payee is or may be saved. For this purpose it is not, in my judgment, legitimate or relevant for the payer to seek to give to the sum paid some label or description such as "capital" in the hands of the payee. Whether the sum paid is income or capital in the hands of the payee is a matter with which the payer is not concerned. As I have earlier said, counsel for the county council stated, in opening the appeal, that the compensation in this case in the hands of the company would not be liable to be brought into account for income tax purposes. That may or may not be so, but it is a matter with which I am not concerned. What the payer has to pay by way of compensation is, as stated by SCOTT, L.J. ([1941] 1 All E.R. at p. 491), in the passage which I have already twice read, a sum so as to put, so far as money can do it, the owner in the same position as if his land had not been taken from him; and this, I observe, is exactly the same measure as the measure of damages applied to the case of a man liable to pay compensation for breach of contract or, for that matter (where there is no question of punitive damages) in tort.

Next, it is not, in my judgment, true to say that the profits which the company was prevented from earning from the Wilson contract would have, as such, been taxable in the company's hands. The company's liability to income tax arises in respect of the profits and gains of its business during any given year of assessment. No doubt, if the Wilson profit had been earned in fact, that sum would have to have been brought into account in the appropriate year in arriving at the profits or gains (if any) for that year, but whether and to what extent income tax would have been made leviable by reason or in consequence of the Wilson contract would have depended on a number of considerations relating to the whole business activities carried on by the company—so long, indeed, as it continued to carry them on; and it is not, in my judgment, a sufficient answer to say: "That is merely a matter of estimation, in the light of all the known facts, or an administrative difficulty, no greater than the administrative difficulties with which a court or a jury is often faced in fixing a sum for damages". Apart from the extended scope of the inquiry which acceptance of the proposition would necessarily demand, the question of the tax liability of the company in respect of its trading profits or gains (if any) is a question between the company and the Crown, with which the county council are not concerned. So far as the county council are concerned, these tax matters are, in my judgment, *res inter alios actae*; and this, in my view, was the true ratio decidendi of *Billingham v. Hughes* (1), which did not depend on the fact that the defendants in that case were wrongdoers and for that reason deprived, by way of punishment for their wrongdoing or otherwise, of a right to reduce their liability. The defendants in *Billingham v. Hughes* (1) were liable, in the same way as the council are liable here, to compensate the other party, so far as money could do it, for the loss which the other party had suffered by reason of the acts committed or complained of.

I refer to certain passages in the judgment, first of TUCKER, L.J., and then of SINGLETON, L.J., in *Billingham v. Hughes* (1). TUCKER, L.J., said ([1949] 1 All E.R. at p. 686):

"It is contended on behalf of the defendants that the sum ultimately arrived at should reflect the fact that it is not subject to income tax or surtax, whereas the fees which the plaintiff would have received would have been reduced by the incidence of these taxes. It is, I think, significant that, although income tax rose to 5s. in the £ in the year 1916-17 and has never

A since gone below 4s. this point was never raised in any reported case in this country until 1933 when it was rejected by DU PARCQ., J., in *Fairholme v. Firth & Brown, Ltd.* (4). After an interval of thirteen years and with the introduction of the 'P.A.Y.E.' regulations*, it was again raised before

B ATKINSON, J., in *Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd.* (5), and met a similar fate. Neither of those cases was taken to this court, and we are, accordingly, called on to deal with it for the first time. *Fairholme's* case (4) was a claim for damages for wrongful dismissal, but I can see no distinction in principle between that case and the present. It can, no doubt, be said in a case of damages for wrongful dismissal that it is difficult to see why the party who has broken his contract should benefit from his breach by paying less by way of damages than if he had paid the salary due under his agreement with the plaintiff, but considerations of this kind

C are irrelevant to the only question involved in the assessment of damages, whether for breach of contract or tort, namely: What is the sum required so far as possible financially to effect restitutio in integrum? Where, therefore, loss of salary or earnings is the basis of the claim for damages, whether for breach of contract or in tort, the same considerations must

D apply . . . On what principle, then, can the defendants, who have rendered the earning of these fees impossible, be heard to say that the loss should be estimated, not at the sum which the plaintiff would have received from his patients, but at a lower figure based on an estimate of tax which he would have been called on to pay at some future date? It seems to me, apart from authority and apart from the practice which has prevailed for so many

E years, that restitutio in integrum requires the plaintiff to be put in the position in which he would have been vis-à-vis his patients, that is, to receive his fees in full, and that questions of his ultimate liability to the revenue authorities are matters which do not concern the defendants."

TUCKER, L.J., then referred to certain cases, including two Scottish cases, which I pass over for the moment, because they are referred to in a passage which

F I propose to read from the judgment of SINGLETON, L.J., who said ([1949] 1 All E.R. at p. 687): "It is surprising that this question has not come up for consideration in the Court of Appeal until now. It is of great importance." The learned lord justice then referred to the two English cases, *Jordan's* case (5) and *Fairholme's* case (4), and said (*ibid.*, at p. 688):

G "Some three months before the decision of ATKINSON, J. [in *Jordan's* case (5)], the question had arisen in Scotland in *M'Daid v. Clyde Navigation Trustees* (6). The report of that case was not before ATKINSON, J. In that case LORD SORN, Lord Ordinary, held that, where loss of earnings became a factor in assessing an award of damages to a pursuer, if these earnings would have been liable to taxation that fact should be taken into consideration and some deduction should be made in respect of this liability. There

H is much in the reasoning of LORD SORN which appeals to me. If the assessment of damages is based on the gross loss of earnings of an injured person (and if no portion of the sum awarded is subject to income tax) it seems to me that the assessment is not based on the pecuniary loss sustained. In other words, if the calculation was precisely accurate arithmetically, a plaintiff would recover more than his pecuniary loss. The question again came up

I for consideration in Scotland in *Blackwood v. Andre* (7), when LORD KEITH, Lord Ordinary, expressed a directly opposite view to that of LORD SORN in *M'Daid v. Clyde Navigation Trustees* (6) . . . Though the principle has always been to seek to arrive at the pecuniary loss of the individual, the practice in the courts of this country has consistently been not to have regard to income tax in the assessment of damages, and to alter the practice now

* See now the Income Tax (Employments) Regulations, 1950 (S.I. 1950 No. 453), as amended; 11 HALSBURY'S STATUTORY INSTRUMENTS 30.

would lead to great confusion and would add immeasurably to the difficulty of assessing damages and in the direction to be given to a jury." A

SINGLETON, L.J., then considered cases where the persons injured were so situated, having regard to the conditions of their families and so forth, that the amount of tax would be very different in the one case from what it was in the others, and he concluded (*ibid.*, at p. 689):

"A man's income is his own and he can do with it what he likes. Income tax is a charge on the person, and not on property or gains. By the Income Tax Act, 1918, s. 1, it is to be charged 'in respect of all property, profits, or gains', and, under Sch. D., I (a) (ii), tax is to be charged in respect of the gains to any person from employment or vocation." B

I add, reverting to the judgment of TUCKER, L.J., that, after referring to LORD SORN's decision in *M'Daid's* case (6), the lord justice expressed the view (*ibid.*, at p. 687) that the two English cases, *Fairholme's* case (4) and *Jordan's* case (5), had been rightly decided. C

In my opinion, there is no trace in the judgments from which I have read of the proposition that the principle on which *Billingham v. Hughes* (1) was decided was dependent on the circumstance that the defendants were wrongdoers. D Indeed, such a view was expressly rejected by TUCKER, L.J. As I have earlier said, the ratio decidendi of the judgment was that the matter of income tax liability was *res inter alios acta* so far as the defendants were concerned. "A man's income is his own", said SINGLETON, L.J., "and he can do with it what he likes". "Questions of [the plaintiff's] ultimate liability to the revenue authorities", TUCKER, L.J., concluded, "are matters which do not concern the defendants". E In the present case, as it seems to me, the county council are claiming to assert and revive the proposition stated by LORD SORN in *M'Daid's* case (6) which the English Court of Appeal has expressly rejected. It follows, therefore, that, if I am wrong in the reasons which I have earlier given for sustaining the view of the Lands Tribunal, there is, in my judgment, no valid ground for distinguishing the present case from the decision, binding in this court, of *Billingham v. Hughes* (1). F Put another way, if we sought to distinguish it on the grounds which the learned counsel for the county council have stated, we should be doing no more than creating unjustified distinctions of great refinement which would add confusion to the administration of the law. For these reasons, I think that this appeal fails and should be dismissed.

HODSON, L.J. : I entirely agree with the judgment of SIR RAYMOND EVERSHERD, M.R., and cannot usefully add anything. G

PARKER, L.J. : I also entirely agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for Clerk of the county council, Bury St. Edmunds (for the county council); *E. P. Rugg & Co.* (for the claimant company).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

KIRKNESS (INSPECTOR OF TAXES) v. JOHN HUDSON & CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow), March 28, 29, 30, 31, May 5, 1955.]

Income Tax—Wear and tear—Balancing charge—Wagons of coal merchants—Vesting in British Transport Commission—Whether a “sale”—Income Tax Act, 1945 (8 & 9 Geo. 6 c. 32), s. 17 (1)—Transport Act, 1947 (10 & 11 Geo. 6 c. 49), s. 29, s. 30 (1).

Statute—Construction—Construing Acts as one—Whether later Act affects construction of earlier Act—Ambiguity in earlier Act.

On Jan. 1, 1948, railway wagons owned by the taxpayers and at that date under requisition by the Minister of Transport under the Defence (General) Regulations, 1939, reg. 53, vested in the British Transport Commission by virtue of the Transport Act, 1947, s. 29. Compensation in respect of the wagons became payable by the commission to the taxpayers under the Transport Act, 1947, s. 30 and Sch. 6. The amount of compensation so determined was substantially higher than the written-down value of the wagons for the purposes of the income tax allowances in respect of wear and tear as appearing in the taxpayers' books. A balancing charge, representing the excess of the original cost over the written-down value, was made on the taxpayers in pursuance of the Income Tax Act, 1945, s. 17 (1), by an assessment for the year 1948-49.

Held: (i) (LORD MORTON OF HENRYTON dissenting) the word “sold” in its ordinary meaning connoted mutual assent and wagons compulsorily acquired were not “sold” within the ordinary meaning of that word; there was nothing in the context of s. 17 of the Income Tax Act, 1945, sufficient to displace the ordinary meaning of the word “sold” and, accordingly, the section did not apply to the compulsory acquisition and the balancing charge ought not to have been made.

Newcastle Breweries, Ltd. v. Inland Revenue Comrs. (1927) (96 L.J.K.B. 735) distinguished.

(ii) (by VISCOUNT SIMONDS, LORDS REID, TUCKER and SOMERVELL OF HARROW) a later statute may not be referred to for the purpose of interpreting clear terms of an earlier Act which the later statute does not amend, even though both Acts are by the express provision of the later statute to be construed as one, unless the later statute expressly places a particular interpretation on the terms of the earlier Act; but if the earlier enactment was ambiguous, a later statute may throw light on the true interpretation of that enactment, as where a particular construction of the earlier enactment will render the later incorporated statute effectual.

Ormond Investment Co. v. Betts ([1928] A.C. 143) followed.

Decision of the COURT OF APPEAL sub nom. *John Hudson & Co., Ltd. v. Kirkness (Inspector of Taxes)* ([1954] 1 All E.R. 29) affirmed.

[**Editorial Note.** On the subject of the construction of related provisions of taxing Acts the present case may usefully be compared with the observations of LORD SIMONDS in *Fendoch Investment Trust Co. v. Inland Revenue Comrs.* ([1945] 2 All E.R. at p. 144, letter E) where, in an opinion with which other Lords of Appeal concurred, he declined to give to words in the later of a series of enactments a meaning which they did not naturally bear in order to bring them into accord with what was alleged to be the scheme of the enactments. Reference may also be made to the judgments of the Court of Appeal in *Camille and Henry Dreyfus Foundation, Inc. v. Inland Revenue Comrs.* ([1954] 2 All E.R. 466) where the principle of *Ormond Investment Co. v. Betts* ([1928] A.C. 143) in

relation to the interpretation of earlier enactments by reference to the provisions of later statutes was considered. A

The effect of provisions for construing several statutes as one Act is discussed in 31 HALSBURY'S LAWS (2nd Edn.) 489, para. 616; and for cases on the subject, see 42 DIGEST 662-665, 714-753.

For the Income Tax Act, 1945, s. 17, see 12 HALSBURY'S STATUTES (2nd Edn.) 629, and for the replacing provisions of the Income Tax Act, 1952, s. 292, see 31 HALSBURY'S STATUTES (2nd Edn.) 283. B

For the Transport Act, 1947, s. 29, s. 30, see 19 HALSBURY'S STATUTES (2nd Edn.) 1055, 1056.]

Cases referred to:

- (1) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp. C
- (2) *Foster (John) & Sons v. Inland Revenue Comrs.*, [1894] 1 Q.B. 516; 63 L.J.Q.B. 173; 69 L.T. 817; 58 J.P. 444; 39 Digest 281, 648.
- (3) *Great Western Ry. Co. v. Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, 646.
- (4) *Ormond Investment Co. v. Betts*, [1927] 2 K.B. 326; 96 L.J.K.B. 634; 137 L.T. 142; *reversd.* H.L., [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; Digest Supp. D
- (5) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
- (6) *A.-G. v. Clarkson*, [1900] 1 Q.B. 156; 69 L.J.Q.B. 81; 81 L.T. 617; 42 Digest 665, 751.
- (7) *International Bridge Co. v. Canada Southern Ry. Co., Canada Southern Ry. Co. v. International Bridge Co.*, (1883), 8 App. Cas. 723; 42 Digest 664, 745. E
- (8) *Re MacManaway*, [1951] A.C. 161; 2nd Digest Supp.
- (9) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259, 273; 3rd Digest Supp. F
- (10) *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.*, (1887), 12 App. Cas. 315; 56 L.J.P.C. 82; 11 Digest (Repl.) 249, 785.
- (11) *Re Gerard (Lord) & London & North Western Ry. Co.*, [1895] 1 Q.B. 459; 64 L.J.Q.B. 260; 72 L.T. 142; 11 Digest (Repl.) 163, 365.
- (12) *Hart v. Hudson Brothers, Ltd.*, [1928] 2 K.B. 629; 97 L.J.K.B. 804; 139 L.T. 663; 92 J.P. 170; 44 Digest 133, 26.
- (13) *Phillips v. Parnaby*, [1934] 2 K.B. 299; 103 L.J.K.B. 575; 151 L.T. 400; 98 J.P. 383; Digest Supp. G
- (14) *R. v. Folkestone & Area Rent Tribunal, Ex p. Sharkey*, [1951] 2 All E.R. 921; [1952] 1 K.B. 54; 116 J.P. 1; 3rd Digest Supp.
- (15) *Coltress Iron Co. v. Black*, (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 1 Tax Cas. 287; 28 Digest 6, 13.
- (16) *Partington v. A.-G.*, (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370; 42 Digest 736, 1603. H

Appeal.

Appeal by the Crown from an order of the Court of Appeal, dated Dec. 2, 1953, and reported sub nom. *John Hudson & Co., Ltd. v. Kirkness (Inspector of Taxes)*, [1954] 1 All E.R. 29, affirming an order of UPJOHN, J., dated Apr. 29, 1953, and reported [1953] 2 All E.R. 64, allowing an appeal by the taxpayers from the Special Commissioners of Income Tax. The facts appear in the opinion of VISCOUNT SIMONDS. I

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Cyril King, Q.C., and Sir Reginald Hills for the Crown.

J. Senter, Q.C., and *A. P. L. Barber* for the taxpayers.

The House took time for consideration.

A May 5. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises questions of some difficulty in regard to the meaning and effect of s. 17 of the Income Tax Act, 1945. The material parts of that section are as follows:

B “ (1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of Sch. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as ‘a balancing allowance’ or ‘a balancing charge’) shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . .

E “ (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the plant or machinery still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys.

F “ (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys . . . ”

It will be observed that in sub-s. (1) (a) occur the words “is sold”, and it is around these two plain English words that a controversy arose between the Crown and the taxpayers which occupied your Lordships for several days.

G The relevant facts are simple and few. At all material times, the business of the taxpayers was that of coal merchants and they owned a large number of wagons which they used for the transport of coal. These wagons were, on Jan. 1, 1948, under requisition by the Minister of Transport under the powers contained in reg. 53 of the Defence (General) Regulations, 1939. On Jan. 1, 1948, the property in these wagons was vested in the British Transport Commission by virtue of s. 29 of the Transport Act, 1947, which is in the following terms:

H “ Where, immediately before the date of transfer, any privately owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by reg. 53 of the Defence (General) Regulations, 1939—(a) the property in that wagon shall vest in the commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then cease; . . . ”

I Compensation to the owner of wagons who has been thus deprived of them is provided by s. 30 which enacts, by sub-s. (1), that, subject to the provisions of the three next succeeding sub-sections, the commission shall pay to him as compensation in respect thereof an amount determined by reference to the type of wagon and the year in which it was first built in accordance with the Table set out in Sch. 6 to the Act. The three succeeding sub-sections provide for certain variants of the amount of compensation, but, broadly speaking, it is a sum determined by age and type without reference to the condition of repair. The amount so determined, if it exceeded £2,000, was not to be paid in currency but

was to be satisfied by the issue of British Transport Stock. It is, perhaps, worth noting that the expression "the date of transfer" refers back to s. 12 of the Act which provides for the vesting in the commission of the undertakings specified in Sch. 3 on Jan. 1, 1948, and refers to that date as the date of transfer. "Transfer" is, apparently, adopted as a convenient word for describing a statutory operation by which the property of "A" is vested in "B".

Pursuant to s. 29 of the Act, the taxpayers' wagons were duly vested in the commission, and in due course the taxpayers received an amount of compensation determined in accordance with the provisions of s. 30 and Sch. 6, which was satisfied by the issue of an equivalent amount of British Transport Stock. This amount was substantially higher than the written-down value of the wagons for the purposes of the income tax allowances in respect of wear and tear as appearing in the taxpayers' books. On these facts, a balancing charge of £29,021 was made on the taxpayers in pursuance of s. 17 (1) of the Income Tax Act, 1945, which I have already set out, by an assessment for the year 1948-49 made under Case I of Sch. D to the Income Tax Act, 1918. This amount (except for a part about which no dispute arises) represents the excess of the original cost over the written-down value.

The taxpayers appealed against the balancing charge to the commissioners for the special purposes of the Income Tax Acts, who determined the question in favour of the Crown and, at the request of the taxpayers, stated a Case for the opinion of the High Court. The Case was duly heard by UPJOHN, J., who reversed the determination of the commissioners, holding that no balancing charge was payable, and his decision was upheld by the unanimous opinion of the Court of Appeal. Your Lordships are now invited to reverse their judgment.

My Lords, I must, at a later stage, call your Lordships' attention to an argument which is founded on the provisions of certain later Acts, but our primary task is to consider whether the statutory transaction which I have described was an event to which s. 17 (1) (a) of the Income Tax Act, 1945, applied, or, in other words, whether the taxpayers' wagons were "sold" within the meaning of that section. Let me say at once that there is nothing in the Act itself to give any special meaning or colour to that word; it may be that the policy of the Act might equally well be applied to other transactions which are in some respects analogous to sales, but that is guess work and we are here concerned with sales not with analogous transactions.

My Lords, in my opinion, the taxpayers' wagons were not sold, and it would be a grave misuse of language to say that they were sold. To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he has had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say of a man who has been deprived of his property without compensation that he has given it away. Alike in the ordinary use of language and in its legal concept, a sale connotes the mutual assent of two parties. So far as the ordinary use of language is concerned, it is difficult to avoid being dogmatic but, for my part, I can only echo what SINGLETON, L.J., said in his admirably clear judgment ([1954] 1 All E.R. at p. 32):

"What would anyone accustomed to the use of the words 'sale' or 'sold' answer? It seems to me that everyone must say 'the taxpayers did not sell'."

I am content to march in step with everyone and say "the taxpayers did not sell". Nor is a different result reached by an attempt to analyse the legal concept. When BENJAMIN said in the passage quoted by SINGLETON, L.J., and BIRKET, L.J., from his well known book *SALE OF PERSONAL PROPERTY* (2nd Edn.), p. 1, that

"By the common law a sale of personal property was usually termed a 'bargain and sale of goods'",

A he was, by the use of the word "bargain", perhaps unconsciously emphasising that the consensual relation which the word "bargain" imports is a necessary element in the concept. In this there is nothing new: the same principle is exhibited in the Roman law, for the opening words of Title 23 of the third book of the INSTITUTES OF JUSTINIAN "De emptione et venditione" are

"emptio et venditio contrahitur simulat que de pretio convenerit."

B I underline the word "contrahitur" and point out that it may have more than academic interest since the Income Tax Act, 1945, is a United Kingdom Act, and "sale" must be construed by reference to the law of Scotland as well as the law of England. Sometimes the contract for sale is itself the sale, as so often in the sale of goods: sometimes, and particularly in the sale of land, it is regarded as a part of the sale as, for example, when it is said by a modern writer that "The first step in the sale of land is the contract for sale" (see CHESHIRE'S MODERN REAL PROPERTY (6th Edn.), p. 651). But it is immaterial whether the contract is regarded as the sale itself, or as a part of, or a step in, the sale, or as a prelude to the sale: there is, for the present purpose, no substance in any such distinction. The core of it is that the consensual relation is connoted by the simple word "sale".

D It was urged on your Lordships that, after all, the result in law of a sale is to transfer the ownership of property from A to B for a consideration in money or money's worth, and that this is just what the Transport Act, 1947, does to the tax-payers' wagons. But, my Lords, if I may say so without disrespect to the very able and helpful argument of the learned Attorney-General, I find it in this aspect

E dangerously near a logical fallacy. A dog is an animal that has four legs and a tail, but not every animal that has four legs and a tail is a dog. Nor is a statutory vesting of A's property in B and the award of compensation to A a sale, though its result may be the same as if A had sold that property to B.

Reference was next made to procedure under the Lands Clauses Consolidation Act, 1845, and to general or special Acts which give to undertakers, or to central or local authorities, powers of compulsory acquisition, and it is true enough that

F these powers are commonly referred to as powers of compulsory purchase and the transaction is sometimes referred to as a compulsory sale. Faced with this nomenclature, which has been used for a hundred years or more, the taxpayers did not admit that, even if the transfer of their property had been effected by the usual procedure of compulsory purchase, which is now generally standardised

G by the Acquisition of Land (Authorisation Procedure) Act, 1946, the transaction would be a sale within s. 17 (1) (a) of the Income Tax Act, 1945. I do not think that it is necessary to determine this question. There are aspects of a so-called compulsory sale which clearly distinguish it from a sale *stricto sensu*, and I am not satisfied that, without some context to aid it, the word "sale" in an Act of Parliament should be held to include a transaction which is more accurately

H and, I think now more commonly, described as a compulsory acquisition. But, however this may be, the operation of the Transport Act, 1947, is widely different from that of the Acts to which I have referred. It has not those elements which, in some degree, assimilate a compulsory sale to a sale *simpliciter*, and make the name, if a misnomer, at least a convenient misnomer. It was easy to describe as a purchase or sale with the qualifying adjective "compulsory", a transaction in

I which the parties were placed in a position to negotiate and, apart from the power of compulsion in the background, were not unlike an ordinary vendor and purchaser. These elements, as I say, are wholly lacking in the transaction under review and it is, in my opinion, an illegitimate use of language to say that, because an acquisition under the procedure of the Lands Clauses Acts is spoken of as a compulsory sale, therefore this transaction is a sale.

Reliance was placed by learned counsel for the Crown on *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1). The facts of that case are sufficiently set out in the judgment of SINGLETON, L.J. ([1954] 1 All E.R. at p. 34), and I do not

think it necessary to repeat them. Nor do I differ in any respect from the view which he and BIRKETT, L.J., formed on its relevance. The question there was whether a sum awarded to the company by way of compensation for a quantity of rum requisitioned by the Admiralty was a profit arising from its trade or business. The company contended that it was not. It was held by ROWLATT, J., and the Court of Appeal and this House that it was. ROWLATT, J., in the course of his judgment referring to the transaction said (12 Tax Cas. at p. 937) "Now what is that except a compulsory sale of the rum?" and somewhat similar expressions were used in this House. But they were used *alio intuitu*, and are no authority for saying that every compulsory acquisition, however effected, is a sale. A

Nor, my Lords, do I get any assistance in the construction of this Act from the numerous cases decided under the Stamp Acts to which we were referred. In one of them (*John Foster & Sons v. Inland Revenue Comrs.* (2)), on which the Crown chiefly relied, LINDLEY, L.J., used language which, taken out of its context, would support the view that any transfer of A's property to B for a consideration in money or money's worth could be regarded as a sale. In *Great Western Ry. Co. v. Inland Revenue Comrs.* (3), similar language was used by LORD ESHER, M.R. ([1894] 1 Q.B. at p. 512). But, assuming, as I do, that these cases were rightly decided for the purpose of determining what sort of instrument is a "conveyance on sale" within the meaning of the Stamp Act, I must repeat that in them, no more than in the *Newcastle Breweries* case (1), do I find authority to support the Crown's wide proposition in the present case. B

At an early stage in this opinion, I indicated that I would have to refer to an argument founded on the provisions of later Acts. Two questions here arise (i) whether it is legitimate to seek guidance from the later Acts in construing the earlier one, and (ii) if it is, what light the later Acts throw on the earlier one. C

I must preface my consideration of these questions by a reference to *Ormond Investment Co. v. Betts* (4), for, at more than one point, it is a direct authority on the questions we have to decide. In the first place, I will quote a passage from LORD BUCKMASTER's speech ([1928] A.C. at p. 156). He cites the following words from the judgment of LORD STERNDALE, M.R., in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (5) ([1921] 2 K.B. at p. 414): D

" 'I think it is clearly established in *A.-G. v. Clarkson* (6) that subsequent legislation on the same subject may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier'." E

LORD BUCKMASTER said:

"This is, in my opinion, an accurate expression of the law, if by 'any ambiguity' is meant a phrase fairly and equally open to divers meanings, but in this case the difficulty is not due to ambiguity but to the application of rules suitable for one purpose to another for which they are wholly unfit." F

Other noble and learned Lords expressed the same opinion. Here, then, is the first proposition, that it is only where there is an ambiguity in the earlier Act that recourse may be had to a later Act for its construction. What, then, is an ambiguity for this purpose? The *Ormond* case (4) here, too, gives valuable help, not only in the exposition given by LORD BUCKMASTER, but also by its own example. The facts which I extract from the headnote to the report were these. By r. 1 of Case V of Sch. D to the Income Tax Act, 1918, the tax in respect of income arising from foreign stocks and shares fell to be computed on the full amount thereof on the average of three preceding years as directed in Case I. The Rule Applicable to Case I, which dealt with trades, prescribed how the tax G

A should be computed. But, in addition to rules under Case I, there were Rules Applicable to Cases I and II, of which r. 1 (2) prescribed the method of computation in certain cases. The Ormond company was assessed to tax on the basis that the words in r. 1 of Case V "as directed in Case I" referred to r. 1 (2) of the Rules Applicable to Cases I and II, as well as to the Rule Applicable to Case I. This assessment was supported by the Crown, both on the ground that

B this was what the relevant words in the Act of 1918 by themselves meant, and on the further ground that a consideration of the provisions of a later Act, viz., s. 26 of the Finance Act, 1924, showed that this was the meaning attributed by the legislature to the words of the earlier Act. In this House, LORD BUCKMASTER was of opinion, as had been at least one of the members of the Court of Appeal, that the first contention of the Crown was right, and that the words of the earlier

C Act had the meaning they sought to put on them. The other noble and learned Lords thought otherwise. It would have been easy, then, to say that, since judicial opinion differed as to the meaning of these words, there was such an ambiguity as to justify recourse to a later Act to resolve it. But the decision of this House was unanimously to the contrary. That means that each one of us has the task of deciding what the relevant words mean. In coming to that

D decision, he will necessarily give great weight to the opinion of others, but if, at the end of the day, he forms his own clear judgment and does not think that the words are "fairly and equally open to divers meanings", he is not entitled to say that there is an ambiguity. For him, at least, there is no ambiguity, and on that basis he must decide the case. So, here, for me, the meaning of s. 17 of the Income Tax Act, 1945, is clear beyond a peradventure, and I cannot look to

E later Acts for its meaning and effect.

My Lords, on another point the *Ormond* case (4) is an important authority. For, in the present case, much stress was laid on the fact that the later Acts to which it is sought to refer are, by their terms, to be construed as one with the earlier Act. This is, indeed, a common feature of revenue legislation, and it was present and by no means forgotten in the *Ormond* case (4). For I find in the

F argument of the then Attorney-General the following passage ([1928] A.C. at p. 147):

"The Act of 1924 is to be read with the Act of 1918, and the new rule provided by s. 26 of the later Act is to be regarded as another provision of the principal Act."

G In the speech of LORD BUCKMASTER from a passage, the whole of which is a valuable exposition of the law of this subject, I cite these words (*ibid.*, at p. 154):

"It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual . . ."

H "As they are in this case" are, for my present purpose, the material words in this passage, for they show, as the argument for the Crown has shown, that, in the *Ormond* case (4), as in the present case, the House was dealing with two or more statutes which were to be read together or construed as one, and it was to

I those conditions that it directed its decision.

My Lords, numerous authorities besides the *Ormond* case (4) were referred to: and though I do not think that they carry the matter any further, I will comment on some of them. But before doing so, I would make a more general observation. When an Act of Parliament becomes law and its meaning is plain and unambiguous a citizen is entitled to order his affairs accordingly and to act on the footing that the law is what it unambiguously is. He must be assumed to know that the law may be altered but, if so, he may be assumed to know also that it is contrary to the general principles of legislation in this country to alter the law

retrospectively. He should know, too, that, if Parliament alters the existing law retrospectively, it does so by an amendment which is an express enactment and, above all, he is surely entitled to be confident that it will not do so by force merely of an assumption or an allusion in a later Act. When the *Ormond* case (4) was heard at first instance by ROWLATT, J., he described an argument to the contrary as a sinister and menacing proposition. So it is, and I hope that your Lordships will have none of it.

My Lords, it follows from what I have said that, even where two Acts are to be read together, it is not permissible to make what is clear in the earlier Act obscure and ambiguous by reference to something in the later Act. The contrary view would be in direct conflict with the decision of this House in the *Ormond* case (4). What, then, is meant, it may be asked, when it is said that the earlier and later Acts are to be read as one, and how is the decision in the *Ormond* case (4) to be reconciled with what the EARL OF SELBORNE, L.C., said in *International Bridge Co. v. Canada Southern Ry. Co.*, *Canada Southern Ry. Co. v. International Bridge Co.* (7)? My Lords, I think that the question is easily answered. In the first place, if the earlier Act contains such an ambiguity as I have described, then the proposition can be accepted in its widest sense and recourse can be had to the later to explain the earlier Act. But, secondly, if there is no ambiguity in the earlier Act, then the proposition must have a more limited meaning, and it will be the earlier Act to which recourse may be had to explain a provision of the later Act. It is on the same principle that, where there has been a judicial interpretation of words in a statute, those words will be deemed to have the same meaning in a subsequent statute dealing with the same subject-matter. I am aware that LORD SELBORNE used language capable of a wider interpretation, but what he said must be read in the context of that case, in which the difficulty arose, not on the earlier, but on the later, Act and it was to the former that recourse was had to explain the latter. It was not necessary to his decision to hold that an unambiguous provision of an earlier Act can be interpreted by reference to a later one, and I cannot suppose that he meant to decide anything of the kind.

My Lords, I have looked at the later Acts to which the learned Attorney-General referred in order to satisfy myself that they do not contain a retrospective declaration as to the meaning of the earlier Act. They clearly do not, and I do not think that it has been contended that they do. At the highest, it can be said that they may proceed on an erroneous assumption that the word "sold" in s. 17 (1) (a) of the Income Tax Act, 1945, has a meaning which I hold it has not. This may be so and, if so, it is an excellent example of the proposition to which reference was made in the report of the Committee of the Privy Council in *Re MacManaway* (8), and again by my noble and learned friend, LORD RADCLIFFE, in *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (9) ([1952] 1 All E.R. at p. 544), that the beliefs or assumptions of those who frame Acts of Parliament cannot make the law.

My Lords, having, as I say, looked at these Acts and so far satisfied myself, I shall, consistently with what I hold to be the true principle of the interpretation of statutes, deny myself the pleasure of further examining them. I return to the Act of 1945 and reaffirm that, according to the plain and unambiguous meaning of s. 17 (1) (a), the taxpayers did not sell their wagons to the British Transport Commission.

The appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON : My Lords, the only question which arises on this appeal is whether 663 railway wagons belonging to the taxpayers were "sold" within the meaning of s. 17 (1) (a) of the Income Tax Act, 1945, when the property in these wagons was vested in the British Transport Commission on Jan. 1, 1948, under s. 29 of the Transport Act, 1947, and on the terms as to compensation set out in the immediately following sections of that Act. Section 17 of the Income Tax Act, 1945, so far as material, is in the following

A terms:—[HIS LORDSHIP read the terms of the section which are set out at p. 347, ante].

By s. 58 (3) of the Act, any references in the Act to a sale of any property are to be read as including a reference to the exchange of any property, but the Attorney-General, for the Crown, did not seek to contend that the transaction now under consideration amounted to an exchange. Section 68 (1) defines

B “sale, insurance, salvage or compensation moneys” as

“(a) where the event is a sale of any property, the net proceeds to that person of the sale.”

Section 70 provides that the Act “shall be construed as one with the Income Tax Acts.”

C The Act of 1945 greatly extended the scheme of capital allowances for depreciation of capital assets, for the purpose of the taxation of the profits of business undertakings; a special feature of such allowances was the making of an initial allowance on the acquisition of the asset, in addition to subsequent annual allowances. The object of the provisions contained in s. 17 (1) (a) is, I think, plain. The legislature realised that machinery or plant might be sold before the

D trader had obtained the full amount of the depreciation allowances which might have accrued in respect thereof, and the moneys received on the sale might be less than the written-down value of the asset. This would indicate that the depreciation allowances had not been sufficiently generous in this particular instance, and, by way of putting the matter right, a “balancing allowance” became claimable by the trader. Conversely, if the moneys received on the sale

E were in excess of the written-down value of the asset, a “balancing charge” was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive.

It is convenient to turn at once to certain provisions of the Finance Act, 1947, and the Finance Act, 1948, as the Attorney-General submitted, as I think rightly, that these provisions throw much light on the interpretation of s. 17 of the Act

F of 1945. Section 29 (1) of the Finance Act, 1947, provides, so far as material, as follows:

“Where, whether before or after the passing of this Act, any assets consisting of or of an interest in any property vest in the National Coal Board by virtue of s. 5 or s. 6 of the Coal Industry Nationalisation Act, 1946, or by virtue of s. 44 of, and Sch. 3 to, that Act, and, immediately before the date of the vesting thereof, the assets were assets of a colliery concern . . . the provisions of Sch. 7 to this Act shall have effect in computing the liability to income tax of the person who was, immediately before the said date, the owner of the said assets, and of the said board respectively.”

G

Schedule 7 to the Act, after defining “relevant property” and defining “vest” as vesting in the National Coal Board under certain sections of the Coal Industry Nationalisation Act, 1946, sets out certain provisions which are to have effect for the purposes of computing the liability of the board to income tax from any year of assessment. The only relevant provision for the present purpose is para. 3 of Part 3, which reads as follows:

H

“The vesting of, or of an interest in, any relevant property shall not be treated as a sale, or as a purchase, for any of the purposes of Part 2 . . . of the Income Tax Act, 1945 . . .”

I

Part 2 of the latter Act is the part which contains s. 17, already quoted.

By s. 74 (4) of the Finance Act, 1947, it is provided that Part 3 of the Act (which contains s. 29) “shall be construed as one with the Income Tax Acts”.

Section 35 of the Finance Act, 1948, is in the following terms:

“(1) The question whether any and if so what balancing allowance or balancing charge falls to be made to or on the National Coal Board on the

occasion of the transfer to the British Transport Commission under s. 29 of the Transport Act, 1947, of any railway wagons which the said board acquired under the Coal Industry Nationalisation Act, 1946, shall be determined as if s. 29 of the Finance Act, 1947, and Sch. 7 to that Act, had not been passed. (2) This section shall be deemed always to have had effect."

Section 82 (4) of the same Act provides that Part 3 thereof (which contains s. 35) "shall be construed as one with the Income Tax Acts."

The Attorney-General submits that the Income Tax Act, 1945, the Finance Act, 1947, and the Finance Act, 1948, all of which are to be construed as one with the Income Tax Acts, form a statutory code, and that the provisions quoted from the Acts of 1947 and 1948 show that the word "sold" in s. 17 of the Income Tax Act, 1945, is not restricted to a sale by mutual assent. I shall return to this argument later, but, for the moment, I shall summarise the facts of the present case and refer to the provisions of the Transport Act, 1947, under which the taxpayers' railway wagons were transferred to the British Transport Commission.

At all material times the taxpayers' business was that of a coal merchant. They had a number of subsidiary companies which also carried on business as coal merchants. The taxpayers owned railway wagons which were used for the transport of the coal in which the taxpayers and their subsidiary companies were dealing, and the taxpayers were the owner of 663 such wagons at the time of the transfer to the British Transport Commission. The wagons had all been requisitioned by the Minister of Transport under the powers contained under reg. 53 of the Defence (General) Regulations, 1939. On Jan. 1, 1948, being the date of transfer as defined in the Transport Act, 1947, the property in the wagons so requisitioned was transferred to, and vested in, the British Transport Commission under s. 29 of that Act, which is as follows:

"Where, immediately before the date of transfer, any privately owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by reg. 53 of the Defence (General) Regulations, 1939—(a) the property in that wagon shall vest in the commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then cease; and (b) the Crown shall not be liable for any compensation under the Compensation (Defence) Act, 1939, or otherwise in respect of any damage to the wagon occurring during the period of requisition."

Section 30 (1) of the Transport Act, 1947, provides:

"Where under the last preceding section the property in any wagon vests in the commission, the commission shall, subject to the provisions of the three next succeeding sub-sections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the Table set out in Sch. 6 to this Act."

The Table in Sch. 6 sets out a sliding scale of payments adjusted according to the type of wagon and the year in which the wagon was first built. To give one instance—for an eight-ton wagon first built in 1946 the owner would receive £248, but for a similar wagon first built in 1902 he would receive only £16 10s. Sub-section (2), sub-s. (3) and sub-s. (4) contain provisions under which, in certain circumstances, the sums set out in Sch. 6 are varied. Section 32 (1) provides that the amount payable by way of compensation in respect of a wagon should be satisfied by the issue to the person entitled thereto of British Transport Stock, but it is not suggested by either party that this provision has any bearing on the question arising for decision.

A These then were the statutory provisions under which the taxpayers' wagons passed from their ownership into the ownership of the British Transport Commission. It is only necessary to add that there is no dispute in regard to figures in this case; the sole question is, as I have said, whether the wagons were "sold" to the commission within the meaning of s. 17 (1) (a) of the Income Tax Act, 1945.

B My Lords, before I return to a consideration of the words of that section, I shall try to clear the ground by dealing with certain preliminary questions much debated in your Lordships' House. The first preliminary question is whether it is a correct use of the English language to describe as a "sale" a transaction in which the ownership of property is transferred from A to B on the terms that B shall pay a sum of money to A, but the element of mutual assent is absent. Counsel for the taxpayers contends that the answer to this question should be "No". His "sheet-anchor" is the following passage from BENJAMIN'S SALE OF PERSONAL PROPERTY (2nd Edn. (1873), p. 1):

D "By the common law a sale of personal property was usually termed a 'bargain and sale of goods'. It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz. :—(1st) Parties competent to contract; (2nd) Mutual assent; (3rd) A thing, the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in money paid or promised."

E The Attorney-General points out, however, that BENJAMIN'S definition of a sale is contained in the words

"a transfer of the absolute or general property in a thing for a price in money."

F The marginal note to the four "elements" just set out is "The elements of the contract", indicating that, at this stage, the author is dealing only with a sale which is of a contractual nature. The Attorney-General relies on definitions by other writers which omit the element of mutual assent. To give two instances—in BLACKSTONE'S COMMENTARIES, 19th Edn. (1836), Vol. 2, p. 446, the following definition appears:

"Sale or exchange is a transmutation of property from one man to another in consideration of some price or recompense in value",

G while in CHALMERS' SALE OF GOODS (12th Edn.), p. 172, it is said that

"The essence of sale is the transfer of the ownership or general property in goods from seller to buyer for a price."

The Attorney-General points out that in neither of these definitions is the element of mutual assent mentioned.

H My Lords, the question whether it is a correct use of the English language to describe as a "sale" a transaction from which the element of mutual assent is missing is, no doubt, an interesting one. I think, however, that this question loses its importance for the purpose of the decision of this appeal when it is realised that, for the last hundred years, transactions by which the property of A has been transferred to B, on payment of compensation to the owner but without the consent of the owner, have been referred to many times, in Acts of I Parliament, in opinions delivered in this House, in judgments of the Court of Appeal and the High Court of Justice, and in text-books as "sales"—generally as "compulsory sales". Many instances might be given, but I shall confine myself to a few.

In the Lands Clauses Consolidation Act, 1845, between s. 15 and s. 16 there is a general heading

"And with respect to the *purchase* and taking of lands otherwise than by agreement . . ."

while in s. 82 (under the heading "And with respect to the conveyances of land"), the owner whose land is being acquired is called "the seller" and the acquiring body is called "the purchaser". Again, in s. 92, one finds the words "sell or convey" in regard to compulsory taking of land. See also the Local Government Act, 1894, s. 9 (1) and (10). A

In *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (10), one finds the words (12 App. Cas. at p. 321) "compelled to sell"; compensation is referred to (*ibid.*, at p. 325) as the "price" and there is a reference to "consideration for the sale" (*ibid.*, at p. 326). In *Re Lord Gerard & London & North Western Ry. Co.* (11), RIGBY, L.J., said in reference to the Railways Clauses Consolidation Act, 1845 ([1895] 1 Q.B. at p. 469): B

"The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and, if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more." C

Newcastle Breweries, Ltd. v. Inland Revenue Comrs. (1), referred to later, affords a striking modern instance of the use of the word "sale" as applied to a compulsory taking of goods. Finally, the heading of the title dealing with the subject in 6 HALSBURY'S LAWS OF ENGLAND (2nd Edn., 1932, p. 1) is "Compulsory purchase of land and compensation". D

In these circumstances, whether this use of the word "sale" was originally correct or incorrect, I find it impossible to say that the only construction which can fairly be given to the word "sold" in s. 17 (1) (a) of the Income Tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present. I incline to think that, in a modern statute, the word should be construed as including a compulsory acquisition on payment of compensation, in the absence of a context limiting its meaning to sales by mutual assent; but at least the word is fairly capable of the wider meaning, and it is necessary to look at the context in which it is used in order to ascertain the intention of the legislature. E

The second preliminary question arises by reason of an argument put forward by counsel for the taxpayers. He contended that, even if the word "sold" can be construed as including a compulsory acquisition of property by the machinery prescribed in the Lands Clauses Consolidation Act, 1845, it is a further step, and a step which is not justified, to apply the word to the transaction now under consideration. He suggests that the machinery for the taking of land under the Lands Clauses Consolidation Act, 1845, to some extent resembles a sale by mutual assent. For instance, it gives the owner a chance of being heard as to the amount of the compensation money, and there is ultimately a conveyance of the land to the body which acquires it, whereas, in the transaction now under consideration, (i) there is no conveyance, the property in the wagons being simply vested in the commission by s. 29 of the Transport Act, 1947; (ii) the owner is given no opportunity of making representations as to the amount of compensation, which is regulated solely by the provisions of s. 30 of and Sch. 6 to the Act. F

My Lords, if once it is accepted that the words "sale" and "sold" are capable of applying to a compulsory sale of the kind described, e.g., in the Lands Clauses Consolidation Act, 1845, I find it impossible to hold that they are not equally capable of applying to a transaction such as the one which your Lordships are now considering. The differences relied on by counsel for the taxpayers are merely differences in the machinery for carrying out two transactions which are essentially of the same type, viz., compulsory transfers of property with payment of compensation to the transferor. The differences in machinery are due to the nature of the property and to the surrounding circumstances. The vesting provisions in the Transport Act, 1947, were applied to a large number of clearly G
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- A identifiable wagons which were all already under requisition by the Minister of Transport; there was no need for any formal document of transfer, and a vesting declaration was the obvious way of transferring the property. Nor was there any need for elaborate provisions for valuing the property. A separate valuation by experts of each one of many thousands of wagons taken over under the Act of 1947, according to the actual condition of each wagon, would have been
- B prolonged and expensive, and the comprehensive scheme of valuation set out in Sch. 6 was obviously intended to give the dispossessed owner an over-all price fixed according to the type of wagon and its number of years of service. Moreover, the provisions in s. 30 of the same Act show that questions of detail as to the value could be considered in special cases. I would add that, in *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1), the Admiralty, acting under the
- C Defence of the Realm Regulations, had taken over a large stock of rum from the appellant company and in the judgments of ROWLATT, J., of the Court of Appeal, and in your Lordships' House, the transaction is constantly described as a "compulsory sale". For instance, ROWLATT, J., said (12 Tax Cas. at p. 937):

"... what is that except a compulsory sale of the rum? ... That is all it is, a compulsory sale of the rum."

- D LORD HANWORTH, M.R., said that the requisitioning of the rum (*ibid.*, at p. 943)

"... caused it to be dealt with rather sooner than later; but along the same channel down which it was always intended that it should pass from the appellants' possession, namely, by sale."

- E In your Lordships' House, VISCOUNT CAVE, L.C., said (*ibid.*, at p. 953):

"If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle ... The transaction was a sale in the business, and although no doubt it affected the circulating capital of the appellants it was none the less proper to be brought into their profit and loss account."

F

I can see no relevant distinction, for the present purpose, between a requisitioning of rum and a compulsory transfer of wagons.

SINGLETON, L.J., asked the question ([1954] 1 All E.R. at p. 32): "Did the taxpayers sell their wagons to the commission?", and continued:

G

"I am quite sure what the answer of the taxpayers would be, but that is not much help. What would anyone accustomed to the use of the words 'sale' or 'sold' answer? It seems to me that everyone must say 'the taxpayers did not sell'."

H

My Lords, I would agree that not much help can be obtained by considering what would have been the answer of a director of the taxpayers; but if the question were to be put to ten persons unconnected with the taxpayers, I should think it quite likely that five of them might say: "No, the wagons were taken over under the Transport Act", and the other five might say: "Yes", adding, possibly, "but it was a compulsory sale" or "because they had to do it".

I

For these reasons, I would dispose of the second preliminary question by rejecting the argument of counsel for the taxpayers and concluding that if a transfer of land under the Lands Clauses Consolidation Act, 1845, is capable of being included within the words "sale" and "sold", so also is the transaction now under consideration.

My Lords, I trust that, in dealing with the two preliminary questions I have made good the proposition that the phrase "is sold" in s. 17 (1) (a) of the Income Tax Act, 1945, is fairly open to either one of two interpretations, namely, (a) that it refers only to sales made in pursuance of a contract; or (b) that it includes any transfer of ownership of plant or machinery from one to another

"in consideration of some price or recompense in value", to quote again from A BLACKSTONE. If the wider interpretation is accepted, the transaction now in question clearly comes within it. Thus, a question of construction exists, and the materials for determining it are the terms of the Act of 1945, read in conjunction with the provisions already quoted from the Finance Act, 1947, and the Finance Act, 1948.

Turning first to s. 17 of the Act of 1945, I note that it is designed for the practical purpose of producing a fair and reasonable result in two contrasted cases, one of which results in a balancing allowance and the other in a balancing charge. It would, indeed, be strange if the trader could get a balancing allowance if he voluntarily sold his plant at a price below the written-down value, but could get no balancing allowance if the plant were taken from him against his will and the price or compensation paid to him were below the written-down value. The material point under the section is not the method by which the plant was transferred and the price fixed, but the *fact* of the transfer and of the deficiency in price. Similar observations apply with equal force to the converse case in which a balancing charge becomes payable. Counsel for the taxpayers suggested that s. 17 was a "charging section", and should be construed strictly. It is true that, in one event, the section imposes a charge on the subject, but it is equally true that, in another event, it confers a benefit on him, and the words "is sold" must bear the same meaning in each event. In these circumstances, I do not think that the principle of strict construction of a charging section can be applied in this case. B C D

So far it appears to me that the construction for which the Crown contends is the one which best fits the spirit and intent of the section. I now turn to the provisions in the Finance Act, 1947, and the Finance Act, 1948, on which the Attorney-General relied so strongly. As I have already pointed out, each of these Acts contains an operative direction that (*inter alia*) the provisions therein which I have already quoted "shall be construed as one with the Income Tax Acts", and the Attorney-General submitted that the relevant provisions of the three Acts formed one statutory code in regard to balancing charges or allowances, and should be looked at as a whole, as if they were all in one comprehensive Act, for the purpose of interpreting the words "is sold" in s. 17 (1) (a) of the Act of 1945. E F

My Lords, in the absence of authority, I should have thought that, when Parliament says that two or more statutes are to be construed as one, it means that questions of construction *must* be approached in the manner just described; and this view is by no means unsupported by authority. In *Canada Southern Ry. Co. v. International Bridge Co.* (7), the EARL OF SELBORNE, L.C., said in regard to two Acts of the Canadian legislature (8 App. Cas. at p. 727): G

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act." H

This principle has been adopted and applied in many cases (see, for instance, *Hart v. Hudson Brothers, Ltd.* (12); *Phillips v. Parnaby* (13); *R. v. Folkestone & Area Rent Tribunal, Ex p. Sharkey* (14)), and LORD SELBORNE's words are reproduced in MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn., 1953), p. 34, as stating the present law. I

Counsel for the taxpayers, however, submitted that, in the first instance, your Lordships must look only at the Income Tax Act, 1945, and decide, on the wording of that Act alone, whether the words "is sold" in s. 17 (1) (a) were "ambiguous". If these words, so regarded, were ambiguous, then, and then

A only, could the Acts of 1947 and 1948 be referred to; if the words were unambiguous, no attention could be paid to the later Acts, notwithstanding the statutory direction that they were to be construed as one with (inter alia) the Act of 1945. He relied on certain observations by members of this House in *Ormond Investment Co. v. Betts* (4). I am not satisfied that these observations entirely justify counsel's submission, but I need not pursue this matter further, as, in my view, each of the alternative methods of approach leads to the same result. In the last mentioned case, LORD ATKINSON said ([1928] A.C. at p. 164):

" . . . where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute."

C This he referred to (ibid.) as " a well-recognised principle dealing with the construction of statutes." LORD BUCKMASTER in the same case (ibid., at p. 154) said:

" It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do . . . "

D My Lords, for some time I found it difficult to understand what LORD BUCKMASTER had in mind when he referred to " two perfectly clear and plain constructions ", for it is not easy to see how each one of two possible constructions of an ambiguous Act could be perfectly clear and plain. I think, however, LORD E BUCKMASTER meant that it must be perfectly clear and plain what are the two possible constructions, and I do not think that he intended to differ in any way from the principle as stated by LORD ATKINSON.

In the present case, it seems to me clear and plain that the two possible interpretations of s. 17 (1) (a) are those which I have already set out, and I have already stated my view that the words " is sold " are (to quote LORD F ATKINSON) " readily capable of more than one interpretation "; having regard to the widespread modern use of the words " sale " and " purchase " in regard to compulsory acquisitions of property. If this is so, your Lordships are admittedly at liberty to call in aid the provisions of the two later Acts, in order to ascertain which interpretation is in accordance with the intention of the legislature. These provisions make it clear, in my view, that, by the words " is sold " in s. 17 (1) (a), G the legislature intended to include a compulsory transfer such as the one now in question. Paragraph 3 of Part 3 of Sch. 7 to the Finance Act, 1947, shows that such a vesting of property in the National Coal Board as is there mentioned was regarded by the legislature as constituting a " sale ", within the meaning of (inter alia) s. 17 of the Income Tax Act, 1945; otherwise para. 3 would have been unnecessary; and it was not contended that the statutory vesting of property in H the National Coal Board differed, in any material particular, from the statutory vesting of property in the British Transport Commission, which was effected by s. 29 of the Transport Act, 1947. Section 35 of the Finance Act, 1948, drives the point home even more forcibly, for it shows clearly that a balancing charge could become payable on a vesting of property in the British Transport Commission I by s. 29 of the Transport Act, 1947—the same section which vested the taxpayers' wagons in that commission; and a balancing charge could only become payable if such vesting was a sale within the meaning of s. 17 (1) (a) of the Income Tax Act, 1945.

For these reasons, my Lords, I am of opinion that the Special Commissioners were right in holding that the taxpayers became accountable for a balancing charge in the present case.

I should add that counsel for the taxpayers relied strongly on certain observations of my noble and learned friends, LORD REID and LORD RADCLIFFE, in

Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd. (9). In my view, these observations have no application to the present case. There has been here no decision that the words "is sold" in s. 17 (1) (a) of the Income Tax Act, 1945, apply only to sales by mutual assent, and no "unfounded assumption" by Parliament. In effect, Parliament has made clear, in a composite Act, the meaning of words used in one portion of that Act, by words used in another portion thereof. Reference was also made to observations of my noble and learned friend, LORD RADCLIFFE, in delivering the judgment of the Board in *Re MacManaway* (8) ([1951] A.C. at p. 177); but the Board was not dealing in that case with Acts which were to be construed as one.

I would allow the appeal and uphold the assessment under review.

LORD REID: My Lords, s. 29 of the Transport Act, 1947, provided that privately owned railway wagons under requisition should vest in the Transport Commission, and 663 wagons which belonged to the taxpayers vested in the commission under that section. Section 30 required the commission to pay as compensation an amount determined in a schedule to the Act by reference to the type and age of each wagon, and s. 32 made the compensation payable by an issue of British Transport Stock. The Income Tax Act, 1945, provides that a balancing charge shall be payable in certain events. Under s. 17 (1), which applies to machinery and plant, one of those events is where

"(a) the machinery or plant is sold, whether while still in use or not."

The present case turns on the meaning of the word "sold" in this context. If the vesting of the taxpayers' wagons in the commission was a sale within the meaning of this section then this appeal must succeed: if not, it must fail.

These Acts are United Kingdom Acts and it is, therefore, relevant to consider both the law of England and the law of Scotland in interpreting them, for they must be intended to have the same effect in both countries. I do not think that there is any relevant difference between the law in the two countries but I make no apology if I use some terms more appropriate in the law of Scotland. "Sale" is, in my opinion, a *nomen juris*, it is the name of a particular consensual contract. The law with regard to sale of chattels or corporeal movables is now embodied in the Sale of Goods Act, 1893. By s. 1 (1):

"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price",

and by s. 1 (3):

"Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell."

As a contract of sale as distinct from an agreement to sell and, unlike other contracts, operates by itself and without delivery to transfer the property in the thing sold, the word "sale" connotes both a contract and a conveyance or transfer of property.

But the Crown maintains not only that the word "sale" is capable of having a wider or different meaning than that, but that its ordinary and correct meaning does not involve any contract, but is simply the transfer of the property in or the ownership of a thing from one person to another for a money price, and that any sum of money which accrues to the former owner on the transfer is properly called a price. The Crown says that the word "sale" is equally apposite whether the transfer is voluntary or takes place by operation of law, and that the word "price" is equally apposite whatever be the way in which the sum of money payable to the former owner is determined.

A It is true that "compulsory purchase" has long been a familiar phrase. The word "purchase" is frequently used in the Lands Clauses Acts. The confused drafting of these Acts has often been commented on, but I think that it may fairly be said that the method and machinery which they provide to enable undertakers to acquire land compulsorily has been made to look as like an ordinary sale as possible. In Scotland, service of the notice to treat has been

B held equivalent to the making of a contract to sell the land comprised in the notice, and in England the relation of vendor and purchaser has been held to arise at least when the amount of compensation is ascertained. The Acts contain elaborate provisions enabling the owner to sell even if under disability, and for determining the amount of the purchase money or compensation if that is not agreed, and it is only if the owner fails to execute a conveyance after

C the purchase money has been deposited that the undertakers can themselves take the necessary steps to acquire the property. So it is not surprising that the phrase "compulsory purchase", or "compulsory sale", has come to be used to describe the operation of the Acts. But it has certainly not been common to use the words "purchase" or "sale" by themselves to describe compulsory acquisition: indeed, I do not think that we were referred to any case in which

D either word was so used.

Compulsory acquisition of personal or movable property was at least infrequent before the 1914 war, and the first instance to which we were referred of the use of the phrase "compulsory sale" in this connection was in *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1). There the Admiralty had requisitioned a quantity of rum, and the question was whether the whole of the compensation which the company received was a trading receipt. A sum may well be a trading receipt although it does not come to the trader as the price of goods sold. But the company relied on the fact that they did not sell the rum, and the expression "compulsory sale" of the rum was used both by ROWLATT, J., and in this House, in rejecting that argument for the taxpayer. I do not think that it was intended to mean either that the compulsory acquisition was, in fact, a

E sale, or that, for all purposes, it was equivalent to a sale, but only that it had the same effect as a sale in making the sum received a trading receipt.

F Then cases were cited on the question whether a particular instrument was a "conveyance or transfer on sale" within the meaning of the Stamp Act, 1891. In one case, where the acquisition was compulsory, the instrument was a disposition granted by the owner, but generally, although the final step may not

G have been, strictly speaking, a sale, the transaction originated from an agreement. LORD ESHER, M.R., said, in *Great Western Ry. Co. v. Inland Revenue Comrs.* (3) ([1894] 1 Q.B. at p. 512):

"Turning to the Stamp Act, [1891,] the words used are 'a conveyance on sale'. Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale? The latter seems to me to be the meaning of the phrase as there used."

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I cannot get from these cases any guidance as to what is and what is not in fact a sale.

I The Crown relied greatly on descriptions of sale by various writers—for they were hardly definitions. These authors did not mention the contractual element of sale, but they were not dealing with compulsory acquisition and I cannot infer from their words that, if they had been dealing with it, they would have said that compulsory acquisition was truly a sale. Transfer of ownership or possession may follow on barter or donation or pledge or hiring or loan or deposit or their English equivalents, but, if I found a description of any of these which omitted to mention the contractual or mental element, I would not infer that the author thought that any of these terms could properly be regarded as applicable to a

compulsory transfer of ownership or possession. I do not think that any of the authorities cited for the Crown supports the Crown's contention as to the proper and usual meaning of the word "sale", but I would agree that "sale" is a word which has become capable in an appropriate context of having a meaning wider than its ordinary and correct meaning. But it is only permissible to give to a word some meaning other than its ordinary meaning if the context so requires—so I turn to the context. A

I find nothing in the Income Tax Act, 1945, to justify giving to the word "sale" a meaning wider than its ordinary meaning. In a taxing Act, and particularly in a charging section, one assumes that language is used accurately unless the contrary clearly appears, and, in my opinion, s. 17 is a charging section. It is the only section which could authorise the assessment in this case. It is true that its provisions may sometimes favour the taxpayer by entitling him to a balancing allowance. But that does not prevent it from being a charging section as regards those whom it makes liable to pay tax, and B

"No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him" C

(per LORD BLACKBURN in *Coltress Iron Co. v. Black* (15) (6 App. Cas. at p. 330). It may be that there is no apparent reason why the taxpayer should be subject to a balancing charge or entitled to a balancing allowance if his plant is sold but not if it is taken compulsorily but D

". . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be" E

(per LORD CAIRNS in *Partington v. A.-G.* (16) (L.R. 4 H.L. at p. 122).

The context in s. 17 appears to me to be rather against the Crown. In sub-s. (1) (b) the words are

"the machinery or plant . . . ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession." F

There is no apparent reason for the difference between that form of words and the words in sub-s. (1) (a)—"the machinery or plant is sold", but the contrast must have been deliberate. And, even if the Crown is right, admittedly the section does not apply if machinery or plant is confiscated, there being nothing which could be called a price receivable by the owner. No doubt it was not contemplated that machinery or plant would be confiscated in this country, but a taxpayer trading in this country might have machinery or plant abroad which might be confiscated without there being any termination of a concession and, although the need for a balancing allowance would then be greater than if he received compensation, admittedly the section would not entitle him to it. So, on any view, there are cases to which one would expect the section to apply but which it does not cover. In my judgment, if one does not look beyond the Act of 1945, compulsory acquisition is plainly not within the scope of s. 17. G

But the Crown maintains that we must interpret the Act of 1945 in the light of subsequent legislation. Section 29 of the Finance Act, 1947, provides that, where assets vest in the National Coal Board, the provisions of Sch. 7 to that Act shall have effect in computing the liability to income tax of the former owner and of the board. Part 2 of the schedule deals with the liability of the transferor and provides that Parts 1, 2, 3, 5 and 6 of the Income Tax Act, 1945, shall be deemed never to have applied in relation to the relevant property. Part 3 of the schedule deals with the liability of the National Coal Board and provides: H

"3. The vesting of, or of an interest in, any relevant property shall not be treated as a sale, or as a purchase, for any of the purposes of Parts 1, 2, 3, 5 and 6 of the Income Tax Act, 1945, or of Part 4 of the Finance Act, 1944." I

- A Parts 1 and 2 of the Act of 1945 are those which deal with balancing allowances and charges. The vesting provisions of the Coal Industry Nationalisation Act, 1946, are complicated. Some property vested automatically but, with regard to other property, the owner had a right to object if the board wished to take it. Compensation, determined by an elaborate process, was payable, except as to some interests mentioned in Sch. 3. So there is considerable similarity between
- B the vesting in the National Coal Board and the vesting of the wagons in the present case.

It is not easy to follow these elaborate provisions, but I think that the Crown can at least say that it was unnecessary to mention Part 2 of the Act of 1945 in the paragraph which I have quoted from Sch. 7 to the Act of 1947 if the vesting of plant and machinery in the National Coal Board was not a sale within the meaning of Part 2 of the Act of 1945. And it may well be that, if the taxpayers in this case are right, the whole of that paragraph in the Act of 1947 was unnecessary. The Crown's argument is that Parliament must have thought it necessary to enact the paragraph, and could only have thought it necessary on the view that "sale" in the Act of 1945 did include compulsory vesting of property in the National Coal Board: Parliament has, therefore, supplied an authoritative

D interpretation of the Act of 1945.

The other provisions on which the Crown relied are s. 34 and s. 35 of the Finance Act, 1948. Section 34 deals with certain property transferred under, *inter alia*, the Transport Act, 1947, but it does not apply to these railway wagons. Sub-section (2) enacts that a transfer to which that section applies "shall be treated for income tax purposes as a sale of property to which" certain special provisions

E of the Act of 1945 apply. I cannot see that this section could throw any light on the question in this case: its provisions are equally apposite and necessary whether the transfers to which it applies are sales within the meaning of the Act of 1945 or not. Section 35 of the Act of 1948 is closer to the present case: it applies to some railway wagons although not to those which belonged to the taxpayers. It enacts:

- F " (1) The question whether any and if so what balancing allowance or balancing charge falls to be made to or on the National Coal Board on the occasion of the transfer to the British Transport Commission under s. 29 of the Transport Act, 1947, of any railway wagons which the said board acquired under the Coal Industry Nationalisation Act, 1946, shall be determined as if s. 29 of the Finance Act, 1947, and Sch. 7 to that Act, had
- G not been passed. (2) This section shall be deemed always to have had effect."

This is a retrospective amendment of the provisions of the Act of 1947 to which I have already referred. The second sub-section cannot mean more than that the section shall be deemed to have had effect from the moment when the Act of 1947 was passed. It could not possibly have had any effect before that: it would not make sense to interpret "always" as meaning that the section must be deemed to have had effect before balancing charges were first imposed, or, for that matter, before income tax was first imposed. To my mind, the question whether this section can be used to interpret the Act of 1945 is precisely the same as the question whether the Act of 1947, which it amends, can be used

H for that purpose. The Crown can say, with regard to this section as with regard to parts of the Act of 1947, that it is unnecessary if the taxpayers' argument in this case is right, and the argument following on that can be repeated, but I do not think that this section carries it any further. This section does not declare that the provisions of s. 17 of the Act of 1945 apply to the transferred railway wagons; it merely states that the question whether any, and if so what, balancing allowance or balancing charge falls to be made shall be determined under the Act of 1945 as if the Act of 1947 had not been passed. If these wagons were not "sold", then the question whether any balancing allowance or balancing

I

charge falls to be made will be determined in the negative. There will be no conflict with the provisions of this section. A

I must now consider the question whether these provisions of the Acts of 1947 and 1948 can be used to interpret the word "sold" in the Act of 1945. The later Acts both contain the provision that those parts of them which relate to income tax "shall be construed as one with the Income Tax Acts". At first sight, that might seem to mean that you must regard the relevant provisions of all the Acts as if they were all contained in the same Act, so that, before you begin to construe any one of them, you read the whole of them, and then construe in the light of all of them. That was the view expressed by the EARL OF SELBORNE, L.C., in delivering the judgment of the Privy Council in *Canada Southern Ry. Co. v. International Bridge Co.* (7). He said (8 App. Cas. at p. 727): B

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act." C

But that passage must be read in light of the facts of that case and the question which had to be determined. In that case, the earlier Act contained a general power to fix charges, and the question was whether the later Act cut down that power: the meaning of the later Act was the difficulty. It was not necessary to use the provisions of the later Act to attach to a provision in the earlier Act some meaning which it would not otherwise have borne. D

The question how far a later Act could be used to interpret an earlier Act was considered in this House in *Ormond Investment Co. v. Betts* (4). Schedule D, Case V, r. 1, to the Income Tax Act, 1918, provided that tax on income from foreign stocks and shares should be computed "as directed in Case I". It was held that that was not ambiguous, the only relevant rule was the Rule Applicable to Case I, r. 1 (2) of the Rules Applicable to Cases I and II had no application, and the result was that the assessment for the year in question should be nil. The Crown founded on s. 26 of the Finance Act, 1924, in which Act there was the usual provision that it should be construed as one with the Income Tax Acts. That section added a new rule to the Rules Applicable to Case V which provided that, if E

"the total amount of tax, computed in accordance with r. 1 of the Rules Applicable to Cases I and II" F

exceeded another sum, the taxpayer should be entitled to repayment of the excess. The argument was that this new rule amounted to a declaration by Parliament that "as directed by Case I" meant in accordance with the Rules Applicable to Cases I and II, for, unless that was the meaning, the new rule had no application. ROWLATT, J., said, with regard to this argument ([1927] 2 K.B. at p. 333): G

"Am I to give effect to that argument? It formulates what I may almost call a sinister and menacing proposition, because it means nothing less than this, that, on the assumption that I am right in my view of the sections, apart from the effect of s. 26 of the Act of 1924, Parliament has retrospectively by allusion taxed something which was not taxed at the time by previous legislation." H

The judgment of ROWLATT, J., was reversed by the Court of Appeal but restored in this House. On this question, the House was unanimous. LORD BUCKMASTER had dissented on an earlier question, but thought it desirable to express his opinion on this question. He said ([1928] A.C. at p. 154): I

"I do not think that, in the circumstances of this case, the subsequent

- A statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act . . . It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do . . .”

A little later he said (*ibid.*, at p. 155):

- C “The first Act will operate from its fixed date, so that its interpretation becomes at once a matter of necessity, and great unfairness may ensue if an interpretation which an Act of Parliament would fairly bear unaided by subsequent statutes was inferentially changed by other words in a subsequent Act.”

VISCOUNT SUMNER (*ibid.*, at p. 159) refers to the need for the earlier legislation being

- D “. . . ambiguous, so that while the words are reasonably capable of two different meanings, there is no reason on the face of the Act why one should be more right than the other”,

and says that (*ibid.*, at p. 160)

- E “. . . the new rule cannot be regarded as imposing a non-natural construction on r. 1.”

LORD ATKINSON referred (*ibid.*, at p. 164) to

- F “. . . a well recognised principle dealing with the construction of statutes—namely, that where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute.”

LORD WRENBURY (*ibid.*, at p. 167) said:

- G “. . . in my opinion an Act of 1924 passed on Aug. 1, 1924, which is not expressed to be retrospective and does not directly or inferentially purport to put a construction upon a previous Act can have no bearing upon a question arising upon events which happened in 1922 and as to which the last relevant date is Apr. 5, 1924.”

Finally, LORD WARRINGTON OF CLYFFE said this with regard to s. 26 of the Act of 1924 (*ibid.*, at p. 172):

- H “It was said that the effect of this section is to declare that the construction of the Income Tax Act for which the Crown now contends is and always has been the true construction. Much reliance was placed on this point by SARGANT, L.J., but with all respect to that learned judge I cannot concur in his view. The section does not contain any such declaration express or implied. It merely assumes that persons may have paid tax computed in accordance with r. 1 of the Rules Applicable to Cases I and II of Sch. D, and gives those persons the relief mentioned in the section. It says nothing about the legality or otherwise of such computation. To read the section as amounting to a retrospective declaration as to the true construction of the previous Act seems to me to give it an effect which it will not bear.”

My Lords, this decision of this House appears to me to afford conclusive and binding authority for the proposition that, in construing a provision of an earlier Act, the provisions of a later Act cannot be taken into account except in a limited class of case, and that that rule applies although the later Act

contains a provision that it is to be read as one with the earlier Act. Of course, that does not apply where the later Act amends the earlier Act or purports to declare its meaning: in such cases the later Act operates directly by its own force. But, where the provisions of the later Act could only operate indirectly as an aid to the construction of words in the earlier Act, those provisions can only be used for that purpose if certain conditions apply to the earlier Act when it is considered by itself.

The Acts of 1947 and 1948 do not purport to amend the Act of 1945 nor do they, in my opinion, even inferentially purport retrospectively to declare its meaning. So the question is whether s. 17 (1) (a) of the Act of 1945, taken in its context in that Act is, as LORD BUCKMASTER put it, so ambiguous that it is open to two perfectly clear and plain constructions, or whether, as LORD SUMNER put it, there is no reason on the face of the Act why one construction should be more right than the other, or whether, as LORD ATKINSON put it, the Act of 1945 is readily capable of more than one interpretation. A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning. So the *Ormond* case (4) requires one to consider whether the word "sold" in its context in the Act of 1945 is readily capable of more than one interpretation. I have already expressed my opinion that it is not. Moreover, I think that, taking the whole trend of the speeches in that case, LORD SUMNER must be right in his view that the later Act cannot be used to impose a non-natural construction on the words of the earlier Act, and to hold that "sale" includes compulsory acquisition would, in my view, be to impose on that word a non-natural, though in some contexts an appropriate, construction. I would only add that the canon of construction established by the *Ormond* case (4) may not be entirely logical, but on a broader view I think that there are very good grounds for it and I would not be prepared to whittle it away by fine distinctions.

Two later cases were cited on this matter. In *Re MacManaway* (8), I do not find anything in the judgment of the Privy Council delivered by LORD RADCLIFFE which conflicts in any way with my reading of the speeches in the *Ormond* case (4), and I do not think it necessary to examine this case in detail. The other case, *Inland Revenue Comrs. v. Doudall, O'Mahoney & Co., Ltd.* (9), was dealing with rather a different question. There, the earlier statutory provisions could not be said to be ambiguous because their meaning had formed the subject of decisions in this House, and so the later Act could only have effect if it could be held to enact an amendment. But it was held that it could not be so interpreted. The *Ormond* problem did not arise.

In my judgment this appeal should be dismissed.

LORD TUCKER: My Lords, the question for decision in this appeal is the meaning of the word "sold" in s. 17 (1) of the Income Tax Act, 1945, which describes certain events on the happening of which a "balancing charge" or "balancing allowance", as the case may be, shall be made on, or allowed to, a person carrying on a trade for the purpose of computing the tax payable by him in a particular year of assessment. The relevant event is that referred to in para. (a), viz., "the machinery or plant is sold . . .". What is meant by sold in this context? Is there any ambiguity in the word? I think it is desirable to approach these questions in the first instance without reference to the particular happening which is relied on in the present case as constituting a "sale".

My Lords, I feel that the answers must be that the word is unambiguous and denotes a transfer of property in the chattel in question by one person to another for a price in money as the result of a contract express or implied. This is, in substance, the definition of sale given in BENJAMIN'S SALE OF PERSONAL

A PROPERTY (2nd Edn., p. 1), but for present purposes it is sufficient to emphasise that mutual assent is an essential element in the transaction. It is, no doubt, true that the contract or agreement to sell may precede the formal instrument or act of delivery under which the property passes, but to describe a transfer of property in a chattel which takes place without the consent of transferor and transferee as a sale would seem to me a misuse of language. By express enactment or by necessary implication from the context, any word may be given a meaning different from, or wider than, that which it ordinarily bears, and this may apply to the word "sale" where it appears in a context relating to the processes of compulsory acquisition of land under the Lands Clauses Consolidation Act, 1845, and other similar enactments. In this context, it may well be that the phrase "compulsory purchase", having become part of the legal vocabulary, such

C a transaction would be included in the word "sale", but this would not seem to me to justify giving such an interpretation to the word in the context of s. 17. In this connection, the Crown relied on the decision in *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (1), where the question for decision was whether a sum of £5,309 odd awarded to the company by the War Losses Commission in respect of a quantity of rum taken by the Admiralty under the Defence of the Realm Regulations was

D a receipt of the company's trade or a profit arising from its trade or business. Although the transaction is sometimes conveniently referred to as a sale, the decision did not involve a consideration of the meaning of this word, and I do not think the case compels me to give to the word a meaning wider than it ordinarily bears, so as to include a transaction lacking in one of the essential elements of a sale.

E My Lords, if this be correct, it follows that the word "sold" is quite inappropriate to describe the transfer of ownership of the wagons in question from the taxpayers to the Transport Commission, which occurred automatically by process of law when they vested in the commission under s. 29 of the Transport Act, 1947, without any act of assent by either party. The payment of compensation on the scale provided by the Act cannot be regarded as a sufficient substitute for

F the contractual element which is lacking.

On this view of the case, the provisions of s. 34 and s. 35 of the Finance Act, 1948, cannot assist the Crown. Both of these sections occur in a part of the Act which is to be construed as one with the Income Tax Acts, and both are to be "deemed always to have had effect". Section 35 (1) reads as follows:

G "The question whether any and if so what balancing allowance or balancing charge falls to be made to or on the National Coal Board on the occasion of the transfer to the British Transport Commission under s. 29 of the Transport Act, 1947, of any railway wagons which the said board acquired under the Coal Industry Nationalisation Act, 1946, shall be determined as if s. 29 of the Finance Act, 1947, and Sch. 7 to that Act, had not been passed."

H This section, of course, does not apply to the privately owned wagons with which alone the present appeal is concerned, but it does indicate that the legislature in 1948 envisaged a balancing charge or allowance as arising on a transfer from the Coal Board to the Transport Commission under the Transport Act, 1947. It does not, however, purport to amend the Act of 1945, and the effect of its being deemed always to have had effect is merely to make the section operate retrospectively to the date of the transfer from the board to the commission. The circumstances in which a later Act which is to be construed as one with an earlier Act can be used to interpret the language of an earlier statute have been authoritatively dealt with in this House in *Ormond Investment Co. v. Betts* (4).

I LORD BUCKMASTER said ([1928] A.C. at p. 154):

"It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act. It

would be an unnecessary step to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do, and it is also possible that, where a statute has created a crime or imposed a penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well known principle of construction to which I referred at an earlier stage."

My Lords, holding as I do that it is impossible to say of the word "sold", in its present context, that it is open to two perfectly clear and plain constructions, it seems to me that s. 35 of the Finance Act, 1948, cannot be used to give to the word a wider meaning than it bore when the Act of 1945 was passed.

Section 34 of the Finance Act, 1948, was also relied on for the same purpose, and the same reasoning applies in that case, but I share the view of UPJOHN, J., that, in any event, the language of this section would appear to assist the taxpayers rather than the Crown.

For these reasons, I agree with the conclusions reached by UPJOHN, J., and the Court of Appeal, and would dismiss the appeal.

LORD REID: My Lords, I am asked by my noble and learned friend, **LORD SOMERVELL OF HARROW**, who is unable to be here this morning, to say that he had read the opinion which I have delivered and that he agrees with it.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Willis & Willis*, agents for *Taynton & Son*, Gloucester (for the taxpayers).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A

REILLY v. ORANGE.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), April 25, 26, 1955.]

Easement—Right of way—Interruption—Proof of twenty years' uninterrupted user—Whether commencement of action an interruption—Prescription Act, 1832 (2 & 3 Will. 4 c. 71), s. 2, s. 4.

B

In order to establish a claim to an easement under the Prescription Act, 1832, s. 2, the claimant must prove a full period of twenty years' uninterrupted enjoyment. The twenty years' period must be a period next before the commencement of some suit or action wherein the claim or matter to which the period relates is brought in question. The commencement of the suit or action is the event marking the date down to which the requisite period of enjoyment must be shown and does not itself constitute an interruption which, if it were to be effective under s. 4 of the Act of 1832 to interrupt a period of enjoyment, would have to be submitted to or acquiesced in for one year (see p. 372, letter F, post).

C

In 1934 the plaintiff and the defendant, who owned adjoining plots of land, agreed that the defendant should have a right of way over part of the plaintiff's land to a bungalow and garage at the rear of the defendant's land until such time as the defendant had made a new means of access over his own land. The defendant having constructed a new means of access in 1953, the plaintiff gave the defendant notice purporting to terminate any right which he had to use the way over the plaintiff's land. In 1954 the plaintiff commenced this action claiming a declaration that the defendant's right over the plaintiff's land had been determined and other relief. The defendant contended that the commencement of the action was an interruption of enjoyment of the right of way and that as he had enjoyed it for more than nineteen years before the action was begun the interruption ought to be disregarded as it could not continue for a year before the full twenty years' enjoyment had expired and that accordingly he had a prescriptive title to the right of way. The date in 1934 when the agreement was concluded not being proved, it was uncertain whether a full twenty years' user had been enjoyed before the action commenced.

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Held: (i) to establish a title by prescription to the right of way uninterrupted enjoyment of it for a full period of twenty years before action brought had to be shown, and, as the defendant had not proved this, the plaintiff was entitled to the declaration which he sought.

(ii) the commencement of the action was not an interruption within s. 4 of the Prescription Act, 1832.

Flight v. Thomas (1841) (8 Cl. & Fin. 231) considered.

Appeal dismissed.

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H

[As to prescriptive periods of enjoyment of an easement being those next before an action, see 11 HALSBURY'S LAWS (2nd Edn.) 308, para. 555, and as to interruptions, see *ibid.*, para. 556; and for cases on these subjects, see 19 DIGEST 73, 425-437, 74, 443-449.

For the Prescription Act, 1832, s. 2, s. 4, see 6 HALSBURY'S STATUTES (2nd Edn.) 671, 673.]

I

Case referred to:

(1) *Flight v. Thomas*, (1841), 8 Cl. & Fin. 231; 8 E.R. 91; 19 Digest 130, 878.

Appeal.

The defendant appealed from an order of His Honour DEPUTY JUDGE CORLESTONE-BOUGHEY at Birkenhead County Court, dated Mar. 8, 1955, whereby he declared that the defendant's right to use a drive over the plaintiff's land had

terminated and awarded the plaintiff £12 damages in respect of acts of trespass by the defendant. A

The plaintiff, Mr. Reilly, and the defendant, Mr. Orange, were the owners of two contiguous plots of land on the western side of Thurstaston Road, Thurstaston, Chester. The two plots, of which the northern one was the plaintiff's, were formerly in the common ownership of one Karl Petroll and during his ownership the only building erected on the land was a commercial garage known as the Heatherland Garage situate towards the eastern end of the plot which subsequently became the property of the plaintiff. The defendant's plot was laid out at that time as garden ground. The plaintiff's plot including the Heatherland Garage was conveyed to him by conveyance dated Oct. 1, 1932. The defendant's plot was conveyed to him by conveyance dated June 30, 1933. B
The conveyances were drawn and the plans annexed thereto were prepared without a preliminary inspection of the property. In the result the conveyances C
were drawn on the footing that the plots were two level rectangular plots, and provision was made therein for access from Thurstaston Road to the western end of the plots by means of a central strip of land shown on the plans as nine feet in width running from east to west and comprising a strip four feet six inches D
wide of the plaintiff's plot and a similar strip of the defendant's plot. The conveyances contained appropriate provisions for the use by the two parties of this nine-foot way as a means of access. That part of the defendant's plot which, according to the conveyance, should have provided the eastern portion of the nine-foot way was bounded by a wall several feet to the north of the nine-foot way as shown on the plan, and was on a level lower than that of the plaintiff's property and of Thurstaston Road. Consequently it was impracticable to make E
up the nine-foot way as contemplated by the conveyances. At some date during 1934, the parties, then being on friendly terms, agreed to exchange certain parts of their properties and that the defendant should be permitted to use part of the plaintiff's property as a means of access from Thurstaston Road to the western side of his plot and in particular to a bungalow and garage which he had erected on his plot. In 1940 the plaintiff sold the Heatherland Garage and the eastern F
portion of his plot, but he retained a strip some nine feet wide to the south of the part sold which was the site of the means of access used by the defendant. Subsequently disagreement arose between the parties, the plaintiff complaining that the defendant was using the means of access for the purposes of his business and that the agreement had only provided for its use by the defendant and his family for domestic purposes, and, further, that vehicles using the way were causing obstruction. In October or November, 1953, the defendant made a new G
means of access to his premises in the form of a drive leading from Thurstaston Road along the southern boundary of his plot.

In December, 1953, the plaintiff gave notice to the defendant terminating any right the defendant had to use the way over the plaintiff's property. He H
then brought an action in the county court claiming (i) a declaration that the defendant's right to use the way over the plaintiff's land had been determined, (ii) an injunction to restrain the defendant by himself, his servants or agents from using the way, and (iii) damages for trespass. The defendant counterclaimed for a declaration that he was entitled to a right of way over the plaintiff's land, and contended that under the agreement of 1934 he was to have in perpetuity a I
right of way for all purposes over the plaintiff's land, in the nature of an easement annexed to his, the defendant's, plot.

The learned deputy judge accepted the plaintiff's evidence that under the agreement the user by the defendant of the way over the plaintiff's land was to be only for domestic purposes and was to continue only until such time as the defendant had made a new means of access over his own land. He gave judgment for the plaintiff, making a declaration that the defendant's right to use the way

A had been determined and awarded the plaintiff damages for trespass. He dismissed the defendant's counterclaim.

W. L. Blease for the defendant.

K. G. Roulledge for the plaintiff.

B SINGLETON, L.J.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J., stated the facts and continued: Counsel for the defendant very properly admits that for the purpose of this appeal he must accept the learned deputy judge's finding as to the nature and terms of the agreement of 1934, but he says that notwithstanding that he is entitled to succeed on two grounds. He says, first, that the defendant has had twenty years' uninterrupted enjoyment of the right claimed as required by the Prescription Act, 1832. He says further that although the right he claims had its origin in the agreement of 1934 and although that agreement, as found by the learned deputy judge, would only give him a right to use the drive for domestic purposes and only until such time as he made a drive of his own, that permission did not prevent the twenty years' user on which he relies from establishing his right under the Prescription Act, 1832. The second point can only arise if he is entitled to succeed on the first.

The evidence as to the date of the agreement under which the defendant used the drive seems to have been somewhat indefinite. According to the evidence of the defendant the agreement was made in September, 1934. The plaintiff could give no nearer date than that it was in May, June or July. The action was commenced, taking the date of the particulars of claim as the date of commencement, on July 1, 1954. So that on the evidence the defendant failed to prove twenty years' user down to the date of the commencement of the action because in order to do that it was necessary for him to prove that the agreement was made not later than July 1, 1934. But counsel on his behalf seeks to surmount that difficulty by an argument on the Prescription Act, 1832, which makes it necessary to refer to the two sections of that Act which are material for the present purpose.

Section 2 enacts:

G "... No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated . . ."

H It will be observed that the period of user required is actual enjoyment without interruption for the full period of twenty years. Section 4 provides:

I "... Each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and . . . no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

Counsel's argument is of this nature: He says that what must be shown is twenty years' uninterrupted user and that according to s. 4, no act or matter counts as an interruption unless the same shall have been or shall be submitted to or acquiesced in for one year. It follows, says counsel, that as in this case

over nineteen years' user down to the commencement of the action is proved, the defendant's right is made good inasmuch as there could be no interruption acquiesced in for one year between the date of the commencement of the action and the completion of the full period of twenty years. In support of that proposition he referred us to the well-known case of *Flight v. Thomas* (1). The headnote reads (8 Cl. & Fin. 231):

"... A had the free access of light and air through a window of his house for nineteen years and 330 days, and B then raised a wall which obstructed the light, and the obstruction was submitted to only for thirty-five days, when A brought an action to remove it,—Held, that the right of action was complete; that the twenty years' enjoyment was to be reckoned from the commencement of the enjoyment to the time of bringing the action; and that an interruption of the enjoyment, in whatever period of the twenty years it may happen, cannot be deemed an interruption within the meaning of the Act, unless it is acquiesced in for a whole year."

Counsel seeks to apply that to the present case in this way: he says that the commencement of the action constituted an interruption, and that that inasmuch as the action was not commenced until after the alleged easement had been enjoyed for more than nineteen years the interruption so constituted could not last for the required period of one year, so that his title was complete at the time of action brought. In my view that argument cannot prevail. What the Prescription Act, 1832, requires, as appears from the combined effect of s. 2 and s. 4, is the full period of twenty years, being

"the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question."

The commencement of the suit or action in my view is clearly not an interruption within the meaning of s. 4, but is the event marking the date down to which the requisite period of user must be shown. What must be shown is a full twenty years reckoned down to the date of action brought. That must be an uninterrupted period, but in considering whether it is an uninterrupted period or not, interruptions not acquiesced in for at least a year are not to be counted as interruptions. Accordingly, in my view counsel's first argument must fail, unless it can be said that the present action was not a suit or action wherein the claim or matter to which the period relates has been brought into question. Counsel suggested that the present action was not such a suit or action. I cannot agree. Substantially the whole subject-matter of the action, as set out in the particulars of claim, concerned the use by the defendant of the plaintiff's drive and the question whether the defendant was entitled to continue the use of it or not. In my view, therefore, this was a suit or action wherein the claim or matter to which the relevant period related was brought into question; and it follows, to my mind, that inasmuch as that action was commenced before the full period of twenty years' user had been completed, the defendant's claim based on prescription must fail.

The view I have formed on that first point makes it unnecessary for me to express any view on the second point, that is to say, counsel's submission to the effect that if twenty years' user could be made out the fact that such user was referable in its origin to the agreement of 1934 would not prevent it from establishing a prescriptive right. That, on the authorities, seems to me to be a matter of some difficulty. Counsel has pointed to various observations which appear to afford some support for his view, but on the other hand it would, to my mind, be surprising if in a case such as this, a matter which was intended to be a purely personal arrangement of a temporary character, between two neighbours as, for example, an arrangement that one can use a way on the other's land until

A he has a way of his own, should produce, contrary to the intention of either of them, a prescriptive right of way for all time, not merely personal to the party for whose convenience the agreement was made, but, also, enuring for the benefit of anyone for the time being occupying what would then be the dominant tenement.

B Be that as it may, the permission given was in fact revoked and the action was brought before the necessary period of twenty years' user had been completed. Accordingly even if counsel were right in his submission that an agreement or licence such as this does not affect the running of time, the defendant could not succeed, because the necessary period of user has not been made out. For these reasons I am of opinion that this appeal fails and should be dismissed.

C MORRIS, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost*, agents for *G. F. Lees & Son*, Birkenhead (for the defendant); *Kinch & Richardson*, agents for *Percy Hughes & Roberts*,

D Birkenhead (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

E

SILSBY v. HOLLIMAN AND ANOTHER.

F [CHANCERY DIVISION (Upjohn, J.), April 26, 27, 1955.]

Mortgage—Remedies of mortgagee—Foreclosure or sale—House subject to Rent Restrictions Acts—Transfer of mortgage to statutory tenant—Whether statutory tenancy abandoned.

G A mortgagor granted a weekly tenancy of mortgaged premises, at a rent of 19s. weekly, notwithstanding that the mortgage excluded him from any right to lease the premises. The mortgagor subsequently gave the tenant notice to quit, but the tenant continued in occupation as a statutory tenant under the Rent Restrictions Acts. After the mortgagor had died the mortgagees brought an action for possession against the personal representatives of the mortgagor and against the tenant. The tenant took a transfer of the mortgage, became plaintiff in the action and amended the claim to include relief by foreclosure. He continued to pay rent as a statutory tenant after taking the transfer of the mortgage, until his tender of rent was refused by the defendants. The defendants contended that the court should make an order for sale of the premises with vacant possession in lieu of foreclosure. It was agreed that on a sale with vacant possession the price would be substantially more than was required to discharge what would be due on the mortgage, but that on a sale subject to the plaintiff's statutory tenancy the price would be insufficient to pay the mortgage debt in full.

H

I

Held: the plaintiff did not lose his rights as statutory tenant by acquiring the rights of a mortgagee, but was entitled to continue in possession as statutory tenant at a rent of 19s. weekly and any sale of the premises would have to be subject to the statutory tenancy; and, as a sale on that footing would be inequitable, the plaintiff would be granted an order for foreclosure.

[**Editorial Note.** It seems that if the plaintiff, after the mortgage had been transferred to him, had continued in possession without paying rent, he would have been regarded as mortgagee in possession, and not as being in possession as statutory tenant (see p. 376, letter C, post). A

As to the abandonment of a statutory tenancy, see the Supplement to 20 HALSBURY'S LAWS (2nd Edn.), para. 401; and for cases on the subject, see 31 DIGEST (Repl.) 658-661, 7604-7624.] B

Adjourned Summons.

The plaintiff, Arthur James Silsby, by originating summons sought foreclosure of premises known as 124, Manners Road, Southsea, in the City of Portsmouth, the subject of a mortgage and a further charge dated respectively Nov. 14, 1904, and July 10, 1945. C

By a mortgage dated Nov. 14, 1904, Joseph Charles Pearce mortgaged the above named dwelling-house and premises to the trustees of the Loyal Providential and Humane Lodge of the Independent Order of Oddfellows Manchester Unity Friendly Society to secure a loan of £350 and interest thereon. The terms of the mortgage excluded the mortgagor's right to grant leases of the mortgaged premises. On July 23, 1943, Mr. Pearce granted a weekly tenancy of the premises, to which the Rent Restrictions Acts applied, at a rent of 19s. a week to the plaintiff, Arthur James Silsby. On July 10, 1945, Mr. Pearce made a further charge on the premises in favour of the mortgagees to secure payment of £75 and interest thereon. On Aug. 24, 1948, Mr. Pearce served on the plaintiff a notice to quit and thereafter the plaintiff remained in possession of the premises as a statutory tenant under the protection of the Rent Restrictions Acts. On Oct. 18, 1953, Mr. Pearce died having appointed the defendants, Herbert Holliman and Victor Charles Pearce, to be his executors. Apart from a repayment of £25, no repayment of the capital sum secured by the mortgage and further charge was made by the mortgagor during his lifetime, but interest was paid until his death, although none was paid thereafter. On July 6, 1954, the mortgagees issued an originating summons against the executors and the plaintiff as defendants asking for payment of the capital sums and interest due under the mortgage and further charge and for possession of the premises. At the hearing before the master on Nov. 18, 1954, it was admitted on behalf of the executors that they could not further resist the claim and that the estate of Mr. Pearce was insolvent. D

By a deed of transfer of mortgage dated Dec. 22, 1954, and made between the mortgagees and the plaintiff, in consideration of the sum of £423 14s. 4d., being the aggregate of the respective amounts of mortgage money and interest then owing in respect of the mortgage and further charge, the mortgagees transferred to the plaintiff the benefit of the mortgage and further charge. The plaintiff continued paying the rent of the premises until Jan. 24, 1955, when his tender of rent was refused by the executors. E

By an order of the court dated Jan. 21, 1955, the plaintiff was struck out as defendant to the summons and added as plaintiff and was given leave to amend the summons by adding a claim for foreclosure or sale. It was conceded that if the premises were sold subject to a statutory tenancy in favour of the plaintiff they would realise insufficient to pay off the mortgage debt and interest, but that if they were sold with vacant possession they would realise enough to leave a surplus for the defendants. F

Charles Sparrow for the plaintiff.

J. E. Vinelott (with him *J. A. Wolfe*) for the defendants. G

UPJOHN, J., stated the facts and continued: The plaintiff now asks for foreclosure of the premises. On the other hand, the defendants ask that there be a sale in lieu of foreclosure. Valuations of the premises have been made on H

- A** two bases. It is agreed that, if the sale is to be on the footing of vacant possession, the premises should fetch between £1,150 and £1,175: in that case there would be ample to discharge the outstanding amounts due under the mortgage and the costs and a substantial surplus would be left. Therefore, if the plaintiff is to be treated as mortgagee in possession, the defendants have a strong case for urging on me that, in exercise of my discretion, I should grant a sale rather than a foreclosure.
- B** On the other hand, if the plaintiff is not to be treated as mortgagee in possession, but can remain in possession relying on the protection afforded to him by the Rent Restrictions Acts, the premises will have to be sold subject to the tenancy of a sitting tenant paying a rent of 19s. a week. It is conceded that the amount which would be obtained for the property on that footing would be insufficient to discharge the mortgage debt and the defendants could not properly
- C** in those circumstances ask for sale rather than for foreclosure.

- The case is put in this way. It is conceded that if the tenancy created in 1943 was still subsisting as between the plaintiff and the defendants when the plaintiff took a transfer of the mortgage on Dec. 22, 1954, the question whether the tenancy had merged in the greater estate which the plaintiff obtained by becoming a mortgagee would be one of intention, and on the evidence in this case
- D** it is conceded that there would be no such merger. The plaintiff would, therefore, be entitled in these proceedings to say that he was still there as tenant and the sale would have to be subject to that tenancy. The point is made that in fact the plaintiff is no longer a contractual tenant, but is merely a statutory tenant under the Rent Restrictions Acts. The defendants do not rely on merger because a person remaining in possession under the Rent Restrictions
- E** Acts has only the rights of what is commonly called a statutory tenant: he has in fact no estate in the land. I have been referred to a passage in MEGARRY ON THE RENT ACTS (7th Edn.), p. 194, which sets out what is the position of a statutory tenant. The passage is in these terms:

- “ It has been said that ‘ the statutory tenant has no estate or property as
- F** tenant at all but has a purely personal right to retain possession of the property ’. The tenancy has been called ‘ nothing more than the status of irremovability ’, or ‘ a permanency of tenure ’; and it has been said that the tenant, who has been described with some degree of vituperation, is ‘ not a tenant at all in the sense that he has an estate. He has . . . merely a personal right of occupation ’. The convenient but inaccurate term
- G** ‘ statutory tenancy ’ is thus a misnomer; it is ‘ a somewhat inapposite expression for it confers on the so-called statutory tenant no estate or interest in the land ’; and is merely ‘ a compendious term to describe the right of a tenant of protected premises to remain in possession of those premises, notwithstanding the determination of his contractual interest ’. If a statutory tenant sues for possession of the premises, his claim is to the premises and not merely to a statutory tenancy thereof.”

H Most of that paragraph in fact consists of extracts from a number of judgments. A little further on the author says (*ibid.*):

- “ These authorities, however, do not completely cover the ground. Thus a statutory tenant is able to take proceedings in trespass against his landlord, or any other interloper, and is not in the defenceless position of a mere licensee; and in procedural matters he is treated as a tenant. Indeed, he has been said to have a right which avails against all the world, yet he appears to have been unprotected against those claiming by title paramount if the contractual tenancy out of which his statutory tenancy arose would have afforded him no protection.”
- I**

In those circumstances, it is said that when the plaintiff acquired his estate as mortgagee his right to possession under the Rent Restrictions Acts necessarily

went. It was not a question of merger, for there was no estate to merge; but the lesser right must necessarily have gone because the plaintiff could rely on his right to possession as mortgagee. It has been likened to the case of a licensee who subsequently acquires some estate in land, and it is said that the licence automatically must disappear because of the higher right to possession given by the acquisition of the estate. It is pointed out with force that the plaintiff's acquisition of the mortgaged estate was for the very purpose of his remaining in possession and protecting his occupation of these premises, which no doubt have come to be his home now for some twelve years. It is said that the result must necessarily be that the plaintiff is now in occupation as mortgagee in possession, and, therefore, that there should be a sale. A
B

On the whole I do not think that the plaintiff has lost his rights as statutory tenant. He has a right to possession of the premises, a right afforded to him by the Rent Restrictions Acts, so long as he continues paying 19s. a week and no case is made for ousting him under the provisions of those Acts. He also has a right to enter into possession, if he so desires, as mortgagee in possession. No doubt, if he wished, he could have refused to continue paying rent to the defendants and then he would at once have become accountable as mortgagee in possession. In my view, he has those two rights to possession and the law cannot treat him as having abandoned what for some purposes may be regarded as the lesser right, that is the right to remain in possession under the Rent Restrictions Acts. In my judgment, those two rights are now subsisting and the plaintiff is in a position to come to this court and say: "I have the right today to remain paying a rent of 19s. a week having regard to the Rent Restrictions Acts. Therefore, if there is to be a sale, it must be on that footing". In the circumstances, for the reasons I have explained earlier in my judgment, it would then plainly be inequitable to grant a sale. Accordingly, I must make an order for foreclosure. C
D
E

Order accordingly.

Solicitors: *Arbeid & Co.* (for the plaintiff); *Simon, Haynes, Barlas & Cassels* (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A THYNNE (MARCHIONESS OF BATH) v. THYNNE
(MARQUESS OF BATH).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), May 5, 1955.]

B Divorce—Decree absolute—Amendment—Marriage as pleaded and proved dissolved by decree—Decree made absolute—Two ceremonies of marriage—Petition referred only to second ceremony—Application to amend petition and decrees by substituting references to first ceremony—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 (1) (a), r. 6 (1), r. 80.

C Divorce—Practice—Amendment—Application to amend petition and decrees nisi and absolute—Application by motion and not summons—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 80.

By the Matrimonial Causes Rules, 1950, r. 4 (1) (a), a petition for divorce must state the “names of the parties to the marriage, the place and date of the marriage and the name and status of the wife before the marriage” and, by r. 6 (1), must be supported by an affidavit by the petitioner verifying the facts.

D On Oct. 8, 1926, the parties went through a ceremony of marriage in secret at the church of St. P. The husband transposed his Christian names and omitted one of the wife’s Christian names for the entry in the marriage register. On Oct. 27, 1927, the parties went through a second ceremony of marriage at the church of St. M., which was attended by their friends and relations. Their names were on this occasion correctly entered in the register. On Jan. 20, 1953, the wife presented a petition for divorce on the ground of the husband’s adultery, and set out the details relating to the second ceremony. On May 15, 1953, a divorce commissioner granted to the wife a decree nisi, pronouncing that “the marriage had and solemnised on Oct. 27, 1927, at St. M. parish church” between the parties be dissolved. E On June 27, 1953, the decree was made absolute. Subsequently each party re-married. On July 7, 1954, an order was made in respect of the wife’s prayer for maintenance, and on Oct. 6, 1954, an order was made varying the marriage settlement. On a summons by the wife calling on the husband to show cause why she should not be at liberty to amend the petition and the decrees by substituting the date and place of the first ceremony for those of the second ceremony, and by inserting the descriptions in the marriage register relating to the first ceremony, F

G Held: precision in pleading the marriage ceremony which, by a petition for divorce, a petitioner prays that the court should dissolve is a matter of substance, not of form (*Reder v. Reder* ([1948] W.N. 238) applied); when the decrees for dissolution were made in the present case it was intended only to dissolve the marriage which had been pleaded and proved, viz., that of Oct. 27, 1927; and as there had been no slip or omission in recording that decision, the court had no power either under R.S.C., Ord. 28, r. 11, or its inherent jurisdiction to make the amendments sought (*MacCarthy v. Agard* ([1933] 2 K.B. 417) considered and applied) and the summons would be dismissed. H

I *Hampson v. Hampson* ([1908] P. 355) not followed; dictum of LORD MERRIMAN, P., in *Everitt v. Everitt* ([1948] 2 All E.R. at p. 549, letters E and F) considered.

Per CURIAM: a matter of this importance should have been brought before the court by motion, and not by summons (see p. 382, letter C, post).

[As to amendment after decree absolute, see 10 HALSBURY’S LAWS (2nd Edn.) 831, para. 1328 note (m); and for cases on the subject, see 27 DIGEST (Repl.) 452, 3842, 3843.

As to amending judgments and orders under the slip rule, see 19 HALSBURY'S LAWS (2nd Edn.) 261, para. 561; and for cases on the subject, see DIGEST (Practice) 472-476, 1530-1567.

For the Matrimonial Causes Act, 1950, s. 4 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.

For the Matrimonial Causes Rules, 1950, r. 3 (1), r. 4 (1) (a), r. 6 (1), see 10 HALSBURY'S STATUTORY INSTRUMENTS 197, 199, 202.]

Cases referred to:

- (1) *Hampson v. Hampson*, [1908] P. 355; 77 L.J.P. 148; 99 L.T. 882; 27 Digest (Repl.) 690, 6608.
- (2) *Marshall v. Marshall*, (1909), 25 T.L.R. 716; 27 Digest (Repl.) 453, 3843.
- (3) *Hewett v. Hewett & Dupin*, (1929), 73 Sol. Jo. 402; 27 Digest (Repl.) 552, 5017.
- (4) *Woolfenden v. Woolfenden*, [1947] 2 All E.R. 653; [1948] P. 27; [1948] L.J.R. 622; 27 Digest (Repl.) 686, 6564.
- (5) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 27 Digest (Repl.) 593, 5547.
- (6) *Prince v. Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 27 Digest (Repl.) 597, 5580.
- (7) *MacCarthy v. Agard*, [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595; 27 Digest (Repl.) 252, 2032.
- (8) *Re Swire*, (1885), 30 Ch.D. 239; 53 L.T. 205; Digest (Practice) 472, 1534.
- (9) *Preston Banking Co. v. Allsup (William) & Sons*, [1895] 1 Ch. 141; 64 L.J.Ch. 196; 71 L.T. 708; 10 Digest 805, 5110.
- (10) *Scott v. Morley*, (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 27 Digest (Repl.) 169, 1242.
- (11) *Reder v. Reder*, [1948] W.N. 238; 92 Sol. Jo. 469; 27 Digest (Repl.) 552, 5026.

Summons.

By summons issued in proceedings for divorce after decree absolute had been made on the wife's petition, she applied for liberty to amend her petition so that, in effect, the marriage referred to therein should become a marriage between her and the husband which took place on Oct. 8, 1926, in place of that alleged which took place between the parties on Oct. 27, 1927, and for an order that the decrees nisi and absolute, made on her petition, should be amended also to refer to the marriage of Oct. 8, 1926. The application was supported by the husband. The summons was adjourned into court for judgment. The facts appear in the judgment.

Anthony Harmsworth for the wife.

Victor Russell for the husband.

Cur. adv. vult.

May 5. **LORD MERRIMAN, P.**, read the following judgment: On Jan. 20, 1953, the wife presented a petition for divorce on the ground of the husband's adultery. In para. 1 of the petition it was stated that on Oct. 27, 1927, the wife, then Daphne Winifred Louise Vivian, spinster, was lawfully married to the husband, then Viscount Weymouth, at the parish church in the parish of St. Martin-in-the-Fields, in the county of London. The certified copy of the marriage register, attached to the petition, gives the same particulars, with the addition that the husband is described as a bachelor. Hereafter I will refer to this ceremony as the St. Martin's marriage. In her affidavit, verifying the petition, the wife swore that, inter alia, the statements contained in para. 1 of the petition, setting out the St. Martin's marriage, were true. The wife prayed that the court would, in the exercise of its discretion, decree that her said marriage be dissolved. The petition also contained prayers for the custody of the youngest child of the marriage, for alimony pendente lite, and for maintenance for the wife and for the said child, and for such secured provision as might be just.

A On May 15, 1953, His Honour JUDGE DALE, sitting as a special commissioner at the Royal Courts of Justice, having taken the oral evidence of the wife in support of the petition, pronounced that the wife had sufficiently proved the contents of the said petition, and, in the exercise of the discretion conferred on the court by s. 4 (2) of the Matrimonial Causes Act, 1950, pronounced that the marriage had and solemnised on Oct. 27, 1927, at St. Martin-in-the-Fields parish church in the county of London between the wife and the husband be dissolved, by reason that since the celebration thereof the husband had been guilty of adultery, unless sufficient cause be shown to the court within six weeks from the making of the decree why such decree should not be made absolute. I quote the formal documents textually because I attach importance to the actual wording. The suit was undefended. The husband took no part in the proceedings, although it would, as will appear, have been open to him to have filed an answer correcting the allegation about the marriage, even though he did not dispute the charge made against him. Had he taken that course the present difficulties with which I am confronted need not have arisen, at any rate in their existing form. This decree was made absolute on June 27, 1953. The certification of this fact in form 16, prescribed by the Matrimonial Causes Rules, 1950, sets out the names of the parties as aforesaid, refers specifically to the date and place of the marriage decreed by the decree nisi to be dissolved, and certifies that the said decree was on June 27, 1953, made final and absolute, "and that *the said marriage was thereby dissolved*" (the italics are mine).

On July 11, 1953, the wife went through a ceremony of marriage with Alexander Fielding, who had been named in her discretion statement as a man with whom she had committed adultery, and on July 15, 1953, the husband went through a ceremony of marriage with Virginia Tennant, the woman named in the wife's petition. I am entitled to exercise my judicial knowledge that production of the certificate that the decree nisi on the wife's petition had been made absolute must have been required before the husband and wife went through these marriage ceremonies respectively. On July 7, 1954, WALLINGTON, J., made an order approving a deed of family arrangement dated June 27, 1954, and a conveyance and deed of discharge of the same date, as furnishing suitable and sufficient maintenance and secured provision for the wife for her life, to take effect from the said date. It was further ordered that an interim order for maintenance at the rate of £4,000 per annum be discharged, with effect from the same date. On Oct. 6, 1954, KARMINSKI, J., confirmed the report of Mr. Registrar FORBES, and ordered that what is described as the "ante-nuptial" settlement, made on Oct. 25, 1927—that is to say, two days before the St. Martin's marriage—be varied by extinguishing all the rights, powers and interests of the husband therein, as though he were dead and the wife had survived him; and that the power to revoke and re-appoint contained in a revocable appointment, dated Jan. 18, 1939, be vested solely in the wife to the exclusion of the husband. The orders to which I have referred were, of course, ancillary to the decree absolute in this suit, and it is right to notice that the eldest son, Lord Weymouth, expressly consented to the variation of the settlement, that the younger children were represented by counsel, who satisfied the court that the variation did not in any way prejudice their interests; and that I was informed that there are no children of either of the fresh unions. Nevertheless, it is obvious that it is by no means certain that nothing has intervened since the decrees in this suit were made which might render it inexpedient, or even inequitable, to correct their terms, whether under the inherent jurisdiction of the court or under R.S.C., Ord. 28, r. 11. Indeed, it was stated in the course of the argument that the so-called "ante-nuptial" settlement of Oct. 25, 1927, could only be dealt with by legislation, on the ground that it was a nullity in the circumstances which I must now relate.

The husband came of age on Jan. 26, 1926. From the wife's affidavit in support of the present summons it appears that, because at that time their proposed marriage was strongly opposed by their respective families, the husband and wife decided to get married secretly. In order that the proposed marriage might not be discovered, the husband, when applying for the marriage licence, transposed his Christian names, and omitted "Daphne" from the wife's Christian names, presumably because, as appears from the signature of her petition, it is the one she habitually uses. Accordingly, on Oct. 8, 1926, they went through a ceremony of marriage at St. Paul's Church, Knightsbridge, hereafter referred to as the St. Paul's marriage. They are described in the marriage register (a certified copy of which is exhibit A to the wife's affidavit) as Frederick Henry Thynne, bachelor aged twenty-one, and Winifred Louise Vivian, spinster aged twenty-two. In spite of the fact that the respective fathers' names were given, and both were stated to be peers of the realm, the deception appears to have been successful, for the wife's affidavit shows that no friends or relations were present at the ceremony. About a month afterwards, the affidavit continues, the husband left for the United States of America, as had been previously arranged, and the wife remained in England. In April, 1927, the husband returned to England, by which time the opposition of their families to the supposedly intended marriage had been retracted, but in the circumstances the husband and wife decided not to inform them of the fact that they were already married, for fear of the trouble and distress that might be caused thereby. Accordingly, with the approval of their families, they became officially engaged, and, to continue the quotation from the affidavit, entered into certain settlements in contemplation of the proposed marriage, involving, *inter alia*, very substantial transfers of property. These included the so-called "ante-nuptial" settlement already referred to.

The wife then refers in her affidavit to the St. Martin's marriage, adding that it took place in the presence of all their friends and relations, who were still unaware of the earlier marriage. She states that thereafter in the course of time she came to look on the latter ceremony as the valid marriage, and that she has in fact at all times regarded such ceremony as constituting a valid marriage. I pause to observe that I have had no evidence whatever from the husband as to his views on this subject. The affidavit continues with the statement that when the wife gave instructions to her solicitors to present her petition for divorce, she had firmly in mind that the second ceremony of marriage was the one to be dissolved, and gave no thought to the secret marriage, nor did she inform her solicitors thereof. Then, after referring to the respective re-marriages, the wife adds that she recently published a book of reminiscences in which she referred to her said secret marriage, and states that it was only after the publication thereof that the matter in question was brought to her attention by her solicitors. Accepting, as I naturally do, the wife's statement that she omitted to inform her solicitors of the St. Paul's marriage, with the implication that it first came to their knowledge from the publication of her memoirs, I must not be taken to accept unreservedly the wife's statement as to the completeness or the duration of her oblivion of the St. Paul's marriage. As the wife has not been cross-examined on her affidavit, it is undesirable for me to say more than that it is possible that in instructing her solicitors as she did when she presented her petition, she may have done so because she realised that to plead the St. Paul's marriage, and to swear to it in the affidavit verifying her petition, and indeed to give evidence in support of that marriage at the hearing, as she would have to do, would inevitably have exposed to her family and friends the deception which had admittedly been practised on them in 1927, and had apparently been sedulously maintained thereafter—at any rate, until the publication of her memoirs. The issues arising out of the falsity of the information about her status, and that of the husband, in connection with the St. Martin's marriage, in her affidavit verifying her petition, and her evidence about that marriage at the hearing, and finally, in

A uttering in connection with her present marriage, the certificate of the decree absolute dissolving the St. Martin's marriage, are matters which may be for consideration by others.

The present summons calls on the husband

B "to show cause why [the wife] should not be at liberty to amend para. 1 of her petition by striking out the date 'Oct. 27, 1927', and inserting in place thereof 'Oct. 8, 1926'; by inserting after the word 'Vivian' the words 'in the marriage certificate described as Winifred Louise Vivian'; by inserting after the words 'Viscount Weymouth' the words 'in the marriage certificate described as Frederick Henry Thynne'; and by striking out the words 'the parish church in the parish of St. Martin-in-the-Fields in the county of London' and inserting in place thereof the words 'St. Paul's Church in the parish of St. Paul's, Knightsbridge, in the county of Middlesex'; and for an order that the decree nisi pronounced on May 15, 1953, and the decree absolute made on June 27, 1953, be amended by striking out therefrom the date and place of marriage and description of [the husband] therein appearing, and inserting in place thereof the date and place of marriage and descriptions of [the wife] and [husband] appearing in the amended petition."

I am invited by counsel for the wife, supported by counsel for the husband, to do this on the authority of *Hampson v. Hampson* (1). In that case there had been a marriage in a registrar's office in March, 1899, and a subsequent form of marriage was gone through in church in June, 1899. In the wife's petition for dissolution of marriage in that case, as in the present case, the marriage was stated to have been celebrated on the second occasion in the church, and the decree nisi and the decree absolute subsequently pronounced referred only to that ceremony of marriage. I have examined the record in that case. The facts differ, inasmuch as there was no question of re-marriage, nor was there any suggestion of an attempt at concealment of identity on the occasion of the first marriage, as in the present case. On the other hand, the record shows that between the decree absolute on Aug. 23, 1907, and the motion to rectify the decrees nisi and absolute filed on July 10, 1908, there had been leave to file a petition for maintenance out of time, and an order made by the judge on May 18, 1908, confirming the registrar's report in connection with the variation of an ante-nuptial settlement. The wife applied by motion that the decrees nisi and absolute might be rectified by inserting the marriage at the registrar's office instead of the subsequent ceremony of marriage in church. SIR GORELL BARNES, P., thought it right to amend the petition as well as the decrees, and allowed the wife to take the order for the amendment of all three on affidavit of service of the notice of motion, but refused to allow the costs to be taxed against the husband. That case was followed, more particularly with reference to the question of costs, in *Marshall v. Marshall* (2). In that case there had been a Scottish marriage by declaration in the presence of two witnesses in 1904, but, by reason of some unnecessary doubts as to its validity which were subsequently entertained, the parties in 1906 went through another ceremony of marriage at the sheriff's court in Edinburgh. In the petition presented by the wife to this court in 1908, on the grounds of the husband's desertion and adultery, the wife, under the mistaken idea that the first ceremony was invalid, referred only to the second ceremony, and in October, 1908, decree nisi was pronounced. Apart from the doubts about the validity of the first marriage, that case differs from *Hampson v. Hampson* (1) inasmuch as the motion to amend the petition and the decree nisi was made before the decree nisi was made absolute. There was, however, the complication that the alleged desertion for the statutory period was based, by virtue of s. 5 of the Matrimonial Causes Act, 1884, on non-compliance with a decree for restitution of conjugal rights. It was thought,

therefore, that the petition and the decree in the restitution suit needed amendment. SIR CHARLES BIGHAM, P., allowed this, although there was no motion to that effect, and counsel for the husband, while not dissenting, did not consent. He also allowed amendment of the decree nisi, but without costs. A

I have been pressed by counsel both for the husband and for the wife with the argument that I am obliged to follow these decisions of my two distinguished predecessors. I must say in passing that I wish that the wife had followed these authorities in the matter of procedure. This application was made by summons, so I was informed, on the authority of *RAYDEN ON DIVORCE* (6th Edn., at p. 619, para. 11), where these cases are cited as authorities for the statement that the procedure should be by summons; but in both of them, as the reports show, the application was by motion. In my opinion, a matter of such importance ought to have been brought before the court by motion. However that may be, I was not prepared to give my decision in camera; but as the matter was not listed in open court I was unable to adjourn it into court for judgment then and there, and was therefore obliged to reserve my judgment. Dealing, however, with the merits of the application, I need not say, having regard to the unbounded respect that I have both for SIR GORELL BARNES and for SIR CHARLES BIGHAM, that I would most readily be guided by *Hampson v. Hampson* (1), followed as it was to some extent by *Marshall v. Marshall* (2), if I could convince myself that there is any ground on which the decision can be supported. It is true that these cases were decided as long ago as 1908 and 1909 respectively; but it is not as if they had regulated practice meanwhile, for, so far as I am aware, no subsequent decision of the court has been based on either of them. B C D

As regards *Marshall v. Marshall* (2), the extensive powers of the court in relation to a decree nisi are, in my opinion, beside the point. Without going back to the earlier practice of the ecclesiastical courts, it is sufficient, for example, to allude to the power to set aside a decree nisi on the intervention of the Queen's Proctor, amongst other persons, on the ground that the decree was obtained contrary to the justice of the case, and to the power of the Divisional Court under the Matrimonial Causes Rules, 1950, r. 36 (1), to set aside the decree made by a judge alone where no error on the part of the court at the hearing is alleged. As regards the incidental amendment in that case of the petition and the decree in the suit for restitution of conjugal rights, non-compliance with which was then, as I have said, the equivalent of the statutory period of desertion, there is, in my opinion, no comparison between a decree absolute of divorce which finally affects the status of the parties and a decree for restitution of conjugal rights, the power to enforce which by attachment was abolished by s. 2 of the very Act* which made failure to comply with the decree for restitution the equivalent of the statutory period of desertion. In relation to a decree nisi, however, reference should be made to *Hewett v. Hewett & Dupin* (3). In that case, as in the present, the parties had gone through two ceremonies of marriage, the first secretly at St. Stephen's Church, South Kensington, in October, 1918, and the second at St. Paul's Church, Knightsbridge, in January, 1921, but unlike the facts in *Marshall v. Marshall* (2), there was no doubt about the validity of the first marriage. In pronouncing decree nisi HILL, J., was asked to insert a reference to the second ceremony in the decree, but he declined to interfere, saying that if people went through a second ceremony it was their own look-out. It could not be a marriage because they had already been married. The marriage of October, 1918, which he then dissolved was the legal marriage. He could only dissolve marriages. He could not dissolve anything else. If people chose to go through idle ceremonies he should not assist them. If it were desired to get rid of the second ceremony the court must be asked for a declaration of nullity. E F G H I

* I.e., the Matrimonial Causes Act, 1884, repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226, Sch. 6.

- A** *Hampson v. Hampson* (1) is, on the other hand, with the exception already mentioned, precisely in point. There is nothing to show however, on what foundation SIR GORELL BARNES, P., acted in altering a decree absolute. It was decided in *Woolfenden v. Woolfenden* (4) that the court has authority to set aside a decree absolute if it is a nullity. Equally, whether under the slip rule or by virtue of the inherent jurisdiction of the court, I do not doubt that the court has
- B** power, in an appropriate case, to correct error in a decree absolute arising from any accidental slip or omission, and the slip rule in its present form was in force in 1908. Indeed, by virtue of r. 80 of the Matrimonial Causes Rules, 1950, R.S.C., Ord. 28, r. 11, applies to this court, but I am not aware of, nor have I been referred to, any other authority for power to alter a decree absolute except *Hampson v. Hampson* (1). On the contrary, in *Everitt v. Everitt* (5), in a judgment which I gave when presiding in the Court of Appeal, on behalf of LEWIS, J., and myself, with which BUCKNILL, L.J., expressly agreed, I am reported as saying ([1948] 2 All E.R. at p. 549, letters E and F) that there was no precedent for an application under r. 36* after decree absolute. Although it was unnecessary to decide more than that the particular appeal was properly brought in the Court of Appeal, the judgment suggests—and it is a view that I know is shared by the
- D** judges of this Division—that, except in the case of slip, or of a judgment that is a nullity, it is the Court of Appeal alone which can deal with error in a decree absolute. *Everitt v. Everitt* (5) was cited with approval by SIR RAYMOND EVERSHED, M.R., in *Prince v. Prince* (6). I need hardly say that both counsel rejected with equal emphasis the bare idea that the decree absolute should be set aside as a nullity. As I have no such application before me, I need only add that, even if I
- E** have jurisdiction to accede to the present application, and if the amendments proposed are intended to ensure that no question shall arise about the validity of the subsequent marriages, I am by no means sure that this object would be attained. If, as is argued, the husband and wife were divorced on June 27, 1953, when the decree was made absolute, nothing more is necessary. If they were not then divorced by reason of inherent defect in the process from beginning to end, or
- F** otherwise, I cannot divorce them now with retroactive effect. It remains, however, to consider whether I have power to correct the decrees, either under the slip rule or by virtue of the inherent jurisdiction of the court, whatever the effect of so doing may be. In support of the court's decision in *Hampson v. Hampson* (1), I was pressed with the argument that the learned commissioner intended to dissolve whichever really was the marriage between the husband and wife, and that the reference to the wrong ceremony was merely a defect in form. It may be, however, that this argument merely begs the whole question.
- G**

- As to the application of the slip rule and the inherent jurisdiction of the court, I am content to rely on the decision of the Court of Appeal in *MacCarthy v. Agard* (7), where earlier decisions of the Court of Appeal in *Re Swire* (8) and
- H** *Preston Banking Co. v. William Allsup & Sons* (9), were considered and followed. In *MacCarthy v. Agard* (7) a woman was sued as “Mrs. Agard, a married woman”, and judgment was obtained against her in the form settled in *Scott v. Morley* (10). She was neither Mrs. Agard nor was she a married woman, but was in fact Mrs. Watts, and was a widow, she having kept back from, and actively misrepresented to, the court her real name and status. The real facts
- I** being ascertained, the plaintiff applied to have the judgment altered to a personal judgment against her as Mrs. Watts, a widow. The majority of the Court of Appeal, GREER and ROMER, L.JJ., held that there was no jurisdiction to amend the judgment, either under the slip rule or under the inherent jurisdiction of the court, inasmuch as the judgment had been intentionally given in the form it was. SCRUTTON, L.J., dissented, and it is not unimportant to cite one passage ([1933]

* I.e., r. 36 of the Matrimonial Causes Rules, 1944, now r. 36 of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940).

2 K.B. at p. 422) in his judgment, which shows the ground on which he based his dissent: A

"In my view this is a case in which the court is entitled to say: 'You, the appellant, have deceived us and have thereby induced us to give a judgment in a form to which you were not entitled; we therefore decline to allow you to keep the judgment obtained in that form by your deception'. I should be sorry to think that the inherent power of the court is to be in any way limited by rules." B

The other members of the court, however, rejected the view that misrepresentation made any difference. GREER, L.J., said (*ibid.*, at p. 423):

"Instead of appealing from the judgment that was entered in this case and saying that it should be reversed because it was given in the form in which it was, and the action was brought in the form it was by reason of the false pretence of the appellant that she was Mrs. Agard, a married woman, the respondent applied by summons to the master to amend the judgment. If proper proceedings were taken I cannot conceive that this judgment would be allowed to stand, but that is not the question we have to determine. The question for us is whether under the rules relating to procedure the court can under the slip rule or under its inherent jurisdiction set aside a judgment which has been intentionally entered in the way it was, or whether the court is bound to leave the party aggrieved to the remedy of appealing or bringing an action to set aside the judgment . . . No doubt the judgment was drawn up by a clerk in the office, but as drawn up it accurately represented what the master decided." C D E

The learned lord justice then approved as being accurate the statement in the ANNUAL PRACTICE for 1933, beginning:

"The error or omission must be an error in expressing the manifest intention of the court",

and ending with the sentence: F

"If the order as drawn correctly expressed the intention, it cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the court is procured by fraud or misrepresentation."

That statement is repeated in the current issue [1955 at p. 465], and the slip rule remains unaltered, in spite of the suggestion, which was made both by GREER, L.J., and ROMER, L.J., that some fresh rule should be passed to fit such a case without the necessity for appeal or fresh action. G

ROMER, L.J., relied on the judgment of LORD HALSBURY sitting in the Court of Appeal in *Preston Banking Co. v. William Allsup & Sons* (9) ([1895] 1 Ch. at p. 143) to the effect that jurisdiction to correct an order drawn up in the form intended by the court, even if the order had been obtained by fraud, would be most mischievous, and that it was immaterial whether the application to re-hear was made to the judge who made the order, because if one judge can re-hear the order so can another. ROMER, L.J., then dealt with the contention that in *MacCarthy v. Agard* (7) the court intended to give an effective judgment against the appellant. He rejected that contention on the ground that on the facts before him the master was led to believe that the appellant was a married woman, and it was in those circumstances that the judgment was in the *Scott v. Morley* (10) form. He added that that was the intention of the court, and in those circumstances it was impossible to alter that order and make it one under which the appellant should be unconditionally liable. It seems to me that there is a very close resemblance between that particular contention and the contention of counsel in the present case, that the learned commissioner intended to divorce this husband and this wife, and that I am now merely being invited to correct the form of the judgment to give effect to that intention. This argument assumes H I

A that, provided there was a subsisting marriage which the court could dissolve, it is a mere matter of form that the petitioner pleads some marriage other than that which is the subsisting marriage, and that the court expressly pronounces that it is such other marriage that is dissolved by its decree.

B Without referring to the practice of the old ecclesiastical courts, I have looked at the Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes made by LORD PENZANCE, then SIR JAMES PLAISTEAD WILDE, judge ordinary of the court, by virtue of the power conferred on him by the Matrimonial Causes Act, 1857, and the amending Acts of 1858, 1859, 1860 (which among other things introduced the decree nisi), and of 1862 which perpetuated the provisions of the preceding Act. The rules came into force on Jan. 11, 1866. Rule 1 provides that proceedings before the court shall be commenced by filing a petition, and refers to form No. 1 in the appendix, the first paragraph of which is:

C "That your petitioner was on the day of , 18 , lawfully married to C.B., then C.D. spinster (or widow), at the parish church of, etc. (Here state where the marriage took place)."

D Rule 2 contains provisions that every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and that such affidavit shall be filed with the petition. Section 29 of the Act of 1857 enjoins on the court the duty

"to satisfy itself, so far as it reasonably can, not only as to the facts alleged",

E but also as to connivance, condonation, and any countercharge which may be made against the petitioner. In substance the same provisions are in force today. The corresponding rules made by virtue of s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, are the Matrimonial Causes Rules, 1950, r. 3 (1), r. 4 (1) (a) and r. 6 (1); and s. 4 (1) of the Matrimonial Causes Act, 1950, now represents s. 29 of the original Act. "The facts alleged" manifestly include the

F facts of the marriage which the petitioner is obliged to plead and to prove. Moreover, form 16, to which I have already alluded, is the prescribed form of "Certificate of making decree nisi absolute (Divorce)." If further authority is needed for the proposition that precision about the marriage to be dissolved is essential it is to be found in *Reder v. Reder* (11) in which the Court of Appeal decided that it is improper for the trial judge to decree the dissolution of which-

G ever of two marriage ceremonies created the marriage. In my opinion, therefore, it is not merely as a matter of form that petitioners are required by the Matrimonial Causes Rules, 1950, which are statutory, to assert and to prove the particular marriage which they pray the court to dissolve, or that the certificate of the decree having been made absolute sets out the precise ceremony of marriage which is declared to have been dissolved. In my opinion precision in the pleading and the proof of the marriage in question is a matter of substance. Therefore when it is argued that the learned commissioner intended to give a valid decree of divorce as between this husband and this wife, I am bound, in my opinion, to hold that he can only be taken to have intended to decree that the marriage alleged and proved to have taken place was dissolved, and that there is nothing which can remotely be called an accidental slip or omission in recording that decision, whether it is the slip rule or the inherent jurisdiction of the court that is invoked. That being my opinion, I have no option but to dismiss this summons. I give leave to appeal.

Summons dismissed.

Solicitors: *Gordon, Dadds & Co.* (for the wife); *Charles Russell & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

LAMBE v. SECRETARY OF STATE FOR WAR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.JJ.), April 27, 28, 1955.]

Compulsory Purchase—Compensation—Assessment—“Special suitability or adaptability of the land”—Acquiring authority in possession as tenant under long lease—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5 c. 57), s. 2, r. (2), r. (3).

Property consisting of a large dwelling-house, a coach house and about one acre of land was subject to a lease for a term of ninety-nine years from June 24, 1891, at a ground rent of £17 15s. a year. In 1949 the unexpired term of the lease was bought by the Territorial and Auxiliary Forces Association, who had been sub-tenants of the property since 1938. In 1951 the Secretary of State for War, with a view to acquiring the freehold interest in the property, by virtue of his statutory powers, served a notice to treat on the claimant, who was the tenant for life of the freehold interest. The parties agreed that the compensation should be assessed on one of three bases, namely, (a) “in accordance with r. (2) of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, and on the basis that r. (3) of s. 2 of that Act [operated] to eliminate the special suitability or adaptability of the freehold interest in the land for the purposes of merger with the leasehold interest, for which purpose there [was] no market apart from the requirements of the War Department”, that is to say, on the basis of what a purchaser other than the tenant in possession would pay for the freehold interest as an investment; (b) what a sitting tenant having no power of compulsory acquisition would be prepared to pay, on the basis that, under r. (3), the price which the acquiring authority would be willing to pay was not to be taken into account; and (c) what the acquiring authority, being in possession as tenant, would be willing to pay in a friendly negotiation, on the footing that he had no powers of compulsory acquisition, and on the assumption that the land had no special suitability for the authority alone. No special suitability of the land for the purposes of the acquiring authority was suggested on his behalf, other than the fact that the authority, through the association, was the lessee of the land. On the question which of the agreed bases was correct,

Held: “special suitability or adaptability of the land”, within r. (3) of s. 2 of the Act of 1919, referred to a quality of the land as opposed to the needs of a particular purchaser, and the fact that a tenant in possession might be prepared to pay more than an investor so as not to be turned out of the property did not clothe the land with a “special suitability” which, under the rule, was to be excluded in assessing compensation (*dictum* in *Pointe Gourde Quarrying & Transport Co., Ltd. v. Sub-Intendent of Crown Lands* ([1947] A.C. at p. 571) applied); the acquiring authority had, therefore, failed to prove any “special suitability” within the rule, and the compensation should be assessed on the basis of what the acquiring authority, as the tenant in possession, would be prepared to pay, in a friendly negotiation, in acquiring a freehold interest for his purposes, on the footing that he had no powers of compulsory acquisition.

Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam ([1939] 2 All E.R. 317) followed.

Appeal dismissed.

[As to “special suitability or adaptability” of land, see 6 HALSBURY’S LAWS (2nd Edn.) 46, para. 44; 10 HALSBURY’S LAWS (3rd Edn.) 114, para. 188; and for cases on the subject, see 11 DIGEST (Repl.) 133, 134, 178-186.]

For the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, see 3 HALSBURY’S STATUTES (2nd Edn.) 977.]

A Cases referred to:

- (1) *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*, [1939] 2 All E.R. 317; [1939] A.C. 302; 108 L.J.P.C. 51; 11 Digest (Repl.) 132, 177.
- (2) *Pointe Gourde Quarrying & Transport Co., Ltd. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565; 11 Digest (Repl.) 131, 149.
- (3) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 11 Digest (Repl.) 133, 182.

Case Stated.

This was a Case Stated by the Lands Tribunal (SIR WILLIAM FITZGERALD, President, and J. P. C. DONE, Esq.) pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, on the requisition of the acquiring authority, the Secretary of State for War, on a reference to the tribunal to determine the basis of the compensation payable by the acquiring authority for the freehold interest in premises known as "Inniscarra", 53 Bath Road, Reading. The claimant was the tenant for life of the premises. The facts appear in the judgment of PARKER, L.J.

B. S. Wingate-Saul for the acquiring authority.

Niall MacDermot for the claimant.

SIR RAYMOND EVERSHED, M.R.: I will ask PARKER, L.J., to deliver the first judgment.

PARKER, L.J.: This is an appeal by the Secretary of State for War, the acquiring authority, from a decision of the Lands Tribunal as to the basis of the compensation payable by the authority to the claimant for the freehold interest in premises known as "Inniscarra", 53 Bath Road, Reading. The short facts, so far as they are material, are as follows. Since 1938 the property, which consisted of a large dwelling-house on three floors with a coach house and grounds extending to a little over an acre, was occupied by the Territorial and Auxiliary Forces Association, I think as sub-tenants. The premises were used as the headquarters of a Royal Corps of Signals unit and in the course of that occupation the association erected in the grounds a canteen, a signal store and a general stores. Later, in December, 1949, the association purchased the unexpired term of a ninety-nine year lease of the premises which was due to expire on June 24, 1990, and was at a ground rent of £17 15s. per annum. That lease contained a restrictive covenant under which the premises were to be used as a private dwelling-house only, and by a deed of release dated Dec. 15, 1949, the claimant, who is the tenant for life of the freehold interest, in consideration of a sum of £500, waived the breach of the covenant resulting from the user by the association and substituted a covenant whereby the premises could be used as offices, including, while vested in the association, the provision of a canteen or club. He also authorised an assignment of the lease to the association. In 1951 the acquiring authority was minded to purchase the freehold interest in the premises, and on July 14, 1951, served on the claimant a notice to treat. Thereafter the matter was referred to the Lands Tribunal, not (be it observed) to determine the amount of compensation payable, but to decide which of three agreed bases of valuation was applicable in the circumstances of the case, namely, in the light of the facts set out above, which were agreed. The tribunal held that the third alternative basis was that to be applied.

Before referring to these three bases of valuation, I would refer, so far as it is material, to the general rules laid down by s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. By r. (2), the value of the land, which includes by definition* any interest therein,

" . . . shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise . . . "

* See s. 12 (2) of the Act; 3 HALSBURY'S STATUTES (2nd Edn.) 984.

Prima facie, that would include the value of any potentiality which the land A possessed, but by r. (3) it is provided that

"The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose . . . for which there is no market apart from the special needs of a particular purchaser or the requirements of any government department or any local or public B authority . . ."

In other words, if one of the potentialities of the land is such that there is only one purchaser of the land interested in that potentiality, the added amount which he would pay is to be ignored.

The question referred to the tribunal was as follows:

"Which one of the following valuations . . . was to be adopted as the C basis of compensation in [the] reference? (i) assessed in accordance with r. (2) of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, and on the basis that r. (3) of s. 2 of that Act operates to eliminate the special suitability or adaptability of the freehold interest in the land for the purposes of merger with the leasehold interest, for which purpose there is no D market apart from the requirements of the War Department."

There follows a calculation which arrives at a sum of £600.

"(ii) assessed in accordance with r. (2) of s. 2 of [the Act of 1919] and on the basis that r. (3) of s. 2 of the Act does not apply where the purpose is the merger of freehold and leasehold interests, but that nevertheless the principles laid down in the judgment in the Indian case [*Raja Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam* (1)] do E not apply."

The value arrived at on that basis is the sum of £710.

"(iii) assessed in conformity with the judgment in [*Vyricherla's case* (1)] the value to represent the amount which the acquiring authority, in a friendly F negotiation, would be willing to pay in acquiring a freehold interest for its purposes, and as though no compulsory powers of acquisition had been obtained."

The amount arrived at on that basis is stated to be the sum of £1,420.

I will deal first with basis (i). I confess that I do not find the language easy to follow, but clearly this basis is intended to be purely an investment basis, namely, G what some outsider—not the sitting tenant—would pay for the freehold interest as an investment. The argument for excluding the sitting tenant as a potential buyer is that the freehold interest, so it is said, has a special suitability for the purpose of marriage to the leasehold interest, that the value of that special suitability will only be paid by the sitting tenant, and, accordingly, that under H r. (3) the value of that special suitability is not to be taken into consideration. The Lands Tribunal did not accept this contention; and, in my opinion, they were correct. The expression "special suitability or adaptability of the land" in r. (3) is, I think, clearly referring to the quality of the land as opposed to the needs of a particular purchaser. The fact that the sitting tenant may be prepared to pay more than an investor in order not to be turned out does not clothe the land with a special suitability, within that rule, the value of which is to be ignored. I Some support for this view is, I think, to be found in the judgment of the Board in *Pointe Gourde Quarrying & Transport Co., Ltd. v. Sub-Intendent of Crown Lands* (2). In that case the Crown had acquired land belonging to the appellants on which there was a limestone quarry. It was purchased for the United States of America in connection with a naval base which they were erecting nearby, and the stone, when quarried, would have been of particular importance to the United States on account of their special needs. Section 11 (2) of the local ordinance [the Canadian Land Acquisition Ordinance, No. 14 of 1941] was in the

A same form as s. 2, r. (3) of the Act of 1919. LORD MACDERMOTT, giving the judgment of the Board, said ([1947] A.C. at p. 571):

B “It is, of course, possible that land may have a special suitability or adaptability for several purposes, and, where this is so, it may well happen that s. 11 (2) will operate to exclude compensation in respect of some of such purposes and not in respect of others. But it must be assumed that the word ‘purpose’ is used or referred to throughout the sub-section in the same sense. That being so, the expression ‘if that purpose is a purpose to which it could be applied only in pursuance of statutory powers’ indicates, in their Lordships’ view, that the word is employed in the sub-section as meaning a purpose to which *the land* can be applied. It therefore connotes a use, actual or potential, of the land itself, and cannot be regarded as meaning a purpose which is only concerned with the use of the products of the land elsewhere.”

C It is, I think, convenient to deal with bases (ii) and (iii) together, and here the language used is even less felicitous than that used in basis (i). It only adds, I think, to the confusion to refer to the compensation in the present case as falling to be assessed “in conformity with the judgment in the Indian case [*Vyricherla’s* case (1)]” (basis (iii)), and “on the basis that the principles laid down in [*Vyricherla’s* case (1)] do not apply” (basis (ii)), because *Vyricherla’s* case (1) was, of course, decided, not under the Acquisition of Land (Assessment of Compensation) Act, 1919, but under the local law*, and that local law laid down principles for determining compensation which differed in no material respect from those in operation in this country under the Lands Clauses Act, 1845; that is, before the Acquisition of Land (Assessment of Compensation) Act, 1919, came into operation. On analysis, however, I think that the intention of the parties in putting forward these two bases in this form is reasonably clear. In effect, the local law in *Vyricherla’s* case (1) made applicable the principles embodied in r. (2) of s. 2 of the Act of 1919. There was no exception in the nature of r. (3). Bearing this in mind, I think that basis (iii) is intended to be a valuation of what the acquiring authority as sitting tenant would be prepared to pay, assuming that the land had no special suitability for the authority alone, whereas basis (ii) is intended to be what an ordinary sitting tenant would be prepared to pay on the basis that under r. (3) the price which the authority would be prepared to pay is not to be taken into account.

F Prior to the introduction of r. (3) by the Act of 1919 it was always the law—and it was forcibly re-stated by LORD ROMER, delivering the judgment of the Board in *Vyricherla’s* case (1)—that the amount which the authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest, and as though no compulsory powers of acquisition had been obtained, was a matter to be taken into consideration. Equally, since the introduction of r. (3), that amount is to be taken into consideration unless the acquiring authority is able to show that the amount which he is willing to pay is enhanced by some suitability or adaptability of *the land* for his purposes alone. Accordingly, the question is whether in this case the acquiring authority can show that r. (3) applies so as to eliminate from consideration what he would be prepared to pay. As I understand it, however, no special suitability of *the land* for his purposes was suggested other than that already referred to in connection with basis (i), namely, for the purposes of merger. Accordingly, having failed to prove any special suitability within the rule, basis (iii) is the correct basis. I should add that at one time I was impressed by the fact that, although no special facts in regard thereto had been agreed and although there was no specific finding, yet there must here be in fact some special suitability, in that the value arrived at under basis (iii) is double that arrived at under basis (ii). However, neither the Lands Tribunal nor this court is concerned with the question of amount; it is concerned only with the correct basis of valuation; and, whatever the result, I

* The Indian Land Acquisition Act, 1894.

am clear that, on the facts as agreed, no special suitability of the land has been shown. A

Finally, counsel for the acquiring authority suggested that the price which the authority was prepared to pay ought to be ignored, on the ground that otherwise the value would be enhanced solely due to what he referred to as "the scheme". It is well settled, as was said by LORD MACDERMOTT in the *Pointe Gourde* case (2) ([1947] A.C. at p. 572), that B

"compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition",

in that case the construction of a naval base in the vicinity; but it does not follow that in all cases the price which an authority having compulsory powers will pay should be ignored. In *Vyricherla's* case (1), LORD ROMER, after referring to the judgment of FLETCHER MOULTON, L.J., in *Re Lucas & Chesterfield Gas & Water Board* (3), said ([1939] 2 All E.R. at p. 326): C

"It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by 'scheme' is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. Their Lordships have some difficulty, however, in seeing why the taking into consideration of the fact that the special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference which the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land, and that is a circumstance that is never allowed to enhance the value." D E

Further, in an earlier passage, LORD ROMER said (*ibid.*, at p. 321): F

"The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. This does not mean, however, that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth." G

In the present case, basis (iii) is specifically stated to be on the basis of the value which the acquiring authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest for his purposes and as though no powers of compulsory acquisition had been obtained. I would uphold the decision of the tribunal and dismiss the appeal. H

HODSON, L.J.: I agree and have nothing to add.

SIR RAYMOND EVERSLED, M.R.: I am also of the same opinion. I

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the acquiring authority); *Hewett, Pim & Clarke*, Reading (for the claimant).

[Reported by F. GUTTMAN, Esq., *Barrister-at-Law.*]

A

MOSEY v. MOSEY AND BARKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), April 4, 5, 29, 1955.]

B

Divorce—Maintenance of wife—Secured maintenance—Death of husband before maintenance secured—No agreement as to which properties should constitute security—Enforceability of order against husband's executor—Cross-application to vary order—No variation so as merely to extinguish rights given by order—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 28 (1).

C

A wife obtained a decree nisi of divorce which was made absolute in January, 1952. In December, 1952, the registrar on her application made an order (i) that the husband should secure to her for her life the annual sum of £300 on part of his real property to be agreed or referred to the registrar in default of agreement (ii) that he should secure to her on part of his real property the gross sum of £750 for the benefit of the child of the marriage. The parties failed to agree which of the husband's properties should be selected to constitute the security. In March, 1953, the husband died. The wife issued a summons against the husband's executor to show cause why he should not execute deeds securing the annual sum and the gross sum pursuant to the order, and the executor by cross-summons applied that the provision securing to the wife the gross sum for the benefit of the child should be deleted from the order.

D

E

Held: (i) the wife had an enforceable claim under the order that the annual sum and the gross sum should be secured on real property forming part of the husband's estate and this claim was maintainable irrespective of whether the order had or had not created a charge on the husband's real property (*Richards v. Richards & Flockton* (1940) (111 L.J.P. 20, n.) applied).

F

Observations on whether the order created a charge on the husband's real property (*Waterhouse v. Waterhouse* ([1893] P. 284) considered).

(ii) on the footing that the order of 1952 derived in part from s. 19 (2) of the Matrimonial Causes Act, 1950, the executor of the husband could not, as such, maintain under s. 28 (1) of that Act a claim that rights given by the order of 1952 should be extinguished, and accordingly the cross-summons failed.

Dipple v. Dipple ([1942] 1 All E.R. 234) applied.

G

[As to the effect of the husband's death on the wife's claim for maintenance, see 10 HALSBURY'S LAWS (2nd Edn.) 794, para. 1260, note (f); and for cases on the subject, see 27 DIGEST (Repl.) 611, 5729 and 674, 6418-6422.

For the Matrimonial Causes Act, 1950, s. 19 (2), s. 28 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 414.]

H Cases referred to:

I

(1) *Dipple v. Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 27 Digest (Repl.) 611, 5729.

(2) *Richards v. Richards & Flockton*, (1940), 111 L.J.P. 20, n.; 27 Digest (Repl.) 573, 5291.

(3) *Coleman v. Coleman & Simpson*, [1920] P. 71; 89 L.J.P. 107; 122 L.T. 804; 27 Digest (Repl.) 536, 4833.

(4) *Hyde v. Hyde*, [1948] 1 All E.R. 362; [1948] P. 198; [1948] L.J.R. 641; 27 Digest (Repl.) 629, 5898.

(5) *Baumont v. Beaumont*, [1933] P. 39; 102 L.J.P. 4; 148 L.T. 247; 27 Digest (Repl.) 536, 4830.

(6) *Re Boyd, Ex p. McDermott*, [1895] 1 Q.B. 611; 64 L.J.Q.B. 439; 72 L.T. 348; 4 Digest 92, 834.

(7) *Waterhouse v. Waterhouse*, [1893] P. 284; 62 L.J.P. 115; 69 L.T. 618; 27 Digest (Repl.) 626, 5870.

- (8) *Re Hedderwick*, [1933] Ch. 669; 102 L.J.Ch. 193; 149 L.T. 188; 27 Digest (Repl.) 674, 6421. A
- (9) *Re Woolgar*, [1942] 1 All E.R. 583; [1942] Ch. 318; 111 L.J.Ch. 209; 167 L.T. 60; 27 Digest (Repl.) 674, 6422.
- (10) *Re Bidie*, [1948] 1 All E.R. 885; [1948] Ch. 697; *subsequent proceedings*, [1948] 2 All E.R. 995; 27 Digest (Repl.) 719, 6886.
- (11) *Barker v. Barker*, [1952] 1 All E.R. 1128; [1952] P. 184; 3rd Digest Supp. B
- (12) *Montagu v. Sandwich (Earl)*, (1886), 32 Ch.D. 525; 55 L.J.Ch. 925; 54 L.T. 502; 20 Digest 476, 2018.

Summons.

On Dec. 7, 1951, the wife obtained on her cross-prayer a decree nisi of divorce against the husband on the ground of his adultery and cruelty. On Jan. 25, 1952, the decree was made absolute. On Dec. 23, 1952, Mr. Registrar GRAY, on the wife's application, made the following order: C

"It is ordered that [the husband] do secure to [the wife] for her life until further order as from the date of the decree absolute . . . Jan. 25, 1952, the annual sum of £300 on part of the real property of [the husband] to be agreed or referred to the district registrar in default of agreement and that in default of agreement between the parties as to the form of deed it be referred to conveyancing counsel of the High Court to settle the necessary deed or deeds. And . . . that [the husband] do pay or cause to be paid to [the wife] during their joint lives or until further order as from the date of the decree absolute further maintenance at . . . the rate of £100 per annum less tax both of the said sums to be payable monthly . . . And it is further ordered that [the husband] do secure to [the wife] the gross sum of £750 for the benefit of Michael Sydenham Mosey the child of the marriage on part of the real property of [the husband] to be agreed or referred to the district registrar in default of agreement and that in default of agreement between the parties as to the form of deed it be referred to conveyancing counsel of the High Court to settle the necessary deed or deeds. And . . . that [the husband] do pay or cause to be paid to [the wife] until Michael Sydenham Mosey shall attain the age of twenty-one years or until further order as from the date of the decree absolute maintenance at . . . the rate of £80 per annum less tax such sum to be payable monthly." D E F

On Mar. 31, 1953, the husband died, having, by his will dated Jan. 31, 1950, appointed an executor and trustee. G

On June 9, 1954, the wife issued a summons against the executor calling on him to show cause why he should not be ordered to execute a deed securing the annual sum of £300 to the wife for her life as from Jan. 25, 1952, on part of the real property of the husband and a deed securing the gross sum of £750 to the wife for the benefit of the child of the marriage on part of the real property of the husband, pursuant to the order of Dec. 23, 1952. The executor issued a cross-summons against the wife calling on her to show cause why the order of Dec. 23, 1952, should not be modified by omitting the provisions for securing to the wife the sum of £750 for the benefit of the child of the marriage and for paying to the wife until the child attained the age of twenty-one years maintenance at the rate of £80 per annum. H

Ifor Lloyd, Q.C., and *G. H. Crispin* for the wife and the child of the marriage. *I*
Lord Hailsham, Q.C., and *N. F. Stogdon* for the husband's executor.

Cur. adv. vult.

Apr. 29. **SACHS, J.**, read the following judgment: On Dec. 7, 1951, the wife obtained a decree nisi against the husband on the grounds of his adultery and cruelty. On Jan. 25, 1952, the decree was made absolute. On Dec. 23, 1952, Mr. Registrar GRINDAL GRAY at Scarborough made on the wife's application an order that, inter alia,

- A " [the husband] do secure to [the wife] for her life until further order as from the date of the decree absolute . . . Jan. 25, 1952, the annual sum of £300 on part of the real property of [the husband] to be agreed or referred to the district registrar in default of agreement and that in default of agreement between the parties as to the form of deed it be referred to conveying counsel of the High Court to settle the necessary deed or deeds."
- B Between Jan. 14, 1953, and Mar. 25, 1953, correspondence passed between the solicitors of the respective parties with a view to agreeing which properties of the husband should be selected to constitute the security, but they failed to reach agreement. On Mar. 31, 1953, the husband died. The net value of his estate as sworn for probate was £44,418 including real estate sworn at £25,581. The question is whether the above order can be enforced against the sole executor
- C of the husband or whether the death of the husband results in the wife having as from that date no rights under the order.
- There are two decisions since the enactment of the Law Reform (Miscellaneous Provisions) Act, 1934, which touch closely on the above question. The first is *Dipple v. Dipple* (1) where HODSON, J., held that the right of a wife to apply for an order under s. 190 (1)* of the Supreme Court of Judicature (Consolidation)
- D Act, 1925, was not a "cause of action" within s. 1 (1) of the Act of 1934: accordingly where before the death of the husband the wife had made an application under s. 190 (1) but had not reached the stage of obtaining an order, her claim could not survive his death. In that case HODSON, J., distinguished "the right to ask the court to exercise discretionary powers" from "having an enforceable claim". He instanced an order for costs made against a party in his lifetime
- E as constituting an enforceable claim kept alive by the Act of 1934 even where taxation had not yet taken place, and in this behalf referred ([1942] P. at p. 68) to his decision in *Richards v. Richards & Flockton* (2). Formerly the order for costs would have ceased to have effect on the death of a party to the proceedings: *Coleman v. Coleman & Simpson* (3). The second decision was that of BARNARD, J., in *Hyde v. Hyde* (4). There an order had been made for an annual sum to be secured
- F "on security to be agreed" and before the death of the husband agreement had been reached as to the security to be provided, but no deed had been executed. Counsel for the wife having established that by virtue of the order an equitable charge arose as soon as the security was agreed, BARNARD, J., rested his decision on the fact that the wife had acquired a charge on agreed specific property and directed the executors to execute the necessary deeds. He thus had no need to
- G consider and did not refer to that branch of counsel's argument that was founded on *Richards v. Richards & Flockton* (2). Counsel for the executor's main and much pressed argument was that the court has here no jurisdiction to deal with a matter arising in a divorce suit after the death of one of the parties, on the short ground that there is no fund in court or other res on which to found the post-death jurisdiction. He relied in substance on passages in pre-1934 decisions such as *Beaumont v. Beaumont* (5). Decisions and dicta before the Act of 1934 must be looked
- H at with care to see whether they would have been the same today: and if *Richards v. Richards & Flockton* (2) was rightly decided, as I would respectfully agree that it was (cf. *Re Boyd, Ex p. McDermott* (6), [1895] 1 Q.B. at p. 614, per LORD ESHER, M.R.), the test since 1934 is not "is there a res?" but "does the order create an enforceable claim?" Indeed that case disposes of counsel's main argument and thus of his suggestion that the wife's case must stand or fall according to whether or not the order then and there created an equitable charge.
- I Applying the test: "Does the order create an enforceable claim?", I take the view that if an order lays down within its four corners what is to be done and how it is to be done, it creates an enforceable claim—even if at the date of death everything has not yet been done. In the present case, the order is for £300 per annum to be secured on part of the husband's real property, that part to be

* Now replaced by s. 19 (2) of the Matrimonial Causes Act, 1950.

selected (if agreement has not been reached between the parties) by the registrar. *Certum est quod certum reddi potest*—a maxim which (as appears from BROOM'S LEGAL MAXIMS at p. 422) is not confined to interpretation of contracts and which I regard as properly applicable to the present situation. It is to be noted that BROOM in relation to the application of the maxim makes reference (at p. 424) to orders for "costs to be taxed"—and here again *Richards v. Richards & Flockton* (2) has its relevance. Further, the order, in my view, creates an enforceable claim if the court can and will exercise its powers to ensure the order is enforced in relation to the husband's assets during his lifetime. For that purpose it does not matter whether the power is exercised by means of an appropriate injunction or by other means. If authority is needed to establish that the order in the present case was enforceable at all material times, then *Waterhouse v. Waterhouse* (7) can be relied on as showing how a court can aid a wife even before decree absolute where the husband is bound to secure to his wife maintenance out of a portion of his property not as yet specified. Counsel for the executor submitted that if the husband in the present case had under seal or for good consideration (probably the closest analogy would be a contract under seal for past consideration) contracted to give security in terms identical with that of the present order, the wife would during his lifetime have no remedy in relation to his assets. Analogies from contracts may be of use in that judgments and orders (even if the latter are not "final judgments": see *Re Boyd, Ex p. McDermott* (6)) can be sued on save, for instance, where the second action (e.g., for a debt) is so otiose as to be an abuse of the process of the court. Whilst, of course, appreciating that the obligations created by judgments and orders are in some ways regarded as of a higher order, I consider that, on such a contract as counsel for the executor mentioned, the wife would have been able to come to court at any rate for relief parallel to that given in *Waterhouse v. Waterhouse* (7).

I should also record that in aid of his submissions counsel cited the authorities, including *Re Hedderwick* (8), *Re Woolgar* (9), *Re Bidie* (10), which decide amongst other things that arrears of maintenance ordered by a magistrates' court under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, s. 5, and arrears of alimony do not constitute recoverable debts as against the estate of a deceased husband. It is sufficient to say with regard to those authorities that none of them deals with an order which combined the factors that it was specifically intended to provide for the wife after the death of the husband, that it related to an alienable and assignable right (which orders for alimony do not), and that it was an order in respect of which the remedies were of the type shown to be available by *Waterhouse v. Waterhouse* (7). In addition counsel for the executor relied on that part of the judgment of JENKINS, L.J., in *Barker v. Barker* (11) in which he referred ([1952] 1 All E.R. at p. 1132) to the order made in that case as being

" . . . oppressive in effect, uncertain in operation, difficult of enforcement, and of doubtful validity."

That passage must be considered in the light of the particular facts to which it was being applied. That case related to a general charge on all the assets of the husband: it was an order which in so far as it included personal effects and chattels might well not conform to the tenor of the Bills of Sale Acts, 1878 and 1882, and which by reason of its very generality could have an oppressive effect. That decision does not seem to me to be applicable to a case where any charge created attaches to real property, where the maxim *certum est quod certum reddi potest* can apply, and where there was nothing which could be or indeed was submitted to be oppressive in the order against which the husband had lodged no appeal.

I next turn with some diffidence to the further point urged by counsel for the wife and the child—that one of the ways by which the claim created by the order was enforceable was by way of the charge which it created. If so the present

A case is covered directly by *Hyde v. Hyde* (4), an authority which counsel for the executor stated he in no way challenged. If one looks at the precise form of order made in *Waterhouse v. Waterhouse* (7) (which did not specify the property to be affected) and assumes that it carries into effect that part of LINDLEY, L.J.'s, judgment ([1893] P. at p. 287) which reads:

B “We are asked to make an order which will operate as a charge upon the respondent's property and prevent his making away with it. This we can do, and we make an order confirming the report, and ordering the respondent, within one week after the decree is made absolute, to secure to the petitioner £1,000, and restraining him in the meantime from dealing with the property.”

C it seems to follow that the order in the present case created a charge. Here again, however, it appears proper to try to apply the somewhat broader test of what would have been the position if the husband had for good consideration contracted to give security in terms identical with those of the order. Fully to maintain the analogy one would have to bear in mind that, as stated at the Bar, the registrar on making his order had before him, as is usual in these matters, a list of the husband's real property. It follows that by the order there was created, so to speak, a pool of properties out of which the registrar was, in default of agreement between the parties, to select those which were to be charged. If the wife were given the right to have the selection thus made from that pool, then the husband was not entitled to dispose of parts of the pool till the selection had been made—and in my view a similar term would have to be implied in a contract where, for instance, the words “specified in the attached schedule” were added after the words “part of the real property”. The parallel would then be complete. Then on the basis that equity regards as done what ought to be done I would be inclined to the view that a contract in strictly parallel terms would in equity operate to give a general charge on the whole pool of property until the selection had been made.

F The position, of course, turns on the true construction of the registrar's order in the light of the surrounding circumstances. Having reached the above view on general principles, I feel a little fortified by having come on *Montagu v. Earl of Sandwich* (12), which LINDLEY, L.J., may have had in mind when deciding *Waterhouse v. Waterhouse* (7). There a settlor covenanted “so as to render the real estate (if any) of which he . . . shall die seised . . . the fund primarily liable” to charge an annuity or yearly sum of £1,000 “upon a sufficient part of the real estate”. Of that covenant FRY, L.J. (32 Ch.D. at p. 545) said:

H “That appears to me to have this operation, that it charges the entire estate of which the testator dies seised until the execution of a new instrument which shall charge an adequate part afresh, and thereby discharge the remainder of that which is primarily charged.”

I BOWEN, L.J., regarded the covenant as obscure but with hesitation took the same general view as FRY, L.J., that the intention of the settlor was to charge the entire estate in the first place. To my mind there is some parallel between the intention which BOWEN, L.J., and FRY, L.J., held it right to construe out of the above covenant and the intention which seems to me to be implicit in the registrar's order having regard to the practice of this division.

If, however, contrary to my view, no specific pool and charge thereon was created by the registrar's order, then the dissenting view of COTTON, L.J., in *Montagu v. Earl of Sandwich* (12) would (viewing the matter contractually and omitting the *Waterhouse* case (7) from consideration) presumably apply to the present case and if so the absence of specification of “the part of the real property” would be fatal to the creation of a charge. For COTTON, L.J., said (32 Ch.D. at p. 539):

" . . . where the covenant is to charge, not all or any definite portion of a man's estate, but only that which is worth £1,000 a year, or which would be sufficient to secure £1,000 a year, then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant; and it remains simply a covenant to be enforced as against the assets of the covenantor."

The border-line seems to be thin, and approaching these problems of equity with marked hesitation, I prefer to rest my decision on the footing that the wife has an enforceable claim under the registrar's order irrespective of whether or not it created a charge. The order for maintenance at the rate of £300 per annum to be secured for the benefit of the wife being in my view enforceable against the executor in relation to the estate of the husband, I make a declaration accordingly. Owing to the way in which the executor has been dealing with the estate, the parties have agreed that, rather than that I should here and now make a further order, they will work out a form of order to give full effect to the declaration which I have made. The principles on which I have made the above declaration apply equally to that part of the registrar's order by which the husband was ordered similarly to secure to the wife " the gross sum of £750 for the benefit of Michael Sydenham Mosey the child of the marriage", but as to this £750 I have still to consider the cross-application of the executor to, in effect, discharge that part of the order.

I now turn to the cross-application made by the executor to vary the registrar's order by deleting so much of it as relates to the £750 to be secured to the wife for the benefit of the child of the marriage—an application which of course only arose on the failure of the executor's resistance to the wife's main application. The cross-application is not made by the executor otherwise than in his capacity as such: in particular it is not made for the benefit of the child of the marriage. Indeed it is made against the latter's interests. The sole result of it being allowed would be that the £750 would become part of the residue of the estate and would then be divided equally between the child of the marriage and the executor (a son of a former marriage of the husband) in their capacities as residuary legatees. It being simply an application to extinguish a right given by the court to the wife for the benefit of the child under the order of Dec. 23, 1952, the cross-application was met in limine by a preliminary objection of counsel for the wife and the child. He objected that s. 28 (1) of the Matrimonial Causes Act, 1950, by virtue of which counsel for the executor said he made the cross-application, did not enable an executor thus to apply for a variation of the order. The proceedings before me are between the executor as such and the wife (" widow " would be more strictly accurate) in her personal capacity; and the registrar's order is one to secure the £750 to her, albeit for the benefit of her son. Thus it is convenient first to consider the preliminary objection on the assumption that the order derives in part from s. 19 (2) of the Matrimonial Causes Act, 1950,—which relates to maintenance to be secured " to the wife " and to which s. 28 (1) refers. If the order derives solely from s. 26 (3) which relates to maintenance " for the benefit of the children " then, of course, s. 28 (1) does not apply and the executor, claiming as such, is to that extent the worse off when seeking to establish that rights survived to him.

What then is the position on the footing that s. 19 (2) and s. 28 (1) apply to the present case? Having due regard to the precise terms of s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, the right of a wife to apply after her husband's death as against his executor for the exercise of the court's discretionary powers to grant or increase secured maintenance and the right of a husband's executor as against that wife to apply for the exercise of the court's discretionary powers simply to extinguish or diminish that maintenance, must, to my mind, stand on an equal footing as regards constituting claims which can or cannot be enforced against or by a personal representative of a deceased spouse. Applying *Dipple*

A v. *Dipple* (1), it seems that none of them constitutes such a claim. Accordingly, on the footing that the order in part derived from s. 19 (2), the preliminary objection succeeds as the executor as such cannot ask the court simply to extinguish a right given by an order made under that sub-section. If the executor cannot thus pray in aid s. 19 (2) and s. 28 (1), the preliminary objection succeeds even more clearly.

B Whether, when once the order for security has been complied with, those who have, in their personal capacities, a present or future interest in that security can in appropriate cases come to the court for certain other orders either under s. 28 (1) or under some general jurisdiction of the court, is a point which does not arise in the present case. Having regard, however, to the element of intended permanence inherent in orders made under s. 19 (2) and s. 26 (3), I would assume that even if the jurisdiction exists a court would only exercise it with considerable caution and in exceptional circumstances. As regards the case now before me, it is right to state, in case the matter goes further, that even if I had had jurisdiction I would certainly not have altered the order of Dec. 23, 1952, relating to the £750. One short answer to the application on the merits is that if the husband had been minded to cause the £750 to be taken in part or in whole against the child's share of the residue, he could have easily done so by way of codicil. I see no reason why the husband, who may well have provided the son of the first marriage with an education before leaving him a moiety of the residue should not have been content that the son of the second marriage should in effect have a fund for educational or other expenses as well as his share in the residue. Still less do I see good reason for the court making an order which would deprive the son of that fund. Accordingly I make, with regard to the maintenance to be secured to the wife for the benefit of the child, a declaration similar to that which I have made in respect of the maintenance to be secured for the wife. As regards the second part of the executor's cross-application, counsel have wisely consented to an order being made that so much of the registrar's order as ordered the husband to

F "pay or cause to be paid to [the wife] until Michael Sydenham Mosey shall attain the age of twenty-one years . . . maintenance at . . . the rate of £80 per annum less tax "

be discharged, and that in lieu there be an order that the executor do pay to the wife £80 per annum less tax for the maintenance of the child out of certain income referred to in the will of the husband.

G In the above circumstances I need only mention briefly the alternative application which counsel for the wife and the child by leave filed in the course of the hearing, and by which he sought to vary the order of Dec. 23, 1952, by specifying the real property which was to constitute the security. As he is right on his main point the alternative application does not arise: if he had been wrong and the order had not resulted in an enforceable claim arising, then *Dipple v. Dipple* (1) would have applied and no variation of the order could at this stage have been made. Having given my judgment in that form I think there is an order to be worked out and I feel the matter had better come before me when the order has been drafted and I will approve the order. On the question of costs my order will be that the wife will get her costs on both applications to be taxed together at the same time and of the total sum payable to her three-quarters to be paid out of the estate and one-quarter to be paid by the executor personally.

I

Declarations accordingly.

Solicitors: *C. Grobel, Son & Co.*, agents for *G. F. Mitchell*, York (for the wife and the child of the marriage); *Jaques & Co.*, agents for *Richardson, Parker & Swales*, Scarborough (for the executor).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

HUYTON-WITH-ROBY URBAN DISTRICT COUNCIL v. HUNTER.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), April 26, 27, 28, 1955.]

Highway—Street—Making up—Whether lane not a highway repairable by the inhabitants at large—Onus on local authority—Whether lane a “cul-de-sac” —Finding by justices that lane was a public highway—Conclusiveness—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 5.

Burden of proof—Legal burden—Provisional burden by shifting weight of evidence.

By s. 5 of the Private Street Works Act, 1892, a street means “a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large”.

In the eighteenth century Thingwall Lane led to a hamlet called Thingwall, which consisted of a large house, a farm and some cottages. It branched off from the road to Broad Green, and at the fork in 1776 someone erected a large guide-stone, on one side of which was carved “Road to Broad Green” and on the other “Road to Thingwall. No thorough by”. In a conveyance of the large house in 1846, reference was made to a document of 1812, in which there was no conveyance or reservation of the right to use the lane. There was no record of public money having been spent on the maintenance of the lane, and it was described as an occupation road in a tithe map of 1840. The local authority proposed to make up the lane and to charge the frontagers with the expense under the Private Street Works Act, 1892, on the footing that the lane was a street within that Act. On objection by a frontager, the justices found that the lane was a public highway repairable by the inhabitants at large and that the frontager was therefore not liable. A Divisional Court of the Queen’s Bench Division allowed the local authority’s appeal against that decision, holding that, once it was shown that no public money had been spent on the lane, the onus of establishing that the lane was a highway repairable by the inhabitants at large was shifted to the frontager, and that he had not discharged that onus. On appeal,

Held: (i) the justices having had before them evidence on which they could and did reach a determinate conclusion of fact, viz., that the lane was a public highway repairable by the inhabitants at large, their decision could not be interfered with; and accordingly, although the legal burden of proof throughout lay on the local authority (*Rishton v. Haslingden Corpn.*, ([1898] 1 Q.B. 294), and *Vyner v. Wirral Rural District Council* (1909) (73 J.P. 242) approved and applied), yet the evidence was not so evenly balanced that the incidence of the burden of proof was the deciding factor (dictum of VISCOUNT DUNEDIN in *Robins v. National Trust Co.* ([1927] A.C. at p. 520) applied).

(ii) although, in arriving at the conclusion on the issue of fact, evidence that no public money had been spent on the lane might, if the lane had been a cul-de-sac, have weighted the evidence in favour of the lane not being a highway, yet the court would not have been bound to draw that inference if on the whole of the evidence it had seemed unjustifiable, but in fact the lane was not a cul-de-sac for this purpose as it was a way leading to a village.

Observations on the legal burden of proof and the shifting weight of evidence (see per DENNING, L.J., at p. 400, letter H to p. 401, letter D, post).

Appeal allowed.

[As to the meaning of “street” for the purposes of the Private Street Works Act, 1892, s. 5, see 16 HALSBURY’S LAWS (2nd Edn.) 194, para. 223.

For the Private Street Works Act, 1892, s. 5, see 11 HALSBURY’S STATUTES (2nd Edn.) 183; and for cases on the subject, see 26 DIGEST 549, 550, 2461-2464.]

A Cases referred to:

- (1) *Cababé v. Walton-on-Thames Urban Council*, [1914] A.C. 102; 83 L.J.K.B. 243; 110 L.T. 674; 78 J.P. 129; 26 Digest 362, 876.
- (2) *Rishton v. Haslingden Corpn.*, [1898] 1 Q.B. 294; 67 L.J.Q.B. 387; 77 L.T. 620; 62 J.P. 85; 26 Digest 543, 2416.
- (3) *Vyner v. Wirral Rural District Council*, (1909), 73 J.P. 242; 26 Digest 303, 351.
- (4) *Robins v. National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp.
- (5) *A.-G. v. Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 J.P. 141; 26 Digest 297, 285.

B Appeal.

The appellant frontager was the owner of property known as Alvernia, 51, Thingwall Lane, Liverpool, 14, in Huyton-with-Roby Urban District. On Mar. 2, 1953, Huyton-with-Roby Urban District Council, the local authority, approved specifications, plans and sections and estimates of expenses and the provisional apportionment of the estimated expenses of works of making good, etc., part of the street of Thingwall Lane, under the Private Street Works Act, 1892. The frontager objected to the proposals of the local authority on the ground that Thingwall Lane was a highway repairable by the inhabitants at large and on Apr. 5, 1954, the justices for the county of Lancaster sitting at Prescott heard the objection and viewed Thingwall Lane. The local authority contended that Thingwall Lane originated as an occupation road, that it was never a public highway before the coming into force of s. 23 of the Highway Act, 1835, and that accordingly it was not repairable by the inhabitants at large. The frontager contended that Thingwall Lane had been dedicated by its owner to public use and had been used by the public and so had become a public highway before the coming into force of s. 23 of the Highway Act, 1835, and that accordingly it was at common law a public highway repairable by the inhabitants at large. The justices found that Thingwall Lane was a public highway and repairable by the inhabitants at large and they therefore upheld the frontager's objection, but they stated a Case for the opinion of the High Court. On Jan. 19, 1955, the Queen's Bench Division allowed the local authority's appeal, holding that once it was shown that public money had never been spent on the land the onus shifted to the frontager to prove that it was a road repairable by the inhabitants at large and that he had failed to discharge that onus. The frontager appealed to the Court of Appeal.

Frank Gahan, Q.C., and *J. E. Jones* for the frontager.

Basil Nield, Q.C., and *G. B. H. Currie* for the local authority.

DENNING, L.J. : Huyton-with-Roby Urban District Council, the local authority, propose to make up Thingwall Lane, a road within their district, and they seek to charge the frontagers with the expense of so doing. The frontagers object on the ground that the road is a highway repairable by the inhabitants at large. The justices, having inquired into the matter, decided in favour of the frontagers that it was such a highway. The Divisional Court reversed the justices' decision, however, and found in favour of the local authority,

I but gave leave to appeal to this court.

In the eighteenth century Thingwall Lane led to a hamlet called Thingwall, which consisted of a large house, a farm, and some cottages. It branched off from another road which led to Broad Green. At the fork of the road in 1776 someone put up a guide-stone to show the way—an impressive stone some seven or eight feet high. It was made of one solid block of stone. On one side of the stone was carved: "Road to Broad Green", and on the other "Road to Thingwall. No thorough by". That stone showed people the way when they came

to the fork in the road. If a man wanted to get to Thingwall, he took the way indicated, but the stone by saying "No thorough by" warned him that there was no through road to anywhere else. That stone has been there from 1776 until the present day. It has recently been moved a few feet because it interferes with modern traffic conditions. This road to Thingwall has been open to the public ever since 1776, if not before. There has never been any obstruction or interruption of it. A

At the beginning of the nineteenth century the big house at Thingwall was conveyed to a new owner. The site of Thingwall Lane was not conveyed to him, and there was no grant to him of any right of way along Thingwall Lane. That indicates that there was a public way along it, otherwise the new owner buying the house would surely have stipulated expressly for a right of way. B

Those matters go to show that the road was dedicated to the public at least by 1776, and, if it was dedicated to the public at any time before 1835, the inhabitants at large became at common law under a duty to repair it. If a highway was created after 1835 by dedication or otherwise, it would not be repairable by the inhabitants at large unless the conditions laid down in s. 23 of the Highway Act, 1835, had been complied with: see *Cababé v. Walton-on-Thames Urban Council* (1). C

On the other hand there are indications that Thingwall Lane was a private road. In particular there is no trace of any public money having been spent on maintaining it, and in a tithe map of 1840 it was described as an occupation road. So there were indications each way, some pointing to its being a public way repairable by the inhabitants at large, others indicating that it was a private road. In that state of affairs it was for the justices, as the tribunal of fact, to give their decision, and they said this: D

"Having viewed Thingwall Lane and inspected the guide-stone at its junction with Thomas Lane [we] found the following facts:—that Thingwall Lane is a public highway and repairable by the inhabitants at large." E

That being a finding of fact by the justices, it cannot be reversed on Case Stated unless there was no evidence to support it, and in my view there was evidence to support it. F

The Divisional Court have taken a different view. They said that, once it appeared that no public money had been spent on this road, then the burden of proof shifted on to the frontagers to show that it was a highway repairable by the inhabitants at large. I cannot share that view. In my judgment, on the true interpretation of the Private Street Works Act, 1892, if the local authority desire to charge a frontager with the cost of making up the road, the burden is on them to prove that it is a "street not being a highway repairable by the inhabitants at large". They must prove the negative, that it is not repairable by the inhabitants at large. That is the legal burden which rested on them throughout the case from beginning to end. This view is supported by *Rishton v. Haslingden Corpn.* (2) where CHANNELL, J., said that in such a case, the onus probandi was clearly on the local authority, and that decision has been followed in other cases such as *Vyner v. Wirral Rural District Council* (3). G

The Divisional Court made a mistake in failing to distinguish between a legal burden imposed by law and a provisional burden raised by the state of the evidence. Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, a provisional presumption arises that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden—sometimes apparent, sometimes real—which may shift from one party to the other, or may remain suspended between them. That is not a legal burden, however, H I

- A but only a provisional burden—a burden raised by the state of the evidence — from which the court may draw an inference one way or the other, but is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is repairable by the inhabitants at large or not. If it can come to a determinate conclusion, no question of the legal burden arises; but, if at the end of the case the evidence is so evenly balanced that the court cannot
- B come to a determinate conclusion, the legal burden comes into play and requires the court to say that the local authority have not proved the case.

In an article which I wrote in 1945 in the *LAW QUARTERLY REVIEW* (at p. 375) I tried to point out the distinction between a legal burden imposed by law and a provisional burden raised by the state of the evidence. The part played by a legal burden of proof was well stated by VISCOUNT DUNEDIN in *Robins v. National Trust Co.* (4) ([1927] A.C. at p. 520):

- C “... onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.”
- D

It seems to me that that is what happened in this case. The justices, after hearing and weighing the evidence, came to a determinate conclusion that this was a public highway repairable by the inhabitants at large, and so no question of onus came into it.

- E An argument was put before us on the ground that this land was a cul-de-sac, and that, therefore, following observations in some of the cases—such as in the Stonehenge case, *A.-G. v. Antrobus* (5), per FARWELL, J. ([1905] 2 Ch. at pp. 206, 207)—it was a very important factor that no public money had ever been spent on it. I do not regard this lane as a cul-de-sac. A cul-de-sac, as I understand it, is a blind alley which this is not. There are innumerable villages and hamlets throughout the length and breadth of the land where the highway leads only to the one place, whether it be a hamlet underneath the downs or one beside a river, and the like. They are not culs-de-sac. So in this case. It must be determined according to the principles applicable to ways in general and not as a cul-de-sac.
- F

- G It appears to me that this case was an issue of fact for the justices. They have determined the matter on the facts, and have stated a very careful, complete and instructive Case. In my view they have come to no error in point of law. The decision of the Divisional Court should be reversed accordingly, and the decision of the justices restored. I would allow the appeal.

- H **BIRKETT, L.J. :** I am of the same opinion, and I add a few words only because LORD GODDARD, C.J., who gave the judgment in the Divisional Court, gave leave to appeal, and in order to state the reasons which lead this court to come to a different conclusion. I agree with the judgment which my Lord has delivered.

- I In these proceedings under the Private Street Works Act, 1892, the frontager is liable for only £36 3s. 6d., and the whole collective body of frontagers together for £1,000, but the point is obviously one of importance to the frontagers and to the local authority. In s. 5 of the Private Street Works Act, 1892 “street” is defined as follows:

“The expression ‘street’ means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large.”

The local authority, therefore, could have no claim against the frontager unless

it was clearly established that this was a street within the meaning of that enactment, i.e., that it was not a highway repairable by the inhabitants at large. All the evidence before the justices went to that point, and they said: A

"On Apr. 5, 1954, we proceeded to hear and determine the matter of all such objections, and having viewed Thingwall Lane and inspected the guide-stone at its junction with Thomas Lane, found the following facts:— that Thingwall Lane is a public highway and repairable by the inhabitants at large." B

That was the only fact they found, but they set out the evidence on which that conclusion had been arrived at. I can perhaps summarise it in this way: By the co-operation of the local record office, and of the frontagers, and by the good will of the local authority, a great deal of material was put before the justices in the form of ancient maps, including, according to the record office, the first map ever made of that district (in which the present city of Liverpool is shown as a mere collection of houses and great areas of countryside), and tithe maps, as to the authority of which there was considerable argument, particularly the one which bore the words "occupation road". The maps were important evidence in the case, showing this lane as they did, and its ancient character. There was also the guide-stone. C

LORD GODDARD, C.J., says nothing about the guide-stone, which I regard as being of prime importance. He does refer to the conveyance, which went back by reference at least to 1812, and he refers generally to these maps. I think, however, that the whole of the judgment in the Divisional Court was really based on the onus of proof. Thus LORD GODDARD, C.J., said: D

"One of the most important things is on whom the onus of proof lies in this case . . . once it is agreed or admitted that there has been no expenditure of public money on this road, and it is not shown that the inhabitants at large have ever been called on to repair the road, the onus is on the frontager to show that this is a public highway . . . I do not think . . . that the onus . . . has been anything like discharged." E

With great respect, the real question before the court ought to have been whether there was any evidence before the justices to support their straightforward finding that Thingwall Lane was a public highway, and repairable by the inhabitants at large. That is the kind of question that comes before the Divisional Court almost every day, and before the Court of Criminal Appeal almost every week. Sometimes the question is whether the verdict of the jury is against the weight of evidence, which is an entirely different thing from the question whether there is, or there is not, any evidence. With great respect, the judgment of the Divisional Court seems to be based on the question: what is the weight of the evidence. Thus, the learned Lord Chief Justice says: F

"I think (and I thought from a very early stage) that one of the most important things is on whom the onus of proof lies in this case. The justices have obviously taken a great deal of pains over this case. I think they have applied their minds to the proper points, and they have come to the conclusion that it is a road repairable by the inhabitants at large, and, therefore, the frontager is not liable to contribute. That finding is challenged on the ground that the evidence does not support it." G

That is a rather curious phraseology; it is not: "That finding is challenged on the ground there is no evidence to support it", but "challenged on the ground that the evidence does not support it". H

The learned Lord Chief Justice goes on: I

"I do not think one can lightly dismiss the case by saying that this is a pure question of fact for the justices."

With great respect, if my view is right, that was the question. This was a pure

A question of fact for the justices. I think nobody doubts that it was a question of fact for the justices and in my view the case is to be determined on that simple basis: Was there evidence before them to support their clear conclusion of fact, that this was a road repairable by the inhabitants at large?

The learned Lord Chief Justice continues:

B “We must examine the evidence which was before the justices and see whether it justifies the finding.”

Again, with respect, that language does not accord with the test (if it be the right test): Was there evidence, or was there not? As I put it to counsel for the local authority in the course of the argument, it is as though the learned Lord Chief Justice said: “We must weigh the evidence and examine its texture to see where it leads”, i.e., not “Is there evidence?” but “What is its nature?”

C Again he says:

D “At any rate, I think, taking all the circumstances and position into account, once it is agreed or admitted that there has been no expenditure of public money on this road, and it is not shown that the inhabitants at large have ever been called upon to repair the road, the onus is on the respondent to show that this is a public highway . . . I have come to the conclusion that it is more consistent with its being an occupation road than being a highway, and I think, therefore, the frontager fails in this appeal.”

E Those passages from the judgment in my opinion show that the learned Lord Chief Justice was not applying the proper test. It being admittedly a question of fact for the justices, he is saying: “Let us examine the evidence and see where it leads; does it justify this conclusion, or does it not?”

F I need not repeat what my Lord has said about the onus of proof. I am not at all satisfied that, in proceedings before justices under the section, because one facet of the evidence is that no money has been spent on the lane by the inhabitants at large, therefore the whole onus of proof thereafter falls on the frontager. Thus s. 8 (1) of the Private Street Works Act, 1892, provides:

G “. . . at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable . . .”

H That is the procedure that the justices must follow, as though the local authority were presenting a summons against the frontager for the payment of £36. No one could doubt that the onus would be on the local authority to show that the £36 was due, that this was in fact a street, and that this was the frontager's share of the cost of making it up.

I Counsel for the local authority who has argued this case with complete fairness and fullness, said that one ought to view the frontagers as being appellants to the court against the administrative act of the local authority. I think that is wrong. I think the true position is that the frontagers come to the court, not as appellants against the administrative act of the local authority, but saying to the local authority: “We have been granted these facilities of coming to the justices, to state our objections to your procedure. We have come, and we put you to the proof of what you allege against us.”

At the same time, on the facts of this case, I do not think that the question of onus of proof really arises. I think the passage from the speech of LORD DUNEDIN ([1927] A.C. at p. 520) cited by my Lord applies here. What the justices have done appears clearly from the Case Stated. Admittedly they addressed their minds to the proper points, and the whole of the proper points. Absence of any evidence that payment had been made by the inhabitants at large is a

strong point against the frontager, and it is stated there. But the guide-stone, which was not referred to in the judgment of the Divisional Court, is exceedingly important as evidence for the consideration of the justices. I am afraid that counsel for the local authority did not convince me on that point. The guide-stone on one side says "Road to Broad Green", a clear indication to the public: "That is the way to Broad Green, and you may go". On the other side it says: "Road to Thingwall. No thorough by", clearly an indication to the public: "That is the way to the hamlet of Thingwall, but remember there is no through way there". Counsel argued that it really meant "No thoroughfare". One might put on it "Private road", or "No thoroughfare", but why put "Road to Thingwall, but you cannot come along it"?

Those were matters for the consideration of the justices, and they considered them with great care. They viewed the ancient stone with the initials "J.C." on it, and traced out apparently who J.C. was, and when the stone was erected and why, and they came to the conclusion:

"That there is no record of the said stone having been 'put up' by any surveyor of highways and that the said stone may have been erected by James Clements whose name appears on Yates' map of 1786 for his own private purposes, and that it was the practice for the rich man of the locality to provide the amenities for the area such as signposts. That there was no surveyor of the highways in 1776 and that the date of the first appointment of such an official is not known."

But they felt that that was some evidence that this was a public highway, and that the "rich man of the district" had erected this guide-post for the guidance of the public. It was entirely a question for the justices.

There was also the conveyance in 1846 of the residence known at one time as Summerhill and later as Thingwall Hall. The learned Lord Chief Justice does deal with that. That conveyance refers to a document of 1812, in which it was said that there was no conveyance or reservation of a right to use the lane. The justices thought that was some evidence that this was a public road. I am satisfied that there was considerable evidence on which they could have come to the conclusion at which they arrived and, with great respect to the learned Lord Chief Justice, and to the Divisional Court, I think they came to a wrong conclusion. I would support restoration of the view taken by the justices.

ROMER, L.J. : I agree. If counsel for the local authority is wrong in his submission in regard to the onus of proof, it seems to me there is really very little left in this case. His submission was that, without admitting that the onus was originally on the local authority, in any event it shifted to the frontager because of the combination of two reasons: first, that this lane, Thingwall Lane, was a cul-de-sac—a cul-de-sac in the country, as counsel described it—and, secondly, because the justices found that the lane had never been repaired at the public expense. That was the view of the Divisional Court, and it resulted in the defeat of the frontager at the hearing before it.

I think the argument fails, and that the Divisional Court erred in the view they took of it, if only because, in my opinion, on the facts that appear from the Case, this lane cannot be described as a cul-de-sac within the meaning of that phrase as used in the relevant authorities, because it was a way leading from a highway to a hamlet, and it does not seem to me that that is the kind of way which can, for any material purpose, be described as a cul-de-sac. But the suggestion that it was a cul-de-sac lay at the very foundation of this argument on onus; and accordingly, without that foundation, the argument necessarily fails. I would only add that I entirely and respectfully agree with what my Lord has said on the general question of onus in applications such as the present.

Once the question of onus is out of the way, the only question is whether there was material on which the justices could arrive at the conclusion which they

- A reached. I do not propose to repeat what my Lords have said on the two most material matters, viz., the presence of the guide-stone, and the conveyance executed in 1846. In regard to the guide-stone, counsel for the local authority relied on the presence of the word "No," which appears on the stone before the word "thorough", as indicating that the evidence afforded by that guide-stone is rather in his favour than against him, but, for reasons given by BIRKETT, L.J.,
- B it appears to me that that argument cannot prevail. Counsel for the local authority then said that, at the lowest, the evidence which emerges from the guide-stone is equivocal. I do not think it is equivocal. It points directly towards the conclusion at which the justices arrived, and supports it.

- In regard to the conveyance, counsel for the local authority suggested that the purchaser of Summerhill in 1846, Sir David Ratcliffe, might well have been
- C content to have relied on the means of egress which lay to the west of the house, and therefore would not need the use of the lane in question. In my opinion it appears from the title map of 1840 that that suggestion cannot legitimately be accepted, when one sees from this plan that the road or way described as "A.37", which leads from Thingwall Lane to Summerhill itself, was included in the conveyance. I should imagine the obvious inference is that the purchaser
- D of the house would assume that he was to be entitled to use, and would require to use, Thingwall Lane itself. I think that that conveyance in itself amply justifies the result at which the justices arrived, or at the lowest (and this is all that we are concerned with) was material on which they could properly reach their finding.

- E I accordingly agree that the decision of the justices should be restored, and this appeal allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *W. F. Foster, Hedge & Clare*, agents for *A. Stephen Cawson*, Liverpool (for the frontager); *Sharpe, Pritchard & Co.*, agents for *Oswald Goodier & Co.*, Preston (for the local authority).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. BRYANT.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hallett and Byrne, JJ.), May 9, 1955.]

Court-Martial—Charge—Larceny by person subject to military law—Offence within provisions of Army Act, s. 18—Charge to be laid under that Act—Army Act, s. 18, s. 41—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 2.

Where a person subject to military law is charged with an offence which comes within the provisions of the Army Act, s. 18—as, for example, stealing government stores—the charge should be laid under that section and not under the common law. If, however, a charge of larceny under the common law is made no reference should be included in the charge sheet to the Larceny Act, 1916, s. 2, which does not create an offence.

[**Editorial Note.** The annual Acts continuing the Army Act are to be repealed by the Revision of the Army and Air Force (Transitional Provisions) Act, 1955 (3 & 4 Eliz. 2 c. 20), and the Army Act will be replaced by the Army Act, 1955 (3 & 4 Eliz. 2 c. 18), from a date appointed by Order in Council. No such date has been appointed at the time of publication of this report*. The sections of the Army Act, 1955, corresponding to s. 18 and s. 41 of the Army Act are s. 44 (a) and s. 70.

For the Army Act, s. 18 and s. 41, see 22 HALSBURY'S STATUTES (2nd Edn.) 271 and 284; and for the Larceny Act, 1916, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 1015.]

Appeal against conviction by court-martial.

The appellant, Sergeant John William Bryant, of the Royal Army Service Corps, was convicted before a court-martial sitting in the Canal Zone of stealing two Egyptian pounds, the property of the regimental institute of No. 1 Cold Storage Depot, Royal Army Service Corps. He appealed on the ground that the charge was laid against him in the charge sheet under the Army Act, s. 41 and not under s. 18 which deals specifically with the offence of larceny of military property by a person subject to military law and limits the punishment to two years' imprisonment "or such less punishment as is in this Act mentioned". Under s. 41 where the charge sheet alleged that he had committed a civil offence of larceny "contrary to the Larceny Act, 1916, s. 2" the maximum sentence was five years' imprisonment. The actual sentence passed on the appellant was reduction to the ranks.

W. P. Grieve for the appellant.

E. Garth Moore for the Army Council.

LORD GODDARD, C.J.: The appellant was charged and convicted before a court-martial sitting in the Canal Zone of an offence which was stated in the charge sheet as "committing a civil offence, that is to say, larceny contrary to the Larceny Act, 1916, s. 2, in that he at Port Said on Dec. 22, 1954, stole two Egyptian pounds, the property of the president of the regimental institute of No. 1 Cold Storage Depot, Royal Army Service Corps". He was convicted and he does not dispute the justice of his conviction in the sense that he has not alleged on the merits that he was not guilty of theft. The point he took was that he ought to have been charged under the Army Act, s. 18 and not under s. 41. The judge advocate advised the court that although he might have been charged under s. 18 he was nevertheless liable to be charged under s. 41, and accordingly the court convicted him and sentenced him to be reduced to the ranks, he being a sergeant.

This court desires to say that they entirely agree that the appellant ought to have been charged under s. 18. It is highly desirable that the prosecuting authorities should make up their minds before starting a prosecution what is

*The date intended at the time of publication of this report is Jan. 1, 1957; see HANSARD, House of Lords, Apr. 5, 1955, col. 285.

- A the appropriate section of the Army Act under which an accused person should be tried and that they then should charge him under that section. In the particular matter with which we are dealing, it does not make any difference to the conviction whether he was charged under the Army Act, s. 41, with committing a civil offence punishable under the law of England or under s. 18, which specifically deals with stealing the property of a regimental institute and so forth.
- B What is said here is that the appellant ought to have been charged under that section and he cannot be charged under the Larceny Act, 1916, s. 2, because s. 2 (as modified by the Criminal Justice Act, 1948, s. 1 (1)) says:

“Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with imprisonment for any term not exceeding five years . . .”

- C The first thing to say about that is that s. 2 does not create an offence. Larceny was always an offence at common law. The common law recognised a very limited number of offences—I think about six—and theft was always an offence at common law. Gradually as society got more complicated offences such as embezzlement, larceny by a bailee, and many others had to be created. Take, for example, the offence of larceny by a bailee. As the bailee's original possession was lawful, he could not be charged with stealing; it had to be made a statutory offence. In the same way, embezzlement was only made a felony quite late—I think in the reign of George III—because the clerk who received the money received it lawfully. The offence he committed was putting it in his pocket and using it after he received it and that had to be made a statutory offence.
- D

- E Section 2 in fact is only a section which deals with punishment, that is to say, if a man is guilty of larceny and there is no other punishment provided by the Larceny Act or any other Act, he is liable to five years' imprisonment for such a larceny. It is worth remembering, I think, that the words: “contrary to s. 2 of the Larceny Act, 1916” are surplusage. If a man is charged with simple larceny, he is charged with a common law offence and not an offence against a particular statute. BYRNE, J., has reminded me of the statutory rule under the Indictments Act, 1915, Sch. 1, r. 4 (3), which says:
- F

“The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.”

- G Simple larceny is not an offence created by statute; it is an offence at common law. Therefore the charge sheet in this case might have left out the words “contrary to s. 2” and simply said “committing a civil offence, that is to say, larceny”.

Let us see what is the position, therefore, if a soldier commits larceny.

- H Section 41 of the Army Act says:

“Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows; that is to say . . .”

I

Then, leaving out the first offences, treason, manslaughter, rape, and so on, it is provided in sub-s. (5):

“If he is convicted of any offence not before in this section particularly specified . . .”

and larceny is one not particularly specified

“ . . . which when committed in England is punishable by the law of

England, be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England."

A soldier charged with larceny and convicted is, therefore, liable to serve such punishment as is assigned for such offence by the law of England. In cases of simple larceny, if there is no other section of the Larceny Act, 1916, or any other Act which imposes any particular sentence, he is liable under s. 2 to five years. But if reference is made to the Army Act because the accused is a soldier, it is found that s. 18 of that Act says:

"Every person subject to military law who commits any of the following offences, that is to say . . . (4) Steals, embezzles or fraudulently misapplies or receives, knowing it to have been stolen or embezzled, any property belonging to a person subject to military law, or belonging to any regimental band . . . or . . . mess, or . . . institution, or to the Navy, Army and Air Force Institutes, or any public property . . . shall, on conviction by court-martial, be liable to suffer imprisonment for a term not exceeding two years . . ."

That limits the penalty to two years, but it does not affect the offence; it affects the penalty. It limits the penalty to two years because the accused being a soldier convicted of simple larceny, a special section applies which says that two years is the maximum sentence. This is only limited to convictions by court-martial; he is liable to two years instead of being liable to five years. There is no question here of any length of sentence because the appellant was not sentenced to imprisonment at all. Section 18 provides that he shall

" . . . be liable to suffer imprisonment for a term not exceeding two years, or such less punishment as is in this Act mentioned "

and such less punishment was reduction to the ranks. That was the sentence imposed. Accordingly, the appeal is dismissed, but the court would emphasise the desirability of the prosecution making up their minds what the offence is that is charged and the facts relating to the offence before they start proceedings for the offence. If it is an offence which falls within s. 18, as does apparently stealing government stores by a soldier, then he is to be charged under s. 18 and not charged under the common law. If they do charge him under the common law, they should leave out any words relating to s. 2 of the Larceny Act, 1916, and charge him, as it is proper to charge him in this country, simply with the common law offence of larceny.

Appeal dismissed.

Solicitors: Registrar, Courts-Martial Appeal Court (for the appellant); Directorate of Army Legal Services (for the Army Council).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

A Re LOWER ONIBURY FARM, ONIBURY, SHROPSHIRE.
 LLOYDS BANK, LTD. AND OTHERS *v.* JONES.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), April 27, 28, 29, May 2, 1955.]

B *County Court—Appeal—Agricultural holding—Consultative Case stated by arbitrators—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 105—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), Sch. 6, para. 24.*

Where a Case is stated under the Agricultural Holdings Act, 1948, s. 77 (1) and Sch. 6, para. 24, by an arbitrator for the opinion of a county court on a question of law arising in the course of an arbitration under that Act, an appeal lies to the Court of Appeal from the decision of the county court judge by virtue of the County Courts Act, 1934, s. 105.

C *Re Knight & Tabernacle Permanent Benefit Building Society* ([1892] 2 Q.B. 613) distinguished.

Landlord and Tenant—Lease—Assignment—Covenant personally to occupy—Breach—Lease vesting in trustee—Trustee's failure to occupy—Waiver—Occupation by one of two trustees and later by a beneficiary.

D *Landlord and Tenant—Covenant—Breach—Waiver—Requirement of personal occupation—Application of covenant to trustees—Occupation by one only of two trustees and later by a beneficiary.*

By a tenancy agreement dated Oct. 13, 1893, a farm, including a dwelling-house and other buildings and cottages, was let to E.B. and F.B. (therein jointly, together with their executors, administrators and assigns, called "the tenant") "jointly and severally" for one year from Mar. 25, 1893, and afterwards from year to year until determination by six months' notice given by either party. Clause 15 of the agreement provided: "The tenant will not during this tenancy assign, let, or part with the possession of the farm or any part thereof, but will at all times during his tenancy personally inhabit the farmhouse on the farm and cottages with his family and servants . . ." On Aug. 2, 1923, F.B., who had survived E.B., died having appointed his wife, M.B., and H.B. executors and trustees of his will, which in due course they proved. In 1934, after the death of H.B., G.B.J. was appointed a trustee of the will of F.B. to act jointly with M.B. On May 8, 1950, M.B. died. The tenancy was at all times since 1923 vested in the executors or trustees of F.B., and the farm was occupied by M.B. until her death. After the death of M.B., the farm was occupied by N. and Mrs. N. (who was a daughter, and beneficiary under the will, of F.B.) although the tenancy remained vested in G.B.J. as the sole surviving trustee of the will of F.B. In an arbitration under the Agricultural Holdings Act, 1948, the question was referred by Case Stated for the opinion of the court whether a breach had occurred of cl. 15 of the agreement.

H **Held:** (i) after the death of F.B. the trustees of his will became bound by cl. 15 of the agreement, when a reasonable time had elapsed after the death, to occupy personally the farm, notwithstanding their fiduciary capacity, and failure to do so was a breach of cl. 15.

I (ii) although only one of the two trustees (namely M.B.) had occupied the farm since 1923 up to 1950, and G.B.J. had at no time since his appointment as trustee in 1934 been in occupation of any part of the farm, cl. 15 had not been waived by the landlords' acquiescence, even on the footing that both joint tenants had been required to occupy the farm, because, having regard to the purpose of the clause, which was to ensure the personal occupation of the person responsible for the performance of the covenants in the agreement, the landlords' conduct was not wholly inconsistent with the continued existence of the agreement contained in cl. 15, nor was there anything to show that they intended to waive performance of it.

Hepworth v. Pickles ([1900] 1 Ch. 108) and *Gibbon v. Payne* (1907) (22 T.L.R. 54) distinguished. A

[**Editorial Note.** The Arbitration Act, 1889, s. 19, provided for a Special Case being stated for the opinion of the court. The opinion of the court given thereon was considered in *Re Knight & Tabernacle Permanent Benefit Building Society* ([1892] 2 Q.B. 613) not to be a "judgment or order" from which the Supreme Court of Judicature Act, 1873, s. 19 (now replaced by s. 27 of the Supreme Court of Judicature (Consolidation) Act, 1925) would confer a right of appeal. So far as arbitrations under the Arbitration Act, 1950, are concerned, this law has been altered by statute (see, now, s. 21 of that Act), and an appeal lies (see per SINGLETON, L.J., at p. 412, letter G, post). Much of the old law of "consultative cases", as they were called, has thus been rendered obsolete (see 2 HALSBURY'S LAWS (3rd Edn.) 39). Paragraph 24 of Sch. 6 to the Agricultural Holdings Act, 1948, like s. 19 of the Arbitration Act, 1889, enables an arbitrator to state a Special Case "for the opinion" of the court, in this instance the county court, but appeal lies from the court's "direction or decision" in point of law under s. 105 of the County Courts Act, 1934, which does not use the words "judgment or order" that were used in s. 19 of the Supreme Court of Judicature Act, 1873, but confers a right of appeal from the judge's "direction or decision" in point of law. B C D

As to appeal from a decision of the county court on a Case Stated by an arbitrator under the Agricultural Holdings Act, 1948, see 1 HALSBURY'S LAWS (3rd Edn.) 328, para. 680.

As to implied waiver of covenant in a lease, see 20 HALSBURY'S LAWS (2nd Edn.) 231, para. 253; and for cases, see 31 DIGEST (Repl.) 187, 188, 3181-3201.] E

Cases referred to:

- (1) *Re Knight & Tabernacle Permanent Benefit Building Society*, [1892] 2 Q.B. 613; 62 L.J.Q.B. 33; 67 L.T. 403; 57 J.P. 229; 2 Digest 459, 1056.
- (2) *Re Jones & Carter's Arbitration*, [1922] 2 Ch. 599; 91 L.J.Ch. 824; 127 L.T. 622; 16 Digest 171, 779.
- (3) *Tata Iron & Steel Co., Ltd. v. Bombay Chief Revenue Authority*, (1923), 39 T.L.R. 288; 28 Digest 43b.
- (4) *Sclater v. Horton*, [1954] 1 All E.R. 712; [1954] 2 Q.B. 1.
- (5) *Tatem v. Chaplin*, (1793), 2 Hy. Bl. 133; 126 E.R. 470; 31 Digest (Repl.) 162, 2988.
- (6) *Hepworth v. Pickles*, [1900] 1 Ch. 108; 69 L.J.Ch. 55; 81 L.T. 818; 31 Digest (Repl.) 187, 3194.
- (7) *Gibson v. Doeg*, (1857), 2 H. & N. 615; 27 L.J.Ex. 37; 30 L.T.O.S. 156; 21 J.P. 808; 157 E.R. 253; 31 Digest (Repl.) 153, 2911.
- (8) *Re Summerson*, [1900] 1 Ch. 112, n.; 69 L.J.Ch. 57, n.; 81 L.T. 819, n.; 31 Digest (Repl.) 187, 3193.
- (9) *Gibbon v. Payne*, (1907), 22 T.L.R. 54; *affd.* C.A., 23 T.L.R. 250; 31 Digest (Repl.) 370, 5014. F G H

Appeal.

Appeal by landlords from a decision of His Honour JUDGE ROWE HARDING given at Ludlow County Court on Mar. 17, 1955, on a Case Stated by an arbitrator for the opinion of the court under the Agricultural Holdings Act, 1948, s. 77 (1), and Sch. 6, para. 24. The tenant took a preliminary point that no appeal lay from the decision of the county court judge. I

K. J. T. Elphinstone for the landlords.

Michael Albery, Q.C., and *D. P. Draycott* for the tenant.

SINGLETON, L.J. : We have before us an appeal from a decision of His Honour JUDGE ROWE HARDING, given at the Ludlow County Court on Mar. 17, 1955. The case came before him in this way. There was an arbitration between

A the landlords and the tenant of Lower Onibury Farm, Onibury. The arbitrator was a Mr. Evans. There were questions whether notice to quit given by the landlords was effective. The questions were of some difficulty, and the arbitrator was requested by the parties concerned to submit a Case to the county court judge for his decision. The arbitrator did so.

B I do not propose to go into various questions which were mentioned in the judgment of the learned judge, at least not at this stage, but towards the conclusion of his judgment or decision, I find this paragraph:

C “Accordingly, I answer the question propounded by the arbitrator by saying that although the trustees of the will of Francis Bach, deceased, were originally bound by cl. 15 of the said agreement personally to inhabit the farmhouse on the farm, there has been a breach of such clause continuously since 1923, first by Harry Bach, and then by the respondent, successively
D trustees in whom the legal estate was vested jointly with Minnie Bach, that there was no protest in respect of such breaches by the landlords between 1923 and 1951, and that whether such failure to protest is measured as from 1923 or from 1934, when the respondent became trustee, it is in law a waiver or release of the said breach of the said cl. 15, and the landlords are estopped from relying on it as a ground of forfeiture, or as a breach by the tenant of a term or condition of his tenancy within the meaning of the Agricultural Holdings Act, 1948, s. 24 (2) (d).”

E The decision of the learned county court judge was thus in favour of the tenant. It appears that he went beyond the question raised in the Case submitted to him, and that he did so at the request of counsel and, maybe, on some agreed statement of facts. I have not read the whole of the judgment.

The landlords gave notice of appeal against that decision. Yesterday morning counsel for the tenant took a preliminary objection, to wit, that there was no right of appeal in this case. We heard argument on both sides yesterday, and further argument this morning.

F I can state the submission made on behalf of the tenant in a few words. It is said that when the arbitrator submitted a Case to the learned county court judge it was for the purpose of obtaining the opinion of the county court judge during the course of the arbitration; that it was in no sense a final direction that was asked for; and that as there was no more than a consultative Case, there was no appeal from the decision of the learned county court judge.

G The submission was based on the decision of the Court of Appeal in *Re Knight & Tabernacle Permanent Benefit Building Society* (1), in which case it was decided ([1892] 2 Q.B. 613):

H “No appeal lies from the decision of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference under s. 19 of the Arbitration Act, 1889.”

Section 19 of the Arbitration Act, 1889, provided for the taking of the opinion of the court by way of consultative case. LORD ESHER, M.R., said (*ibid.*, at p. 617):

I “The enactment now in question provides that ‘any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.’ The words are not ‘for the “determination” or “decision” of the court’; so that there is not the *prima facie* difficulty which existed in the case where the statute spoke of the ‘decision of the court.’ It appears to me that what the statute in terms provides for is an ‘opinion’ of the court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order. Under

those circumstances, I think that there is no appeal. I base my decision on the words of the statute; but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the court under this statute in the course of a reference for the guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords."

BOWEN, L.J., said (*ibid.*, at p. 619):

"It appears to me that this consultative jurisdiction of the court does not result in a decision which is equivalent to a judgment or order."

KAY, L.J., said (*ibid.*, at p. 620):

"With regard to the first point, I am much influenced by the consideration that the Act now in question relates to arbitration. One of the advantages of arbitration is that the award of the arbitrator is final and there is no appeal from it. Therefore, where an Act dealing with arbitration gives an incidental power to an arbitrator to state a case or to the court to compel him to state one for the opinion of the court, I should expect, if it were intended that the opinion expressed by the court on that case should be the subject-matter of appeal, that such an intention would be most explicitly stated in the Act. There is nothing of the kind in this Act. Accordingly it is sought to make out that there is an appeal . . . from any 'judgment or order' of the High Court. I think that it is impossible, looking to the language of the Arbitration Act, to say that the opinion given on the special case stated under s. 19 is a judgment or order."

The words "judgment or order" in the Supreme Court of Judicature Act, 1873, s. 19, are repeated in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27; there is an appeal to the Court of Appeal from any "judgment or order" of the High Court.

The effect of the decision of the Court of Appeal in what has been spoken of as the *Tabernacle* case (1) is that a Case Stated under the Arbitration Act, 1889, s. 19, did not lead to a "judgment or order" within the meaning of those words in s. 19 of the Act of 1873, and there being no right of appeal expressly given, no right of appeal arose.

I draw attention to two matters: in the first place, the Arbitration Act, 1889, did not apply, nor do its successors apply, to arbitrations under the Agricultural Holdings Acts, as appears from s. 27 (1) of the Agricultural Holdings Act, 1948. (See also the Agricultural Holdings Act, 1908, s. 13 (4)). Secondly, there has been a change made in the Arbitration Acts. The change which was made in 1934 by the Arbitration Act, 1934, s. 9, is repeated by the Arbitration Act, 1950, s. 21, and since 1934, there has been an appeal on a consultative case so long as the leave of the High Court or of the Court of Appeal is obtained. In that sense there has been an extension: there is a right of appeal in the circumstances I have mentioned.

It is necessary to look at the Agricultural Holdings Act, 1948, and at its predecessors. It is agreed by counsel for the tenant that until the Act of 1948 came into operation there was a right of appeal from the decision of a county court judge on a Case Stated, but since the Act of 1948 it is submitted that there is no such right.

The Agricultural Holdings Act, 1908, s. 13 (1), provided:

"All questions which under this Act or under the contract of tenancy are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the contract of tenancy or otherwise

- A providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in Sch. 2 to this Act."

Schedule 2 to the Act provided in para. 9:

- B "The arbitrator may at any stage of the proceedings, and shall if so directed by the judge of the county court (which direction may be given on the application of either party), state in the form of a special case for the opinion of that court any question of law arising in the course of the arbitration."

Turning back to s. 13 (3), one found the provision:

- C "If in any arbitration under this Act the arbitrator states a case for the opinion of the county court on any question of law, the opinion of the court on any question so stated shall be final, unless within the time and in accordance with the conditions prescribed by the rules of the Supreme Court either party appeals to the Court of Appeal, from whose decision no appeal shall lie."

- D Counsel for the tenant yesterday spoke of that sub-section as a sub-section giving a right of appeal to the Court of Appeal, but when the sub-section is examined, it is clear, I think, that it did not create a right of appeal. It presupposed a right of appeal, and said that the decision of the county court judge

- E "shall be final, unless within the time and in accordance with the conditions prescribed by the rules of the Supreme Court either party appeals to the Court of Appeal, from whose decision no appeal shall lie."

- F Other appeals from the county court ordinarily went at that time to the Divisional Court. The Agricultural Holdings Act, 1908, s. 13 (3), provided that an appeal in such a case under the Agricultural Holdings Act should be to the Court of Appeal, and that the decision of the county court judge was to be final, unless within the time provided by the Rules of the Supreme Court notice of appeal to the Court of Appeal was given. That provision was repeated in the Agricultural Holdings Act, 1923, by s. 16 (4). Section 16 dealt with a matter referred to arbitration, and brought in Sch. 2, which again, by para. 10, provided that a Case might be stated for the opinion of the judge of the county court. Section 16 (4) repeated, word for word, s. 13 (3) of the Act of 1908.

- G So the law remained until 1948. As there is no like provision in the Act of 1948, counsel for the tenant claims that there is no right of appeal to the Court of Appeal on any question submitted to a county court judge and decided by him.

- H It would strike one as somewhat surprising if a right of appeal existing until 1948 was taken away, when in 1934 the legislature in the case of other arbitrations gave a right of appeal, with the leave of the court, on a consultative case. It appears to me that the fallacy in this argument—and I hope I shall not be accused of discourtesy in so describing it—arises from regarding the right of appeal as given by s. 13 (3) of the Act of 1908, or by s. 16 (4) of the Act of 1923. It does not arise in that way at all. The right of appeal arises under the County Courts Act, 1934.

- I First let me look at the County Courts Act, 1888, s. 120, which provides:

"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court."

Thus a right of appeal was given to "the party aggrieved by the judgment, direction, decision, or order of the judge" where the party is "dissatisfied with the determination or direction of the judge in point of law."

The like provision is contained in the County Courts Act, 1934, s. 105:

"If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or equity or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge may appeal therefrom to the Court of Appeal in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court."

The intention of the legislature is clear: an appeal from the county court lies on a point of law. It was not intended that there should be an appeal on fact, and the statute does not give an appeal on fact. But in giving a right of appeal from the county court on a question of law, the statutes go further than those which regulate appeals from a High Court judge to the Court of Appeal. There is an appeal, not only from a "judgment or order", but from a "judgment, direction, decision or order". If it is said that the decision of a county court judge on a Case submitted to him under the Agricultural Holdings Act, 1948, does not lead to a "judgment or order", counsel for the landlords claims in aid the further words of the County Courts Act, 1934, s. 105, "direction or decision". He submitted to this court that the learned county court judge did as he was asked to do: he decided a certain point. Counsel put it another way: that the learned county court judge gave a direction on that point. He claimed that there can be under the County Courts Act, 1934, s. 105, an appeal against the decision of the judge just as there could have been under the County Courts Act, 1888, s. 120.

In 1934 a change was made by the Administration of Justice (Appeals) Act, 1934, under which in Part 1 of the Schedule appeals from the county court were in future to lie to the Court of Appeal instead of to the Divisional Court. When the County Courts Act, 1934, was passed, s. 105 repeated the provision that appeals from the county courts were to be heard by the Court of Appeal. It appears to me that the reason for the Agricultural Holdings Act, 1908, s. 13 (3), and for s. 16 (4) of the Act of 1923, was merely to provide that the appeal under the Agricultural Holdings Act should be to the Court of Appeal. The decision of the county court was to be final, "unless within the time and in accordance with the conditions prescribed by the rules of the Supreme Court either party appeals to the Court of Appeal, from whom no appeal shall lie". From 1908 until 1934 it was necessary if appeals were to lie to the Court of Appeal and not to the Divisional Court, to say so, and each of the Agricultural Holdings Acts which I have mentioned so provided. But when by the Administration of Justice (Appeals) Act, 1934, or by the County Courts Act, 1934, s. 105, which immediately followed, all appeals from the county court were to go to the Court of Appeal, there was no need to repeat that provision. Neither s. 13 (3) of the Act of 1908, nor s. 16 (4) of the Act of 1923 created any right of appeal. The right of appeal was given by the County Courts Act in force at the time, and it became unnecessary after 1934 to repeat the provisions in s. 13 (3) of the Act of 1908 and s. 16 (4) of the Act of 1923. But the position remains that under the County Courts Act, 1934, itself a right of appeal is given from a "judgment, direction, decision or order" on a point of law.

These were proceedings under the Agricultural Holdings Act, 1948. Section 77 of that Act provides:

"(1) Any matter which by or by virtue of this Act or regulations made thereunder is required to be determined by arbitration under this Act shall, notwithstanding any agreement, under a contract of tenancy or otherwise, providing for a different method of arbitration, be determined by the arbitration of a single arbitrator in accordance with the provisions of Sch. 6 to

A this Act, and the Arbitration Acts, 1889 to 1934, shall not apply to any such arbitration. (2) The Minister may by rules make such provision as he thinks desirable for expediting, or reducing the costs of, proceedings on arbitration under this Act."

Schedule 6, para. 24, provides:

B "The arbitrator may at any stage of the proceedings, and shall, upon a direction in that behalf given by the judge of the county court upon an application made by either party, state in the form of a special case for the opinion of the county court any question of law arising in the course of the arbitration."

C In this case, the arbitrator was asked to state a Special Case, and he did so. He stated a Special Case on a question or on questions of law arising in the course of the arbitration. It is said that that is a consultative Case and that the county court judge's decision is no more than an opinion. It appears to me from what I have read that his decision would determine this arbitration finally, but it is not necessary to say so for this purpose. It is a decision on a question of law arising in the course of the arbitration. It might equally be described as a "direction". The wording of s. 105 is quite different from that which led to the decision in the *Tabernacle* case (1). In my view, the wording of the County Courts Act, 1934, s. 105, is sufficiently wide to give a right of appeal in the circumstances of this case. If the legislature had determined to take away the right of appeal, which existed before the Act of 1948, I should have expected it to be stated in clear terms.

E I am satisfied that the preliminary objection fails.

JENKINS, L.J.: I agree, and find I cannot usefully add anything to the reasons given by my Lord for holding that the preliminary objection fails and should be dismissed.

F MORRIS, L.J.: I also agree. In beginning his judgment in *Re Knight & Tabernacle Permanent Benefit Building Society* (1), LORD ESHER, M.R., said ([1892] 2 Q.B. at p. 617):

G "The question is whether there is any appeal from the opinion given by the Divisional Court upon this special case. That question depends upon an accurate consideration of the language of the section under which the case is stated."

H It seems to me that here the matter depends on a consideration of the relevant statutory provisions contained in the Agricultural Holdings Act, 1948, and in the County Courts Act, 1934. In Sch. 6 to the Agricultural Holdings Act, 1948, it is provided, by para. 15: "The award shall be made in such form as may be specified by statutory instrument made by the Minister."

The Agricultural Holdings (England and Wales) Rules, 1948 (S.I. 1948 No. 1943) were made. Article 1 provides:

I "An award in an arbitration under the Agricultural Holdings Act, 1948, shall be in the form set forth in Sch. 1 hereto, or to the like effect, with such modifications of the terms thereof as circumstances may require."

The form which is set out, form A, shows that the award will contain paragraphs in reference to claims by the tenant and landlord beginning with the words "I award and determine that . . . is entitled to receive from . . . the sum of . . . as compensation etc." In reference to other matters the wording will be: "I determine the questions or differences set forth in Part 3 of the Schedule hereto in manner following (that is to say) ".

The Agricultural Holdings Act, 1948, Sch. 6, para. 24, provides:

"The arbitrator may at any stage of the proceedings, and shall, upon a direction in that behalf given by the judge of the county court upon an application made by either party, state in the form of a special case for the opinion of the county court any question of law arising in the course of the arbitration."

Paragraph 25 reads:

"(1) Where the arbitrator has misconducted himself the county court may remove him. (2) Where the arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court may set the award aside."

Those are rather special provisions because normally a county court judge would not be concerned with the setting aside of awards. But those provisions, following what was laid down in *Re Jones & Carter's Arbitration* (2), will not affect the inherent jurisdiction of the High Court, though it may be that the opportunity to invoke the inherent jurisdiction of the High Court to set aside an award for error of law on the face of it may be somewhat restricted in view of the provision in Sch. 6 to the Agricultural Holdings Act, 1948, that an award must be in the form specified and in view of the nature of the form of award which has been specified.

It seems to me that the ultimate question here to be decided is whether the conclusion reached by the county court judge comes within the words "judgment, direction, decision or order" as used in the County Courts Act, 1934, s. 105. That section begins with the words:

"If any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or equity . . ."

"Proceedings" is defined by s. 191 (r) to include "both actions and matters". The definition of "matters" is that it "means every proceeding in a county court which may be commenced as prescribed otherwise than by plaint". The definition of "prescribed" is that it "means prescribed by the county court rules for the time being in force".

Reference must be made to the County Court Rules, 1936, Ord. 41, as amended in 1953. Rule 1 reads:

"Proceedings in a county court under the Agricultural Holdings Act, 1948, other than the hearing of a special case stated by an arbitrator, shall be commenced by originating application."

Then in r. 3, dealing with "Special Case stated by Arbitrator", sub-r. (1) provides:

"Where an arbitrator states, in the form of a special case for the opinion of the court, any question of law arising in the course of the arbitration, the case shall contain a statement of such facts and a reference to such documents as may be necessary to enable the judge to decide the question of law."

Sub-rule (3) provides: "The registrar shall fix a day for the hearing and give notice thereof to the parties in form 343". Sub-rule (6) provides:

"The order of the judge shall be in form 344 and a copy thereof shall be served on the parties to the arbitration and on the arbitrator."

Form 344 is headed: "Order on Hearing of Special Case. Ord. 41, r. 3 (6). The Agricultural Holdings Act, 1948" and reads:

"The special case stated by Mr.———, the arbitrator appointed in the above-mentioned matter coming on for hearing this day: Now, upon reading

A the special case, and upon hearing [etc.] the judge of this court doth declare his opinion on the question of law stated for the opinion of the court as follows."

Then there is a space for the statement of his opinion and the form concludes:

B "And it is ordered that a copy of this order be sent by the registrar to the said Mr. ——— [the arbitrator] for him to proceed in accordance with the opinion so declared as aforesaid."

C I have referred to that rule because I think a consideration of it reinforces the view which I have formed that the ruling of the county court judge on the matter referred to him can be regarded as at least a "direction" within the words "judgment, direction, decision or order". I think it is either a "direction" or a "decision".

D We were much pressed by counsel for the tenant to have in mind what was said by LORD ESHER, M.R., in the *Tabernacle* case (1) and what was said in *Tata Iron & Steel Co., Ltd. v. Bombay Chief Revenue Authority* (3), and in particular what was said by LORD ATKINSON when he delivered the opinion of the Board (39 T.L.R. at p. 291). But it seems to me that we have here to consider the particular statutory provisions that apply in this case and for the reasons stated by my Lord and for these additional reasons I think that an appeal lies within s. 105 of the Act of 1934.

E I would add that our attention was called to the recent case of *Sclater v. Horton* (4) where no point similar to that raised by counsel for the tenant was taken and where an appeal was entertained and heard by this court in a case where an arbitrator had stated a Special Case for the opinion of the county court and the judge had given his decision.

I consider that the preliminary point fails.

Preliminary objection dismissed.

[THEIR LORDSHIPS heard argument].

Cur. adv. vult.

F May 2. SINGLETON, L.J.: This is an appeal from a decision of His Honour JUDGE ROWE HARDING given at the Ludlow County Court on Mar. 17, 1955.

G The case before him arose out of an arbitration under the Agricultural Holdings Act, 1948. At the request of the parties to the arbitration, the arbitrator stated a Case for the opinion of the county court judge. The Case is in somewhat unusual form in that no facts are found. The arbitrator set out the submissions made on behalf of each party, which embraced a number of points of law. He added:

"I have been requested by the parties concerned to submit a Case to this honourable court for its decision on the preliminary points raised."

H In para. 5 he said:

I "I am desirous of stating for the opinion of the court the following question:—Whether a person who as trustee under a will becomes as such entitled to the interest under the tenancy agreement of the former tenant of a holding is bound by the clauses in the agreement relating to that holding and in particular is bound by cl. 15 of the agreement referred to above, namely personally to inhabit the farmhouse on the farm on the ground that such trustee is the 'tenant' within the meaning of the tenancy agreement and the said Act."

At one stage of the argument, counsel for the tenant argued that para. 5 was the only question submitted to the judge, and that the other questions he dealt with were not before him, except by agreement, and that consequently the judge in answering them was acting as an arbitrator, and that there could be no appeal on those questions. It appears to me to be clear that the arbitrator agreed to

state for the opinion of the court the questions raised by both parties, and that he added one of his own on which he desired guidance. We ought to look on them all in the same way. A

There is this further difficulty. It appears that, in the absence of any statement of facts in the case, the parties agreed certain facts. There is no document in which the agreement as to the facts is contained, though there are references in the judgment to the facts agreed. B

The tenancy agreement was made on

"Oct. 13, 1893, between H. J. Allcroft of Stokesay Court . . . (who and whose heirs and assigns are hereafter referred to as 'the landlord') of the one part and Edward Bach and Francis Bach of Onibury . . . jointly and severally either and both of whom (who and whose executors, administrators and assigns, are hereinafter referred to as 'the tenant') of the other part." C

The wording of that part which I have read is not very happy. The agreement provides:

"The landlord agrees to let and the tenant agrees to take all that dwelling-house, with the buildings cottages and lands and all appurtenances thereto called Lower Onibury Farm situate in the parish of Onibury in the county of Salop containing 345 acres or thereabouts . . ."

By cl. 6, the letting is from Mar. 25, 1893, for one year, and afterwards from year to year until the tenancy shall be determined by either party giving to the other six calendar months previous notice in writing to determine the same at the end of the first year or any subsequent year. Clause 15 of the agreement reads: E

"The tenant will not during this tenancy assign, let, or part with the possession of the farm or any part thereof, but will at all times during his tenancy personally inhabit the farmhouse on the farm and cottages with his family and servants, and will give written notice to the landlord of any stock agisted or taken on tack previous to the same being placed upon the farm." F

It is on this clause that the dispute arises. There is correspondence going back for some years, and the dispute arises on the efficacy or otherwise of a notice which is said to have been given under the Agricultural Holdings Act, 1948, s. 24 (2) (d).

The landlords' case before the arbitrator, having set out the relevant portions of the agreement, continues in para. 4: G

"In the events which have happened the said Lloyds Bank, Ltd., and Arthur Raleigh Allcroft are the estate owners in fee simple of the said farm, and as such, the landlords of the premises."

Paragraph 5 reads: H

"The said Edward Bach died many years ago and the said Frank Dawes Bach died on Aug. 2, 1923, having by his will appointed his wife Minnie May Bach and Harry Bach executors and trustees of his will, which was duly proved by them in the Shrewsbury District Registry. The said Minnie May Bach survived the said Harry Bach and died on May 8, 1950, the said George Bernard Jones having been appointed a trustee of the will of F. D. Bach in 1934." I

Mr. George Bernard Jones is one of the parties to the arbitration and is the respondent to this appeal.

Paragraph 6 of the landlords' case is in these terms:

"In the events which have happened the said George Bernard Jones is, and has been, the sole tenant of the said holding since the date of the

A death of the said Minnie May Bach, but the premises have been occupied during this period by the daughter and son-in-law of the late Minnie May Bach, namely a Mr. and Mrs. Norworthy, neither of whom has experience of farming."

Then by para. 7:

B "It is admitted by the tenant that he has not at any time during his tenancy personally inhabited the farmhouse on the said farm."

I need not read the next few paragraphs. Paragraph 12 reads:

"A notice dated Jan. 16, 1954, requiring Mr. Jones to reside on the farm was sent to him on that date."

C The Case continues:

"13. A notice to quit dated Mar. 6, 1954, and expiring on Mar. 25, 1955, was served on the tenant on Mar. 19, 1954. 14. A counter-notice dated Mar. 30, 1954, requiring the matter to be referred to arbitration was received by the landlords on Mar. 31, 1954."

D Then the contentions are set out.

The tenant's case states:

E "1. The tenant does not admit that he is required by cl. 15 of the said agreement dated Mar. 25, 1893, or at all to inhabit the farmhouse in person, and denies that he is in breach of the said clause as alleged or at all. 2. If, which is not admitted, the said clause does require the personal residence of the tenant in the farmhouse, the said clause is not applicable to a person who holds the said tenancy in a representative capacity, namely as trustee. The tenant denies that he is in breach of the said clause by reason of the fact that the said farmhouse is occupied by Dorothy Mary Norsworthy the daughter and a beneficiary under the will of Frank Dawes Bach deceased of which said will the tenant is trustee . . . 4. The term of the agreement requiring personal residence at the farmhouse has been waived by acceptance of trustees as tenants and by acceptance of rent. 5. That if the tenant was still bound by the said term, which is not admitted, that the length of time given in the notices to the tenant was not reasonable. 6. That the tenant undertook the management of the said farm in 1927 previous to him being appointed a trustee in 1934. During the whole of this period the tenant has lived and is now living at Merrivale, Brimfield. That the landlord and her predecessor in title were aware of this fact and have acquiesced thereto. 7. That if the tenant is still bound by the said terms which is not admitted, the breach is merely technical and does not prejudice the landlord at all. If, however, the tenant's right to object to the notice to quit is excluded, no compensation for disturbance will be recoverable although the said farm has been farmed by the Bach family for over three hundred years."

H It is to be observed that the surviving trustee, Mr. Jones, is described throughout this case as the tenant. Indeed, he is the person in whom the rights of the tenant under the tenancy agreement are vested; he pays the rent, and he is the person responsible for the performance of the covenants. Counsel for the tenant did not dispute that Mr. Jones is the tenant, but he submitted that there should be read into cl. 15 the words "provided that the tenant is legally entitled so to do", after the covenant that the tenant shall personally inhabit the farmhouse. I cannot see that it is necessary to add such a term to the agreement; nor do I see that it would help. We do not know the facts under which, or the time at which, Mr. and Mrs. Norsworthy went into occupation. They could only do so with the consent of the tenant, Mr. Jones, and if he put it out of his power to inhabit the farmhouse, can the tenant now be heard to say that he is unable to

comply with the terms of the covenant? He could have arranged to live on the premises to protect the tenancy, or he could have approached the landlords to make some arrangement agreeable to them. A short interval would not be regarded as a breach of the covenant. We do know from the letter of Jan. 30, 1951, that it is abundantly clear that the landlords were unwilling to accept Mr. and Mrs. Norsworthy as tenants of the farm.

The county court judge dealt with the facts so far as they were agreed. The judge said:

“Edward Bach predeceased Francis Bach at some unspecified date many years ago and Francis Bach died on Aug. 2, 1923, having by his will appointed his wife and Harry Bach his executors and trustees. Harry Bach retired from the trust in 1934 and the respondent [Mr. Jones] was appointed trustee in his stead. On May 8, 1950, Francis Bach's widow, Minnie Bach died, leaving the respondent sole surviving trustee, and it has never been in dispute between the parties to this arbitration that the legal estate in the tenancy of the holding in dispute has been at all material times since the death of Francis Bach in his executors and trustees for the time being, and since the death of Minnie Bach in the present respondent. From the date of her husband's death in 1923 until she died in 1950 it is common ground that Minnie Bach resided on the holding, and, although there is no express admission about this, I imagine that Francis Bach resided on the holding until his death, though whether Edward Bach did so until he died does not appear. It was stated by Mr. Draycott, and not challenged by Mr. Mynett, that Harry Bach did not reside on the holding while he was trustee, and I assume that to be the fact. It is also admitted that G. B. Jones has not resided on the holding during any part of the time that he has been trustee, though he is a farmer and farms a neighbouring farm. Since the death of Minnie Bach the holding has been, and is, occupied by a Mrs. Norsworthy, whose husband farms it with the assistance of a bailiff. It was stated by Mr. Draycott for the respondent that Mrs. Norsworthy was one of two beneficiaries under the will of Mrs. Minnie Bach who purchased the interest of the other beneficiary, her sister, on Jan. 15, 1954, and that she is now entitled to whatever beneficial interest the estate of Mrs. Minnie Bach has in the farm, but her exact interest is not material to any question I have to decide. Having stated the facts, I come to the question, which is whether the respondent, as the surviving trustee of the will of Francis Bach, is bound by cl. 15 of the tenancy agreement dated Oct. 13, 1893, personally to inhabit the farmhouse on the farm and cottages with his family and servants. If he is so bound, and as he has not in fact done so at any time, there is a breach of a term or condition of the tenancy which entitled the landlords, if they satisfy the other conditions of s. 24 (2) (d) of the Act of 1948 to claim that s. 24 (1) does not apply, and accordingly that the tenancy of the respondent will expire on Mar. 24, 1955. The answer depends, first, on the true construction of the agreement and in particular of cl. 15, and secondly on whether, assuming there has been a breach, there has been a waiver of it. As to the first part, I have no doubt that the trustees of the will of Francis Bach, in their capacity as trustees, as distinct from the capacity as executors, were bound by the clause. It is conceded by both counsel that the condition is one that runs with the land. At one time I had thought it a possible argument that it was one personal to the original lessees, but in *Tatem v. Chaplin* (5) a clause almost identical in its terms with the present one, was held to be one binding on assigns or, in other words, ‘running with the land’. I accept Mr. Mynett's submission that, whatever may be the position with regard to executors, ‘one who takes the legal estate is liable on the covenants, though he takes as trustee or mortgagee’.”

A The judge stated his conclusions as follows :

“ I think that every trustee for the time being was at all times after the completion of the duties of executorship bound by the clause requiring residence on the farm. It follows that the respondent was so bound from the time he was first appointed. It is not suggested that the landlords were not aware of his appointment. They have accepted rent for many years knowing of his appointment and knowing of his breach of the clause requiring personal residence. I accept Mr. Draycott's submission that there has been waiver, so far as the respondent's obligations under cl. 15 are concerned, from May 23, 1934, until Jan. 31, 1951. *Hepworth v. Pickles* (6) is authority for the proposition that acquiescence for twenty years is waiver or release of a breach of an obligation of this kind. There is no obligation upon me to treat twenty years as a minimum period. I am quite satisfied that the conduct of the landlords in standing by from May 23, 1934, until Jan. 31, 1951, without protest at the respondent's non-residence on the holding constitutes waiver or release of, or acquiescence in, the respondent's breach of cl. 15, and that the landlords are now estopped from alleging that the respondent has committed a breach of cl. 15. That would be sufficient to conclude the matter in the respondent's favour, but Mr. Draycott submits that there has been waiver since as far back as 1923, and if, as has not been challenged, Harry Bach did not reside on the holding during the time that he was trustee he, too, was in breach of cl. 15, and it is not suggested that any protest as to his non-residence was ever made by the landlords. Clearly, there was in those circumstances waiver of his breach of cl. 15, but the question is whether Mr. Jones, the respondent, can pray in aid the waiver accorded to Harry Bach, and add it to his own period of seventeen years, so as to make a period of twenty-eight years during which a breach of cl. 15 by one of the persons entitled to the legal estate was acquiesced in by the landlords. I think he can. He was successor in title to Harry Bach, and I think he is entitled to say there has been waiver of cl. 15 for twenty-eight years, a time a good deal longer than was considered necessary to establish waiver, release or acquiescence in the case of *Hepworth v. Pickles* (6) above quoted. Accordingly, I answer the question propounded by the arbitrator by saying that although the trustees of the will of Francis Bach deceased were originally bound by cl. 15 of the said agreement personally to inhabit the farmhouse on the farm, there has been a breach of such clause continuously since 1923 first by Harry Bach, and then by the respondent, successively trustees in whom the legal estate was vested jointly with Minnie Bach, that there was no protest in respect of such breaches by the landlords between 1923 and 1951, and that whether such failure to protest is measured as from 1923 or from 1934, when the respondent became trustee, it is in law a waiver or release of the said breach of the said cl. 15, and the landlords are estopped from relying on it as a ground of forfeiture, or as a breach by the tenant of a term or condition of his tenancy within the meaning of the Agricultural Holdings Act, 1948, s. 24 (2) (d).”

I This was a very troublesome case, and one to which the learned judge gave great care. I regret that I am unable to agree with his conclusion as to waiver or release. I am prepared to approach this point on the basis that, according to the strict terms of cl. 15, both joint tenants and both trustees were required to live on the premises, though I wish to make it clear that it is not admitted that that is the true position. There is now only one tenant, Mr. Jones, and he is not personally inhabiting the farmhouse. Until the death of Mrs. Minnie Bach in 1950 there had always been a tenant who lived on the farm. There has been no acquiescence by the landlords since 1950, as the documents show; thus it cannot be said that the landlords have acquiesced in the position as it now stands. Clause 15 is designed to prevent assignment by the tenant, and also

to secure that the tenant shall live on the farm. It cannot be supposed that the landlords would have insisted on both, or all, the trustees of a former tenant living there. The purpose of the covenant that the tenant "will at all times personally inhabit the farmhouse" was to ensure that the person responsible for the rent and for performance of the covenants should live there; in other words, to avoid having an absentee tenant, or a tenant who lived elsewhere and farmed through someone else. I do not suppose for one moment that if two trustees were tenants the landlords would have hesitated to give their permission, if it was sought, to one only living on the premises, and this was the position as long as Mrs. Bach was alive. A

It is desirable to consider the circumstances of the case. Acquiescence, or failure to insist on one's rights, ought not to be held to amount to waiver of, or release from, a covenant without regard to the facts. It is not right to say on a covenant of this kind that the landlords, by reason of the fact that only one of two trustees lived on the premises, waived for all time the right to insist on the tenant, or, at least, on one of the joint tenants, personally inhabiting the farmhouse. To decide otherwise would mean in effect that the tenant could avoid the covenant against assignment, and could put on to the farm someone of no farming experience against the wishes of the landlords. B

We were referred to certain authorities on the question of acquiescence which might lead to waiver or release in particular cases. The first was *Gibson v. Doeg* (7) in 1857. I do not propose to refer to that case in detail, for it is dealt with sufficiently in *Hepworth v. Pickles* (6). I read the headnote in the latter case ([1900] 1 Ch. 108): C

"By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beerhouse. Shortly after the date of the conveyance beer and spirits were sold in one of the houses erected on the land, and continued to be openly sold for upwards of twenty-four years:—*Held*, in an action by a purchaser to rescind a contract for sale of that house on the ground of the existence of this restrictive covenant, that it must be presumed from the uninterrupted user of the premises as a beerhouse for twenty-four years, that there had been a waiver or release of the covenant." D

That was a decision of FARWELL, J., who earlier in the same year had appeared as counsel in *Re Summerson* (8), which is reported in a footnote to *Hepworth v. Pickles* (6). FARWELL, J., in his judgment said (*ibid.*, at p. 110): E

"I find as a fact that, very shortly after the date of that conveyance, beer, and, after a short interval, spirits, were both sold at that shop and have ever since been sold openly with the licence appearing in large letters over the door for upwards of twenty-four years. That being so, the first question I have to determine is whether the shop is in fact now bound by the restrictive covenant. In my opinion it is not so bound, although on its construction the covenant is of course a continuing covenant. I think the case is covered by the authority of *Gibson v. Doeg* (7), and by the unreported case, which I have referred to, before ROMER, J., of *Re Summerson* (8). I apprehend the law is well stated by POLLOCK, C.B." F

The judge read a passage from the judgment of POLLOCK, C.B., in *Re Summerson* (8) (*ibid.*, at p. 113), and continued (*ibid.*, at p. 110): H

"That I take to mean this—that if you find a long course of usage, such as in the present case for twenty-four years, which is wholly inconsistent with the continuance of the covenant relied upon, the court infers some legal proceeding which has put an end to that covenant, in order to show that the usage has been and is now lawful, and not wrongful. This case was I

A followed by ROMER, J., in the case I have mentioned, which is in some ways a stronger case. It was a case in which there was a sale under the order of the court, the corporation of Newcastle being the lessors. There was a similar restrictive covenant. The actual lease was anterior to the root of title fixed in the case, and there was a very stringent covenant. In that case it was also shown that for thirty years the house had been carried on as a public-house. ROMER, J., held, following *Gibson v. Doeg* (7), that there must be presumed to have been an actual waiver or release. I propose to follow those authorities, and I find in this case that the covenant has been waived or released, and that there is no longer any doubt or question about it."

I draw attention to the words in the judgment of FARWELL, J.,

C "if you find a long course of usage, such as in the present case for twenty-four years, which is wholly inconsistent with the continuance of the covenant relied upon . . ."

The only other authority to which I need refer is *Gibbon v. Payne* (9), in which (22 T.L.R. 54):

D "The lessee of a plot of land covenanted with the lessor to complete a coach-house and stable upon the land within six months to the satisfaction of the lessor, and to keep in repair the demised buildings. The lease contained a proviso for re-entry on breach of covenant. The plot was one of a number of building plots subject to a building scheme. The scheme was subsequently modified, and no coach-house or stable was ever built, the lessor approving and consenting to the alteration. Rent was paid for the land for nearly forty years. In an action by the assignee of the lessor to recover possession for breach of the covenant to repair the coach-house and stable:—*Held*, that the true inference was that the parties intended to release the covenant to repair as regards the coach-house and stable."

F In his judgment, A. T. LAWRENCE, J., is recorded as saying (*ibid.*, at p. 55):

G "I am satisfied that 3, 4, and 5 were originally laid out so as to incorporate this strip of ground and have ever since been so enjoyed. I think that it is not a case of the mere non-enforcement of a covenant to repair. I am satisfied that, in fact, this lessor approved of this alteration and licensed it, and that both parties intended the covenant to repair to be released *qua* this stable and coach-house. I am now asked to eject the assignee of No. 6 for not repairing a stable and coach-house which do not exist, upon land upon which he has not even a right to enter. I cannot do this. I think the facts bring it well within the principle enunciated by POLLOCK, C.B., in *Gibson v. Doeg* (7). I, therefore, give judgment for the defendants Payne and Woolerton, with costs."

H In the present case there is nothing in the landlords' conduct which is wholly inconsistent with the existence of the covenant; nor is there anything to show that they intended to waive performance of it. So long as a tenant was inhabiting the farmhouse they were satisfied. The fact that they did not take steps to compel both of two trustees to live there cannot of itself amount to complete waiver of the covenant. In a sense, it was only a partial breach which did not defeat the object of the landlords.

I In my judgment, there is nothing in this case which can be said to have led to the doctrine applied in the cases I have mentioned; in other words, there is not, on the facts before this court, either waiver or release. The appeal should be allowed.

JENKINS, L.J. : I agree, and I will not take up time by repeating the facts on which, largely by way of admission—for the Special Case stated by the arbitrator contains no findings of fact—the matter has proceeded.

As to the first question, i.e., the question whether, apart from waiver, the tenant was bound by cl. 15 of the tenancy agreement of Oct. 13, 1893, which I will call the covenant, I think the learned judge came to a right conclusion on it. The covenant is admittedly of a kind capable of running with the land (see *Tatem v. Chaplin* (5)) and having regard to the intelligible, though somewhat ungrammatical, definition of "the tenant" contained in the agreement it is clearly framed in a manner apt to make it run with the land. The covenant, accordingly, binds every person in whom the tenancy is for the time being vested. For example, if after Edward Bach's death Francis Bach had with the consent of the landlords assigned the tenancy inter vivos to a third party, such third party would have been bound by the covenant. Counsel for the tenant, as I understand his argument, does not dispute this, but contends that the covenant no longer applies when the tenancy has become vested in a tenant who holds as a trustee and not beneficially, at all events where he holds the tenancy in trust for a beneficiary who is absolutely entitled and cannot be compelled to allow him to inhabit personally. Counsel says that in order to meet such cases the covenant must be treated as impliedly qualified so as to require the tenant to inhabit personally "provided the tenant is legally entitled so to do." Thus, on the present facts, Mrs. Norsworthy, now solely entitled to an absolute beneficial interest in the tenancy, cannot be compelled to allow the tenant to inhabit personally; therefore the tenant is not legally entitled to inhabit personally; therefore the covenant no longer applies.

At one stage in his argument, if I understood him correctly, counsel went so far as to say that, as a trustee cannot profit from his trust, no trustee-tenant could ever be legally entitled to inhabit personally, unless expressly authorised to do so by the terms of the trust. On that view, the covenant would cease to be applicable merely by virtue of the fact that the tenant held as a trustee and not beneficially, and was not authorised by the terms of the trust to inhabit personally. Counsel says, further, that in some circumstances, and in particular circumstances arising from devolution on death, literal performance of the covenant would become impossible, and he instances the case of a testator-tenant appointing a trust corporation, which, obviously, could not inhabit personally, as executor and trustee of his will. He says that considerations such as these show that the covenant cannot have been intended to apply literally in all cases, and justify, nay, demand, the introduction of some such implied qualification as he suggests on the obligation to inhabit personally.

I cannot accept counsel's submissions. If the covenant runs with the land, it binds every person who in law for the time being answers the description of tenant, and, in my opinion, the circumstance that the tenant holds as trustee and not beneficially (a matter over which the landlords have no control) is irrelevant. I see no such impossibility in the literal application of the covenant as would justify the introduction of the implied qualification which counsel suggests. I agree that some forms of testamentary disposition by a tenant might make compliance with the covenant inconvenient, impracticable, or even impossible. But I fail to see how it can be competent to a tenant to absolve his successors from performance of the covenant by so ordering his testamentary disposition as to make it inconvenient, impracticable or impossible for them to comply with it. This would amount to alteration of the terms of the tenancy against the interest of the landlords by unilateral action on the part of the tenant.

As to the position on the death of a tenant, I think that, inasmuch as it must be taken to have been within the contemplation of the parties that every tenant must die at some time, and might do so during the continuance of his tenancy, suspension of personal occupation for a reasonable time consequent on the death of the tenant would not amount to a breach of the covenant. Moreover, if the deceased tenant had by his will specifically bequeathed the tenancy to some person absolutely, the better opinion would seem to be that (as counsel for the landlords

A submitted) his executors could in due course assent to the vesting of the tenancy in that person without thereby committing a breach of the prohibition of assignment contained in the covenant. The beneficiary in such case would thus be constituted tenant and in his turn become bound by the covenant, and no difficulty would arise. It would therefore appear that there is no inherent impossibility, or even difficulty, in the continued application of the covenant after the death of a tenant. No doubt if a tenant chooses to bequeath the tenancy for successive interests which necessitate the vesting of it in trustees, the trustees may sooner or later be unable or unwilling to comply with the covenant, but that is no reason for holding them absolved from complying with it. I should add that I see no ground for holding that it would be as a matter of law impossible for trustees authorised to carry on the farming business of a testator whose assets included a tenancy agreement such as this, to inhabit the premises personally if it was necessary for them to do so in order to preserve the tenancy. The question whether they should make any, and, if so, what, payment for the accommodation inhabited would be a matter for agreement with the beneficiaries or determination by the court.

D For these reasons I am of opinion that the learned judge's decision on the first question should be upheld.

E As to the second question, viz., that of waiver, counsel for the tenant submitted that on its true construction the covenant required the tenant, if there were only one, and both or all the tenants if there were more than one, to inhabit the farmhouse personally. Accordingly he said that the covenant had been consistently broken, and the landlords had consistently acquiesced in its breach, during a continuous period of some twenty-seven years measured from the death of Francis Bach in 1923 to the death of Mrs. Minnie Bach in 1950; for during the whole of that period only one of the two tenants, viz., Mrs. Minnie Bach, had personally inhabited the premises. On the other hand, counsel for the landlords submitted that on its true construction the covenant was satisfied by personal inhabitation on the part of one only of two or more joint tenants, and accordingly that there had been no breach during this period.

F This is, to my mind, a point of some difficulty, but one which need not for the present purpose be decided; for, assuming in favour of counsel for the tenant that his construction is right, that a covenant of this kind is capable of discharge by acquiescence, and that the facts, if fully investigated, would suffice to establish acquiescence by the landlords in the state of affairs which existed from 1923 to 1950, I cannot see that the landlords' acquiescence in that state of affairs suffices to raise the inference of a release of the covenant or an estoppel precluding them from now relying on it. During the period in question one of the two tenant-trustees was at all times personally inhabiting the premises. The landlords' acquiescence in that state of affairs only shows that they were content to accept personal inhabitation by one of two joint tenants as a sufficient compliance with the covenant. I cannot see that it shows any more than this, or affords any sufficient ground for holding that the covenant has been totally waived or released, or that the landlords are precluded from objecting to the wholly different state of affairs which supervened in 1950, since when there has been one tenant only, in the person of the present respondent, who has not at any time personally inhabited the premises. It seems to me that personal inhabitation by one only of two joint tenants on the one hand, and on the other hand failure by a single tenant to inhabit personally, so that there is no tenant inhabiting personally at all, are two materially different states of affairs; and that assent to, or acquiescence in, the latter is by no means to be inferred from assent to, or acquiescence in, the former.

I Accordingly I would allow the landlords' appeal on the second question, while holding that the learned judge's decision in the landlords' favour on the first question should stand.

MORRIS, L.J.: I agree. The learned judge said in reference to the questions submitted to him that, by inference at any rate, it was conceded that the answer to the question did not depend entirely on the construction of the tenancy agreement, but involved a consideration of the question whether, if there had been a breach of cl. 15 of the agreement, there had been subsequently a waiver or acquiescence in such breach which prevented or estopped the landlords from now relying on it for the purpose of invoking the provisions of s. 24 (2) (d) of the Act of 1948. The learned judge held in the first place that those who as trustees held the legal estate for the time being would, in the ordinary course, be bound by the obligation of a tenant as laid down in cl. 15 of the lease. I agree with that conclusion. He further held that when Francis Bach died leaving his interest in the holding vested in trustees, and when once they had completed their duties as executors and held merely on the trusts of the will, that then each one of them was bound by the terms of cl. 15. I agree with that conclusion. Nor can I think that any qualification of the terms of cl. 15 should be implied. Whether or not at the time of the negotiation of the agreement some qualification might reasonably have been agreed, I do not think that any implied term is necessary in order to give proper effectiveness to the agreement. The position was, therefore, that after Francis Bach's death both trustees should have resided. The trustees from 1923 to 1934 were Mrs. Minnie Bach and Mr. Harry Bach, and from 1934 to 1950 Mrs. Minnie Bach and Mr. Jones. After Mrs. Minnie Bach's death, which was in May, 1950, certain communications passed, and it is certainly clear that at least from Jan. 30, 1951, the landlords were not acquiescing in the fact of non-residence by Mr. Jones. On that date they wrote a letter in the course of which they called on Mr. Jones to take steps to comply with the clause in the agreement. The learned judge in his judgment held that the conduct of the landlords in standing by from May 23, 1934, until Jan. 31, 1951, without protest at Mr. Jones's non-residence on the holding constituted waiver, or release of, or acquiescence in, Mr. Jones's breach of cl. 15, and that the landlords were now estopped from alleging that Mr. Jones had committed a breach of cl. 15.

On the admitted facts I cannot see that any implication arises that the landlords agreed that they would never again insist on full performance of cl. 15. It may well be that if they accepted rent with knowledge they waived breaches of covenant from time to time, but I can see no reason why they should be prevented from demanding proper compliance as from the date they required it. There may be conduct from which can be implied the waiver or abandonment of a right. I do not think that the landlords so conducted themselves that they could not assert that cl. 15 should be honoured. There was no reason why after the death of Mrs. Minnie Bach they should not say that, though they had not been insisting on the full and strict compliance with the covenant in cl. 15 in the past, they proposed to require compliance for the future. The present case differs on its facts from such cases as *Gibson v. Doeg* (7), and *Hepworth v. Pickles* (6). It could not here be said that a judge or jury could infer from the landlords' conduct and the admitted facts that the landlords had given some form of irrevocable licence, or some form of release, which had the effect that the covenant in cl. 15 could not in the future be regarded as effective and subsisting.

I agree that the appeal should, to the extent stated, be allowed.

Appeal allowed and the matter remitted to the county court. Leave to appeal to the House of Lords refused.

Solicitors: *Tamplin, Joseph & Flux*, agents for *Sprott, Stokes & Turnbull*, Shrewsbury (for the landlords); *Kenneth Brown, Baker, Baker*, agents for *G. H. Morgan & Sons*, Ludlow, Shropshire (for the tenant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

WATSON AND ANOTHER v. NIKOLAISEN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Pearce, JJ.),
April 26, May 6, 1955.]

Adoption—Dispensing with consent to order—“Consent . . . unreasonably withheld”—Adoption conducing to child's welfare—Consent given and later withdrawn—Whether infant “abandoned” by parent—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 3 (1) (a), (c).

In October, 1952, the mother of an illegitimate child, a girl born in July, 1951, gave the child into the care of the appellants, a husband and wife, who were friends of the mother and were anxious to adopt the child. The appellants, who were then living at Ellesmere, immediately commenced proceedings to obtain an adoption order from the justices at Ellesmere, and on Nov. 24, 1952, the mother gave her written consent to an adoption order being made. At the time when she gave her consent she knew what the effect of an adoption order would be, but she did not know that, until an order was actually made, she could withdraw the consent. Before the date fixed for the hearing of the application before the justices at Ellesmere, the appellants went to live at Bury and, in consequence, they were told that their application should be made to the justices at Bury. As they were advised not to apply for the order until they had a home of their own, they did not make the application until June, 1954. Meanwhile the child remained with them all the time, was entirely supported by them and brought up as their own, and the mother never visited her. Before the application came before the justices at Bury, the mother withdrew her consent and at the hearing objected to an adoption order being made and said that she wished to keep the child. The appellants contended, among other things, that on the facts the mother had abandoned the child, and that, therefore, under s. 3 (1) (a) of the Adoption Act, 1950,* her consent was not necessary. The justices found that the mother had affection for the child, and they held that she had not abandoned the child, within the meaning of s. 3 (1) (a), and that her consent had not been unreasonably withheld, within the meaning of s. 3 (1) (c) of the Act, and, accordingly, they dismissed the application, although they were satisfied that, if the welfare of the child had been the test, an adoption order should have been made. On appeal,

Held: (i) a parent “abandoned” an infant within the meaning of s. 3 (1) (a) of the Adoption Act, 1950, only if the abandonment was of such a kind as that which rendered a parent liable under the criminal law; and, on the facts, the mother had not abandoned her child within the meaning of s. 3 (1) (a) of the Act of 1950, because she had not left the child to her fate but had handed her over to people in whom she had confidence.

Dictum of LORD DUNEDIN, Lord President, in *Mitchell v. Wright* (1905) (7 F. (Ct. of Sess.) at p. 574) applied.

(ii) in determining whether the mother's consent to the order was unreasonably withheld, within the meaning of s. 3 (1) (c) of the Act of 1950, the justices had made no error in law; it was open to them, on the facts, to find that the consent was not unreasonably withheld, and the appeal from their decision should be dismissed.

* The Adoption Act, 1950, s. 3 (1), provides: “The court may dispense with any consent required by s. 2 (4) (a) of this Act if it is satisfied—(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant . . . (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld.”

Hitchcock v. W.B. & F.E.B. ([1952] 2 All E.R. 119), and *Re K. (an infant)*,
Rogers v. Kuzmicz ([1952] 2 All E.R. 877) applied.
 Appeal dismissed.

[**Editorial Note.** *Mitchell v. Wright* (1905) (7 F. (Ct. of Sess.) 568) was decided on s. 1 and s. 3 of the Custody of Children Act, 1891, 12 HALSBURY'S STATUTES (2nd Edn.) 947. The former of those sections enables the court to refuse a parent a writ or order for production of a child where the court is of opinion that the parent "has abandoned or deserted" the child, and the latter (s. 3, para (a)) gives to the court a further discretion over ordering delivery of a child to a parent who has "abandoned or deserted" the child. Paragraph (b) of s. 3 provides another ground on which a court may withhold an order for delivery of a child to a parent, viz., that the parent has allowed the child to be brought up at another's expense. In *Mitchell v. Wright* the mother's petition for the custody of her illegitimate child was refused on the ground that she had allowed the child to be brought up by her cousin, but LORD DUNEDIN (Lord President) also held that she had not abandoned or deserted the child.

In *Re O'Hara* ([1900] 2 I.R. 232) HOLMES, L.J., said, at p. 252, that both words "abandon" and "desert" when applied to a parent in connection with his child, implied a disregard of parental duty and carried with them the idea of moral blame. The present case in effect goes beyond that view and gives to the words as used in this context a criminal connotation in English law.

As to whether consent has been unreasonably withheld, see Supplement to 17 HALSBURY'S LAWS (2nd Edn.) para. 1410.

For the Adoption Act, 1950, s. 3 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 470.]

Cases referred to:

- (1) *Mitchell v. Wright*, (1905), 7 F. (Ct. of Sess.) 568; 28 Digest 262, *t*.
- (2) *Hitchcock v. W.B. & F.E.B.*, [1952] 2 All E.R. 119; [1952] 2 Q.B. 561; 116 J.P. 401; 3rd Digest Supp.
- (3) *Re K. (an infant)*, *Rogers v. Kuzmicz*, [1952] 2 All E.R. 877; [1953] 1 Q.B. 117; 117 J.P. 9; 3rd Digest Supp.

Case Stated.

This was a Case Stated by justices for the county borough of Bury in respect of their adjudication as a juvenile court sitting at Bury on an application by the appellants for an order under the Adoption Act, 1950, authorising them to adopt the respondent's infant, a girl born on July 30, 1951, who had been in the appellants' care since Oct. 13, 1952. The facts appear in the judgment.

J. E. S. Simon, Q.C., and *J. W. Da Cunha* for the appellants.
Melford Stevenson, Q.C., and *C. F. Dehn* for the respondent.

Cur. adv. vult.

May 6. LORD GODDARD, C.J., read the following judgment of the court: This is a Case Stated by the justices for the county borough of Bury to whom the appellants applied for an order under the Adoption Act, 1950, authorising them to adopt an infant girl, one Roberta Jones Nikolaisen, born on July 30, 1951, the natural child of the respondent. The justices refused to make the order on the ground that they could not find that the respondent had either abandoned the infant or had unreasonably withheld her consent to the adoption, and the question which they submit to the court is whether on the facts found they were justified in so holding.

The respondent was married to a Norwegian seaman who deserted her in 1946. By him she had several children, of whom two girls are at present living with her. They, presumably, are legitimate, although whether they are legitimate or

A not is immaterial in this case. After her husband deserted her the respondent returned to Scotland from Norway and formed an association with a man named Mooney who is, admittedly, the putative father of the child in question who was born late in July, 1951. Following her association with Mooney she lived with a man named Doolan and then with another man named Rodden, with whom she is at present living, and by one or other of these men she has had another child, now aged about two years. She is at present living with Rodden in one room in Glasgow with the infant child last mentioned and the two girls of her marriage, and these three children, the respondent and Rodden all live in one room.

The appellants were friends of the respondent. They were married on Sept. 15, 1951, shortly after the birth of the child in question. For reasons into which it is unnecessary to go, the appellants were anxious to adopt the respondent's child and the respondent was perfectly willing that they should do so. Accordingly, proceedings were instituted in October, 1952, to obtain an adoption order from the justices at Ellesmere in Shropshire. The respondent signed the necessary form of consent to the adoption* and the justices in this case are satisfied that she understood the consequences of the step which she was taking in signing the form of consent and that she thought it was a final step which would completely dispossess her of her child and of any right to control her future upbringing. They also find that she was unaware at that time of her right to change her mind and to appear at the hearing of the application for the adoption order and object to its being granted. The child had been handed to the appellants† and, so far as we can see, there is no reason to suppose that, had the application for the adoption order been pursued, it would not have been granted. Before the application was heard, the appellants moved away from Ellesmere, and went to live at Bury, and, accordingly, the appellants were advised that any application for adoption should be made to the justices of the latter town. They were also advised by the children's officer at Bury not to make the application until they had a home of their own and, in fact, they did not make the application until June 2, 1954, and the hearing took place on Oct. 29. Meanwhile, the infant had remained all this time with the appellants. The respondent had never visited her and had seen her only once, namely in July, 1954, when the appellants took the child to Glasgow and called on the respondent and, I think, stayed for a few days with her. The child seems to have been entirely supported by the appellants and brought up as their own. The respondent never contributed to her maintenance, but, I regret to say, she drew the children's allowance in respect of the child and kept it for her own purposes. By the time the case came before the justices at Bury the respondent had, apparently, changed her mind and had discovered that it was possible for her to withdraw the consent which she had previously given. It does not appear that she ever signed a consent for the proceedings in the Bury court, but the papers, I understand, had been sent from Ellesmere to Bury and, no doubt, the form of consent which she had signed previously might have been accepted if it had not been that she attended the hearing and objected. Her reasons for saying that she desired to retain the child were that she was fond of the child, though she never seems to have displayed any affection towards her, and that she was in a highly nervous condition, due, in part, to the fact that she was repenting giving up her rights in the child. On these facts, the justices came to the conclusion that the respondent had not abandoned the child, and that she genuinely desired that the child should remain hers and not be adopted. Accordingly, after referring to the decided cases on the subject, they

* The form of consent was signed by the respondent on Nov. 24, 1952.

† The justices found that the appellants had received the infant from the respondent on Oct. 13, 1952, and that since then the infant had been in the sole care of the appellants.

came to the conclusion that they could not hold that her refusal to consent was unreasonable, although they were satisfied that, if the question had been what was for the benefit of the child, they would have held that the child should remain with the appellants. Accordingly, they refused to make the order.

The point that was mainly argued by counsel for the appellants was that on these facts the respondent had abandoned the child. By s. 3 (1) (a) of the Adoption Act, 1950, it is provided that the court may dispense with the consent of a parent of an infant if the parent has abandoned, neglected or persistently ill-treated the infant. I admit that at first I was very much attracted to the view submitted by counsel for the appellants that in the present case the respondent could be said to have abandoned her child because in the proceedings which had been instituted at Ellesmere she had deliberately consented to the adoption, believing that she thereby gave up all rights in the child and intended so to do, although she did not know that she could have withdrawn her consent. Certainly until the proceedings in 1954 she never indicated by word or deed that she desired to withhold her consent or that she had in any way changed her attitude. The only thing which she had ever done in relation to the child was to take the allowance that the state made towards the child's maintenance and keep it for herself. On consideration, however, I am satisfied that the respondent has not abandoned the child as contemplated by s. 3 (1) (a) of the Act of 1950. She was not leaving the child to her fate; she was giving her over to people who desired to adopt her and in whom she had confidence, and, when one finds that s. 3 (1) (a) deals with abandonment, neglect or persistent ill-treatment, I think it is clear that abandonment means abandonment that would have rendered her liable to the criminal law. Section 27 of the Offences against the Person Act, 1861, provides that

"Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour . . ."

Under s. 1 (1) of the Children and Young Persons Act, 1933, a person who wilfully neglects, abandons or exposes a child in a manner likely to cause him unnecessary suffering or injury to health is also liable to punishment. It is clear that the mother did not abandon her child in this sense at all. In *Mitchell v. Wright* (1), a similar case under the Custody of Children Act, 1891, LORD DUNEDIN (Lord President), said (7 F. (Ct. of Sess.) at p. 574):

"I think that the words 'abandoned or deserted the child' [in s. 1 of the Act of 1891] point at the parent leaving the child to its fate. But in this case, although the petitioner did little for her child, she never really abandoned or deserted it, because she knew and approved of the steps which the respondent took for its maintenance."

The facts in that case were that the mother had entrusted her illegitimate child for more than seven years to the care of a cousin. The real position, in the present case, is that proceedings had been started at Ellesmere, but, unless and until an adoption order was made, and it never was, the respondent not only had not parted with all her rights in the child, but had certainly not divested herself of her responsibility towards the child as the child's parent. She may have thought that she had rid herself both of her child and all her responsibilities to the child, but in that she was mistaken. Until the adoption order was made it would have been open to the appellants, had they so desired, to have returned the child to the respondent and refused to keep her, and, if the appellants had returned the child, the respondent could not have avoided her duties as a parent and would have been guilty of a criminal offence if she had not taken due steps to provide for and protect the child. In my opinion, therefore, the justices were

A right in coming to the conclusion that the respondent had never abandoned her child up to the time that the case came before them at Bury.

With regard to the question whether the respondent had unreasonably withheld her consent, the justices appear to me to have applied their minds to the right point. They considered *Hitchcock v. W.B. & F.E.B.* (2) and *Re K. (an infant)*, *Rogers v. Kuzmich* (3), where this court held, in the first case, and the Court of Appeal, in the second, that in adoption proceedings, unlike proceedings for care and custody, the welfare of the child is not the primary consideration. The parent may have forfeited his or her rights to have the care and custody of a child, but it is quite another thing to say that he or she must, on that account, give a consent to the child being adopted so that the child becomes a member of the family of the adopting parents and the natural parent loses all parental rights in relation to the child. I am aware that in *Re K.* (3) the Court of Appeal said ([1952] 2 All E.R. at p. 885):

“ . . . we would say that such withholding of a parent’s consent cannot be held unreasonable merely because the parent has, in circumstances such as those of the present case, placed the child in the care of foster-parents, without in any sense abandoning it, but on the contrary contributing towards its support and visiting it from time to time.”

That does look at first sight as though the court considered that a parent could be said to have abandoned the child by placing the child in somebody else’s care and never contributing towards the child’s support, but that is one passage in a very long judgment and one in which the point which we have to consider was not being considered. The view of the Lord President, already referred to, in *Mitchell v. Wright* (1) is directly in point and, as I have often pointed out in other cases, it would be very unfortunate for a statute to be construed in different senses on either side of the border. There is certainly high dictionary authority supporting what was, apparently, LORD DUNEDIN’S view that “abandon” or “desertion” in the context in which he was construing them have the same meaning. The OXFORD ENGLISH DICTIONARY gives, as one of the meanings of “abandon”, “to desert”, and, if one turns to see the meanings given by that same high authority to the word “desert”, one finds that the first meaning given is “to abandon”. It is significant, however, that, after giving the meaning “desert” to the word “abandon”, the dictionary goes on to add “leave without help”. It is true that LORD DUNEDIN was considering the provisions of another Act, but it was one closely akin to the one which we have to consider and for this purpose there can be no distinction between them. The courts have never laid down, and probably never will, what can amount to an unreasonable withholding of consent. The justices found in this case, and it was certainly open to them to do so, that the respondent has affection for the child and does desire that it should remain a member of her family, and it is perhaps not inappropriate to remember that, in the first letter which she wrote on the subject to the appellants, she stressed her desire that they should allow the child to retain her baptismal name of Roberta as Robert was the respondent’s father’s name and she was his only namesake.

The result is that the answer to the question submitted to us is in the affirmative and we dismiss this appeal. We cannot, however, leave the case without expressing the hope that, should any proceedings hereafter take place with regard to the care and custody of this child, our decision will not be quoted as indicating our view that the child should be returned to the respondent, for we are certainly not saying that. For a little girl to be brought up in the atmosphere in which she would be if she is returned to the respondent, a woman who has lived with at least three different men since her husband deserted her and is living in an unmarried state with one of them, with children some of whom are legitimate offspring and one of whom, at least, is illegitimate, and all of them

living in one room, is certainly not a state of affairs that this court would encourage. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Woodcock, Ryland & Co.*, agents for *Woodcock & Sons*, Bury (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Hall & Smith*, Bury (for the respondent).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

DEAN v. WIESENGRUND.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), April 21, 22, May 4, 1955.]

Rent Restriction—Recovery of overpaid rent—Overpayment by tenant—Right of tenant's personal representative to recovery—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 14 (1). Executor and Administrator—Property passing to—Statutory right or cause of action—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 41), s. 1.

The defendant was the landlord of a dwelling-house to which the Rent Restrictions Acts applied and which was let for a term of years. At all material times the agreed rent exceeded the recoverable rent. The tenant paid the agreed rent until she died and, after her death, her executor brought an action to recover the overpayments of rent made by her. The defendant contended that the tenant's right to recover overpayments under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, did not pass to her executor.

Held: the right given by s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to the tenant to recover overpayments of rent made by her devolved on her death to her executor because it was a right which was in the nature of an asset or debt due to the tenant and as such devolved on her legal personal representatives in the absence of a clear indication in the Act of 1920 that it should not so devolve, and because, even if that were not the true construction of s. 14 of the Act of 1920 taken alone, the right passed to her executor by virtue of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934; the plaintiff was, therefore, entitled to recover the overpayments of rent made to the defendant by the deceased.

Twomey v. Cronin ([1937] I.R. 324) and *Minto v. Cahill* ([1940] I.R. 302) not followed.

Observations on the application of the maxim "expressio unius, exclusio alterius" (see p. 438, letter G, and p. 443, letter B, post).

Appeal allowed.

[**Editorial Note.** The words of s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, 9 HALSBURY'S STATUTES (2nd Edn.) 792, are wide. They provide that ". . . on the death of any person . . . all causes of action . . . vested in him shall survive . . . for the benefit of, his estate". The conclusion in the present case that, independently of the Act of 1934, the right conferred on a tenant by s. 14 (1) of the Act of 1920 passes, on the true construction of the

A section, to personal representatives, seems to indicate also that there is no such context in s. 14 (1) as would exclude the application of the definition of "tenant" in s. 12 (1) (f) of the Act of 1920. "Tenant" is there stated to include, except where the context otherwise requires, any person from time to time deriving title under the original tenant.

B As to the devolution of property on personal representatives, see 14 HALSBURY'S LAWS (2nd Edn.) 160, para. 240.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 14, see 13 HALSBURY'S STATUTES (2nd Edn.) 1015.]

Cases referred to:

- C (1) *Sharp Brothers & Knight v. Chant*, [1917] 1 K.B. 771; 86 L.J.K.B. 608; 116 L.T. 185; 31 Digest (Repl.) 688, 7797.
 (2) *Twomey v. Cronin*, [1937] I.R. 324; 31 Digest (Repl.) 691, 2572.
 (3) *Minto v. Cahill*, [1940] I.R. 302; 31 Digest (Repl.) 685, 2568.
 (4) *Darlington v. Roscoe & Sons*, [1907] 1 K.B. 219; 76 L.J.K.B. 371; 96 L.T. 179; 34 Digest 253, 2168.
- D (5) *Peebles v. Oswaldtwistle Urban District Council*, [1896] 2 Q.B. 159; 65 L.J.Q.B. 499; 74 L.T. 721; *subsequent proceedings* sub nom. *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1757.
 (6) *Colquhoun v. Brooks*, (1887), 19 Q.B.D. 400; 57 L.J.Q.B. 70; 57 L.T. 448; *revsd.* C.A. (1888), 21 Q.B.D. 52; 57 L.J.Q.B. 439; 59 L.T. 661; 52 J.P. 645; *affd.* H.L., (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 2 Tax Cas. 490; 17 Digest (Repl.) 305, 1121.
- E (7) *Carter v. S. U. Carburetter Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288; 111 L.J.K.B. 714; 167 L.T. 248; 31 Digest (Repl.) 634, 7429.
 (8) *Blackpool Corpn. v. Starr Estate Co.*, [1922] 1 A.C. 27; 91 L.J.K.B. 202; 126 L.T. 258; 86 J.P. 25; 42 Digest 770, 1974.
- F (9) *Barker v. Edger*, [1898] A.C. 748; 67 L.J.P.C. 115; 79 L.T. 151; 42 Digest 768, 1952.

Appeal.

The plaintiff appealed from an order of His Honour JUDGE HARGREAVES sitting at West London County Court, dated Feb. 22, 1955, whereby he dismissed the plaintiff's claim to be entitled to recover overpayments of rent. The plaintiff was the executor of Matilda Agnes Bligh, deceased, and the defendant was the landlord of a ground floor flat known as 17, Elvaston Place, Kensington, to which the Rent Restrictions Acts applied. By an agreement in writing dated Jan. 10, 1948, the defendant granted to one William Alexander Edwards a tenancy of the said flat for a term of seven years from Dec. 25, 1947, at a rent of £300 per annum inclusive of rates, the tenant covenanting to pay as additional rent, any increase in the rates then payable. By an assignment in writing dated May 9, 1949, Mr. Edwards assigned the remainder of the said term to the deceased. From the date of the assignment until the date of her death on Jan. 17, 1954, the deceased paid the rent to the defendant at the agreed rate and after the death of the deceased the plaintiff as executor paid rent to the defendant at the same rate. The recoverable rent of the flat at all times during the two years preceding the date of the commencement of the proceedings was £175 p.a. and overpayments had been made by the deceased amounting to the sum of £140 4s., and by the plaintiff as executor amounting to the sum of £112 15s.

On Jan. 12, 1955, the plaintiff as executor commenced an action in the county court claiming that he was entitled to recover both those sums from the defendant. The defendant admitted that he was bound to repay the sum of £112 15s. but denied that the plaintiff was entitled to recover such overpayments as had been made by the deceased (i.e. £140 4s.).

The learned judge gave judgment for the defendant holding that the tenant's right to recover overpayments of rent did not pass to his personal representative and that, therefore, the plaintiff was not entitled to recover. A

J. Montgomerie for the plaintiff.

M. L. M. Chavasse for the defendant.

Cur. adv. vult.

May 4. The following judgments were read. B

SINGLETON, L.J., stated the facts and continued: The question which is to be determined arises under s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Before I deal with that section, it is of some interest to notice the history of this legislation.

By s. 1 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, it was provided* that where the rent of a dwelling-house to which the Act applied was increased above the standard rate as defined, the amount of that increase should be irrecoverable against the tenant notwithstanding any agreement to the contrary. The Act did not give the tenant a right to recover the excess amount: see *Sharp Brothers & Knight v. Chant* (1), in which case it was held that money so paid was paid under a mistake of law and could not be recovered by the tenant. To remedy this omission a section was included in the Courts (Emergency Powers) Act, 1917; it is s. 5, and for the purposes of this appeal it may be regarded as in the same terms as s. 14 of the Act of 1920. The Act of 1920 repealed s. 5 of the Courts (Emergency Powers) Act, 1917, and in place of it there came s. 14 of the Act of 1920, under which this appeal arises. The section provides that rent irrecoverable by the landlord under the Act or any Act repealed by the Act shall be recoverable from the landlord or his legal personal representative by the tenant by whom it was paid. It also provided that without prejudice to any other method of recovery any such sum could be deducted by the tenant from any rent payable by him to the landlord. C D E

Thus a tenant who paid more than the recoverable rent was given a right to recover the excess amount as soon as he had paid it, and even though he had entered into an agreement to pay it. This right was something of value to the tenant; it was a right which was capable of assignment and it was something which, in the event of his bankruptcy, would have passed to the trustee in bankruptcy for the benefit of the creditors. Now it is said that the right does not pass to the executor or personal representative of the tenant, and the learned county court judge so held. The basis of the decision is that the section, when giving a right to recover, gives it to the tenant without mention of his personal representative, whereas, when stating from whom the excess amount may be recovered, it confers the right on the landlord who received the payment or *his personal representative*; from which it is said that the intention of Parliament was to make the right to recover a personal right in the tenant and one which does not pass to his personal representative. If that is right it means that an asset of the tenant—a chose in action—which Parliament gave to him lasted as long as he lived, but was destroyed by his death. It requires clear words to take away a right so given. I am not sure that any good purpose is served, when considering a question of construction, in inquiring how or why the words “or his legal personal representative” came first into s. 5 of the Courts (Emergency Powers) Act, 1917, after the words “from the landlord . . . who received the payment.” It is, however, interesting to notice the provision for deduction at the end of sub-s. (1) as well as the like provision at the end of s. 14 (1) of the Act of 1920. It may well be that questions were raised when the Bill was before Parliament as to what would happen if there was a change of landlord by death. Would an executor be able to say: “I am not the landlord; it is only the landlord against whom the F G H I

* The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5 c. 97) was repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17).

A excess amount can be recovered" ? It is possible that some such discussion as this led to the insertion of the words " or his legal personal representative ". However that may be, I find it difficult to see that an extension of the right of the tenant—if it is an extension, which I doubt—or a clarification of the position is sufficient to deprive the tenant's estate of an asset given to the tenant by the section. It seems to me that the landlord's estate would have been liable to the
B tenant without the introduction of the words " or his legal personal representative ", and that those words must have been included to make it abundantly clear and to avoid uncertainty on a subject which would normally involve only small amounts, and on which it was particularly desirable to avoid uncertainty.

There have been two cases in Ireland in which it has been held on similar statutory provisions that the personal representative of the tenant could not
C recover. The first is a decision of the High Court, *Twomey v. Cronin* (2), in which case JOHNSTON, J. ([1937] I.R. at p. 328), drew attention to the contrast disclosed between the person who may be the plaintiff and the person who may be the defendant in an action to recover money by virtue of a section in similar terms, and referred to it as striking and as indicating the intention of the legislature to draw the contrast. The second case, *Minto v. Cahill* (3), was
D before the Supreme Court on a Case Stated. I must read passages from some of the judgments in that case. SULLIVAN, C.J., said ([1940] I.R. at p. 307):

" But I can see no reason why the words ' or his legal personal representative ' are introduced in the sub-section after the words ' the landlord . . . who received the payment ' and are omitted after the words ' the
E tenant by whom it was paid ' unless the legislature intended that, while the liability to repay should be imposed on the personal representative of the landlord, the right to recover the overpayment should be conferred only on the tenant who made it."

MEREDITH, J., said (*ibid.*, at p. 309):

F " The sums recoverable under s. 15 can only be recoverable by the persons indicated in the section. In dealing with the right to recover, the section uses the words ' the tenant ' but omits the words ' legal personal representative ', although these words are expressly mentioned in connection with the correlative duty to repay. The omission forces the conclusion that
G the right to recover is conferred on the tenant alone. The distinction is not meaningless. The tenant may have agreed with his eyes open to pay a higher rent than that permitted by the Act, and, having done so, it may well be that his conscience did not allow him to go back on his contract and set up a claim for overpaid rent, and this may explain why the right to recover was confined by the section to the tenant himself. The provisions of s. 15
H are not penal, and the legislature may well have considered that the personal representative should not be obliged to make a claim for rent overpaid by a tenant who in his lifetime was unwilling to make such a claim, and accordingly conferred the right only on the tenant, to be exercised by him if he elected to do so, and not otherwise."

GEOHEGAN, J., said (*ibid.*, at p. 310):

I " To sustain this claim the plaintiff must bring herself within the terms of s. 15. That section gives the right to ' the tenant by whom it [the rent] was paid.' I am unable to find anything in the Act which makes this right transmissible to the personal representative of the tenant."

Then O'BYRNE, J., said (*ibid.*, at p. 311):

" Now, there is an obvious differentiation between the way in which the section deals with the liability to repay and the right to recover. The

liability to repay is expressly imposed not only on the landlord but also on his legal representative. If it were intended that the right to recover overpayments should descend on the personal representative I do not see any reason why similar express language to this effect was not inserted in the section. The insertion of the words 'his legal personal representative' in relation to the landlord's liability and the omission of similar words in relation to the right to recover overpayments seems to me a clear indication that the legislature did not intend to confer the right to recover on the personal representative of the tenant."

I need hardly say that I approach the question with great respect to the judges of both courts. I would, however, point out that the question of the nature of the right conferred on the tenant does not seem to have been considered. MEREDITH, J., said (*supra*):

"The omission forces the conclusion that the right to recover is conferred on the tenant alone."

GEOGHEGAN, J., said (*supra*):

"I am unable to find anything in the Act which makes this right transmissible to the personal representative of the tenant."

If the right which is given to the tenant is, as I have suggested, an asset it is something which, *prima facie*, would on his death pass to his personal representative, whether it arises under the provisions of statute or otherwise, unless there is something in the statute which clearly indicates that it is not to do so. The Sale of Goods Act, 1893, by s. 49 (1), gives to a seller the right to recover the price of goods sold if certain conditions are fulfilled. It is a right given by statute although it was a re-statement of the position before the Act was passed. No one would contend that the right so given does not pass to the personal representative of the seller on the seller's death. The same applies in the present case unless there are clear words to take away the right so given. The right is there unless it is taken away. In *Darlington v. Roscoe & Sons* (4), it was held that where the sole dependant of a deceased workman whose death was caused by accident arising out of and in the course of his employment made a claim against his employers for compensation under the Workmen's Compensation Act, 1897, but died before any award was made, the right to compensation survived and passed to the legal personal representative of the deceased dependant. SIR RICHARD HENN COLLINS, M.R., referred to the case of *Peebles v. Oswaldtwistle Urban District Council* (5), and said ([1907] 1 K.B. at p. 227):

"There an action was commenced by a manufacturer for a mandamus to compel the defendants under the Public Health Act, 1875, s. 15, and the Rivers Pollution Prevention Act, 1876, s. 7, to make a sewer to enable the plaintiff to dispose of the liquids proceeding from his factory. The plaintiff died, and his executors applied to be substituted as plaintiffs. It was held that, as the alleged cause of action arose out of a statutory duty to the deceased, it survived to his executors. Here a statutory duty, not to do something, but to pay a sum of money, existed for the benefit of the dependant when she died, and that case seems to me a distinct authority that the right to performance of that duty survived to her legal personal representative. Further, it was pointed out that the omission of any mention of the legal personal representative of a dependant in s. 7, the definition section, has not the effect of barring further proceedings on the claim by such legal personal representative, for there is an express provision, if one be needed, in r. 64 of the Workmen's Compensation Rules, 1898, which provides that 'where any matter or thing is not specially provided for under these rules, the same procedure shall be followed, and the same provisions

A shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act.' Therefore, unless from the omission of any reference to the legal personal representative of a dependant there can be inferred a positive inhibition of any further claim of compensation after the death of the dependant, it is a mere case of an omission in the statute as to machinery of procedure, which is made good by the statutory rules. It has been pointed out that the statute contains no mention of the legal personal representative of a deceased doctor or undertaker entitled in respect of medical or funeral expenses, but it cannot have been intended to inhibit a claim in respect of such expenses by the legal personal representative. I do not think that there is any evidence in the statute of any intention to inhibit such a claim as that in the present case."

I am unable to regard the reference to the personal representative of the landlord against whom a claim can be made as sufficient to deprive the estate of the tenant of the benefit of a right, or an asset, which is given to him by the statute. There is no clear indication that the right is to be taken away in the event of the tenant's death before he has obtained payment. Thus I find myself unable to agree with the two judgments reported in the Irish Reports to which I have referred, or with the learned county court judge against whose judgment this appeal is brought.

A further point arises under s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which I read:

E "Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under s. 189 of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery."

This section is in wide terms:

G "... all causes of action subsisting against or vested in him shall survive ... for the benefit of, his estate."

H The cause of action given to a tenant by s. 14 of the Act of 1920 is at the lowest a personal right conferred on the tenant. If I am wrong in that which I have said above and if s. 14 did not confer a right which passed to the personal representative of the tenant, the effect of s. 1 of the Act of 1934 is that the cause of action so given shall survive for the benefit of his estate. Section 1 (1) of the Act of 1934 contains a proviso that it shall not apply to certain causes of action. Apart from those excluded it is to apply to all causes of action, and it appears to me that it is sufficient to cover the claim in this case. The learned judge felt considerable doubt on this part of the case, although his judgment was against the plaintiff, who appeals to this court. In my opinion the appeal should be allowed and judgment should be entered for the plaintiff for the amount claimed.

I I should like to add that we are greatly indebted to both the learned counsel who put the various points before us so clearly, and who showed that they had taken care to make themselves fully acquainted with the law on the subject.

JENKINS, L.J.: It seems to me reasonably plain that the intention of s. 14 (1) of the Act of 1920*, as of its precursor, s. 5 of the Act of 1917†, must have been to create a statutory relationship of debtor and creditor between the

* I.e., the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

† I.e., the Courts (Emergency Powers) Act, 1917.

landlord and the tenant in respect of any rent made irrecoverable by the landlord by the provisions of s. 1 of the Act of 1920, or its precursor, s. 1 of the Act of 1915*, but in fact paid to him by the tenant, so that the tenant should be able not only to refuse to pay it, but to recover it from the landlord if in fact paid. To this end, it was necessary to fix the landlord with the character of a debtor in respect of the amount in question and to designate the tenant as the creditor to whom he was to be held indebted. This it was sought to do by the words

"the sum so paid shall be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant . . . by whom it was paid."

On the strength of the inclusion of a reference to the landlord's legal personal representative in the designation of the debtor, and the omission of any reference to the tenant's legal personal representative in the designation of the creditor, it is argued on the part of the defendant landlord in the present case that the tenant's right to recover the amount is personal to, and dies with, the tenant, and the learned county court judge has so held, following the two Irish decisions of *Twomey v. Cronin* (2) and *Minto v. Cahill* (3), to which my Lord has referred. I find it impossible to accept this view, which involves construing s. 14 (1) as if it provided that "the sum so paid shall be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant . . . by whom it was paid *but not by the personal representative of such tenant.*" It is only by recasting the section in this way that the landlord's contention can be supported, for unless words excluding the tenant's personal representative must by necessary implication be read into it, the position can only be that the section invests the tenant with the character of a creditor of the landlord in respect of the sum in question, which sum has all the incidence of a debt, including the devolution on the creditor's legal personal representative of the right to recover it after the death of the creditor. I see no justification for any such implied exclusion of the tenant's personal representative. It may well have been thought necessary or ex abundanti cautela desirable to include an express reference to the landlord's personal representative in defining the nature and extent of the liability laid on him by the enactment, so as to leave no doubt that his liability was to be the ordinary liability of a debtor, but unnecessary to do more in defining the right of the tenant to recover the amount in question than to give him simpliciter the right of recovery, which would in itself clearly suffice to constitute the amount in question a debt owing to the tenant from the landlord or his personal representative, with all the ordinary incidence of a debt as regards assignment, devolution on death, and so forth.

The argument for the landlord is summed up in the maxim *expressio unius exclusio alterius*, which, applied to the present case, is said to compel the conclusion that the express reference to the legal personal representative of one of the parties excludes any implied reference to the legal personal representative of the other. But this maxim is, after all, no more than an aid to construction, and has little, if any, weight where it is possible, as I think it is in the present case, to account for the "*expressio unius*" on grounds other than an intention to effect the "*exclusio alterius*". In this connection I think that there is force in the suggestion made by counsel for the plaintiff legal personal representative that the express reference to the legal personal representative of the landlord might, in view of the retrospective operation of s. 5 of the Act of 1917, by which the right to recover overpayments was first given to the tenant, have been intended to meet the case of an overpaid landlord dying before the commencement of the Act, whose estate might otherwise have escaped liability on the

*I.e., the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.

A ground that he had never been liable himself. In *Colquhoun v. Brooks* (6), LOPES, L.J., said (21 Q.B.D. at p. 65):

B “The maxim ‘expressio unius, exclusio alterius’, has been pressed upon us. I agree with what is said in the court below by WILLS, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.”

C In my opinion the application of the maxim here would lead to inconsistency and injustice, and would make s. 14 (1) of the Act of 1920 uncertain and capricious in its operation.

E I am by no means clear as to the nature and incidence of the limited right which, according to the landlord's argument, is all a tenant can claim under the section. Is it a purely personal right enforceable only by the tenant himself personally and neither assignable nor liable to vest in his trustee in bankruptcy? Such a right would indeed be a legal curiosity. Or is it to be regarded as carrying all the normal incidence of a debt as regards assignment and so forth so long as the tenant lives, but ceasing to exist on his death? This would be hardly less curious. If the right has all the other characteristics of a debt, why should it be denied the normal incidence of devolution on the legal personal representative of the creditor? I cannot help thinking that if the legislature had intended to give the tenant something less than the full rights of a creditor the section would have been framed so as to include some attempt at a definition of the nature and extent of the limited right which the tenant was to have. I do not think the landlord's argument is advanced by the reference in s. 14 (1), to “the tenant . . . by whom it was paid”. These words, with the reference to “the landlord . . . who received the payment”, serve, in my view, merely to identify the debtor and creditor and not to qualify the obligations or rights of the persons so identified as debtor and creditor respectively. Nor am I impressed by the argument that in general the rights conferred on tenants by the Rent Acts are personal rights, and that accordingly the right conferred by s. 14 (1), should be regarded as personal to the tenant. I accept the distinction drawn by counsel for the plaintiff between rights of possession and financial provisions, which is supported by the case to which he referred on this point of *Carter v. S. U. Car-buretter Co.* (7).

H The argument to the effect that the tenant might prefer not to take proceedings to recover the overpayments and to honour the contract actually made although legally unenforceable, and accordingly that a personal right to recover any over-payments which he alone could exercise or not as he pleased, would be appropriate, seems to me to be offset by the consideration that if the landlord's construction of s. 14 (1) of the Act of 1920 were to prevail the claim of a tenant who did want to recover rent overpaid and duly issued a writ for that purpose would be defeated by his death before judgment. For these reasons I think that on the true construction of s. 14 (1) the plaintiff here should succeed. Even if the plaintiff, contrary to my view, cannot establish his claim by the unaided operation of s. 14 (1), there is, to my mind, no such express exclusion of the personal representative of a tenant as would be required to oust the application in the plaintiff's favour of the provisions of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934. Accordingly, I think this appeal should be allowed.

I MORRIS, L.J. : The questions raised in this appeal are twofold: (a) whether if a tenant of a dwelling-house to which the Rent Acts apply pays rent beyond the permitted rent so that there are sums which he can recover, and if he dies without having had recovery of them, his personal representatives have

(apart from the Law Reform (Miscellaneous Provisions) Act, 1934) a claim which they can assert; and (b) whether in the circumstances stated the Act of 1934 makes possible the assertion of a claim. A

If an amount of overpaid rent is constituted a debt to which the tenant who has overpaid is entitled, then, on general principles, it would be natural to suppose that the personal representatives of a deceased tenant could (subject to any statutory time limitations) recover that which the deceased tenant had the right to recover. B The submission that they are not so entitled depends entirely on a contention that an implication may be deduced from a consideration of the wording of s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

When the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was passed it was provided by s. 1 (1) that: C

“Where the rent of a dwelling-house to which this Act applies . . . has been, since the commencement of the present war, or is hereafter during the continuance of this Act, increased above the standard rent . . . as hereinafter defined, the amount by which the rent . . . payable exceeds the amount which would have been payable had the increase not been made shall, notwithstanding any agreement to the contrary, be irrecoverable.” D

It was, however, not made an offence to receive more than the permitted amount and there was no provision enabling overpaid sums to be recovered. In *Sharp Brothers & Knight v. Chant* (1), it was held in this court that although the Act of 1915 provided that the increase beyond the standard rent was not recoverable by the landlord if the tenant had not paid it yet the tenant, having paid it under a mistake of law, was not entitled to recover it from the landlord in any shape or form. E

In July, 1917, the Courts (Emergency Powers) Act, 1917, was passed, and by s. 5 (1) it was enacted, so far as is now material, as follows:

“Where any sum has, whether before or after the passing of this Act, been paid on account of any rent . . . being a sum which by virtue of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, would have been irrecoverable by the landlord . . . the sum so paid shall at any time within six months after the date of payment, or, in the case of a payment made before the passing of this Act, within six months after the passing thereof, be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant . . . by whom it was paid, and may, without prejudice to any other method of recovery, be deducted by such tenant . . . from any rent . . . payable within such six months by him to such landlord . . .” F G

The language of s. 14 (1) of the Act of 1920 (to which I will later refer) bears close relation to the wording of s. 5 (1) of the Act of 1917. It is said that there is a contrast between the words “be recoverable from the landlord . . . who received the payment or his legal personal representative” and the words “by the tenant . . . by whom it was paid” which point to the conclusion that only recovery by the tenant personally and in his lifetime is permitted. It is said that the omission after the word “tenant” of the words “or his legal personal representative” is pointed and is pregnant with significance. H I The significance is said to be that the legislature must be taken to have given only a limited right of recovery to the tenant, that is, a right which will disappear when the tenant dies. But this is not expressly so enacted, and it would be surprising if the notion of a debt owing to the tenant which ceased to be a recoverable debt on the tenant's death should be introduced not by direct provision, but by way of an inference to be drawn.

A By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, there was a repeal of s. 5 of the Courts (Emergency Powers) Act, 1917, but the provisions of that section were to a considerable extent re-enacted in s. 14 (1) of the Act of 1920. So far as here material the terms of s. 14 (1) are:

B "Where any sum has, whether before or after the passing of this Act, been paid on account of any rent . . . being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord . . . the sum so paid shall be recoverable from the landlord . . . who received the payment or his legal personal representative by the tenant . . . by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant . . . from any rent . . . payable by him to the landlord . . ."

D It was provided by s. 1 of the Act of 1920 that the amount of any rent in excess of that which the Act permitted should "be irrecoverable from the tenant". It may also be noticed that s. 8 of the Act of 1920 (now repealed by and replaced by s. 2 of the Landlord and Tenant (Rent Control) Act, 1949) imposed restrictions on requiring the payment of any fine, premium or other like sum or the giving of any pecuniary consideration in addition to the rent; and, subject to the provisions of the section, the amount or value of any such payment or consideration was made "recoverable by the person by whom it was made or given".

E It will be seen that s. 14 (1) of the Act of 1920 did not specify any time limits for the recovery of sums paid in excess of the permitted amounts. By s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, it was provided:

F "Any sum paid by a tenant . . . which, under s. 14 (1) of the [Act of 1920] is recoverable by the tenant . . . shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

The period of six months was extended to two years by s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, which provides:

G "The period fixed by s. 8 (2) of the Act of 1923 for the recovery by a tenant . . . of certain over-payments is hereby extended, in relation to payments made not earlier than six months before the passing of this Act, to two years from the date of payment."

H In the case now under consideration there was an agreement in writing creating a contractual tenancy for a term of seven years from Dec. 25, 1947. The agreed rent considerably exceeded the recoverable rent. On May 9, 1949, Agnes Bligh became the assignee of the remainder of the term and thereafter paid the agreed rent. She died on Jan. 17, 1954. It seems clear that on Jan. 16, 1954, she had a statutory right to recover the excess amounts that she had paid in the previous two years. It is said that the obligation of the landlord to repay the excess amounts received became extinguished on the death of the deceased. No claim was in fact made until Jan. 12, 1955, by which date some part of what the deceased could in her lifetime have recovered had in any event become irrecoverable. As the right to recover overpayments of rent is statutory, the question as to the extent of the right which is given must depend on a construction of the words used by the legislature. Since the provisions of s. 14 of the Act of 1920 considerably follow and re-enact the provisions of s. 5 of the Courts (Emergency Powers) Act, 1917, it is perhaps appropriate more particularly to consider that section. The matter must, however, be looked at against the

background of the general law. If A owes a debt to B it does not become extinguished on the death of B. Nor does A's liability to B cease on the death of A. If the legislature is creating a new statutory liability as between A and B it might be necessary to provide for the situations where either A or B had died before the legislation was passed. If it is provided that there is to be a liability in A or his personal representative to pay to B it would normally follow that a right once possessed by B to receive money would pass on B's death to his personal representative. If B is given a right to receive money it would require clear language to enact that B's right is to cease unless it is satisfied before his death. The general rule is thus stated in *WILLIAMS ON EXECUTORS* (13th Edn., vol. 1, p. 347):

"With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the general rule has been established from the earliest times, that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator."

In *COMYNS' DIGEST—Administration* (B.13)—it is said:

"An executor or administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his testator or intestate."

Again in *WILLIAMS* (p. 348) it is said:

"Thus an executor or administrator may recover debts of every description due to the deceased, either debts of record as judgments, or recognizances, or debts due on special contracts, as for rent, or arrears of a rent-charge; or on bonds and covenants under seal; or debts on simple contracts and promises not in writing, either express or implied."

It was enacted, reproducing earlier legislation, by the *Administration of Estates Act, 1925*, s. 26 (1), that:

"For any debt (including arrears of rent) due to a deceased person . . . his personal representative shall have the same right of action as the deceased would have had if alive."

That sub-section ceased to have effect on the passing of the *Law Reform (Miscellaneous Provisions) Act, 1934*.

When considered against the background of the general law, it seems to me that the mere fact of the inclusion of the words "or his legal personal representative" after the word "landlord" and their omission after the word "tenant" forms inadequate and insufficient reason for deciding that the legislature intended to give to a tenant a right of recovery not possessing the ordinary incidence of such a right, but one that should expire with him and (as seems to be implicit in the defendant's submissions) one that could not avail for the benefit of an assignee or of creditors in the event of a bankruptcy. When in July, 1917, the *Courts (Emergency Powers) Act, 1917*, was passed it may be that consideration was given to the situations where either a landlord who had received overpayments or a tenant who had overpaid had died before the Act was passed. In the case of such a landlord he would not (apart from what was enacted) have been under legal liability. In the case of such a tenant he would not have died possessed of any right to recover. It may be that it was decided to make liable the estate of a landlord who had died before the passing of the Act without giving to the estate of a tenant who had died before the passing of the Act a right of which he did not die possessed. But whether this is, or is not, the explanation of the wording of the Act of 1917, it seems to me that very different wording would have been adopted if there had been the intention to create for the benefit

A of a tenant a debt or a right to recover a sum of money to which was attached the somewhat novel feature that the death of the creditor should destroy it. But it was submitted on behalf of the defendant landlord that if a tenant presented a valid claim for the return of overpaid sums and not having received payment started an action to recover such sums, and then died before the case was heard, the sums ceased to be due.

B The maxim "expressio unius exclusio alterius" was relied on. In considering the application of this maxim it is desirable to have in mind the warnings expressed by WILLS, J., and by LOPES, L.J., in *Colquhoun v. Brooks* (6). WILLS, J., said (19 Q.B.D. at p. 406):

C "I may observe that the method of construction summarised in the maxim 'Expressio unius exclusio alterius' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind; and the application of this and every other technical rule of construction varies so much under differing circumstances, and is open to so many qualifications and exceptions, that it is rarely that such rules help one to arrive at what is meant. Certainly in the present case the only use of the maxim in question is to summarise in four words the argument upon this point for the Crown."

D LOPES, L.J. (21 Q.B.D. at p. 65) in the Court of Appeal referred to the maxim as often being "a valuable servant, but a dangerous master". Doubtless there are instances where matters expressly mentioned may be regarded as comprehensive, complete and all-inclusive; but I fail to see that the maxim can be applied to the provisions in the 1917 and 1920 enactments. Decisions of policy might account for the provisions enacted. Furthermore, if the maxim is being considered, I should have thought that it ought to be considered separately in regard to the landlord's position and in regard to the tenant's position. A provision that a sum shall be recoverable "by the tenant . . . by whom it was paid" does not in relation to the tenant set out any express words which by their mention must exclude other words not mentioned. I have considered with every respect the opinions expressed in the cases of *Twomey v. Cronin* (2) and *Minto v. Cahill* (3), but for the reasons which I have set out, I consider that the right of recovery given by s. 14 (1) of the Act of 1920 to a tenant who has overpaid is a right that can devolve to his personal representatives.

G On this view the personal representatives of a tenant who had an unsatisfied right to recover overpaid rent would not need to have recourse to the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The opening words of s. 1 (1) of that Act are, however, if they had to be relied on, amply wide enough to cover the claims now being considered. The argument for the defendant in regard to this Act, presented on the assumption that s. 14 (1) of the Act of 1920 gave a limited right to a tenant only during his lifetime, was based on an application of the maxim "Generalia specialibus non derogant". Reliance was placed on *Blackpool Corpn. v. Starr Estate Co.* (8). VISCOUNT HALDANE in his speech said ([1922] 1 A.C. at p. 34):

H "My Lords, in that state of matters we are bound, in construing the general language of the [Acquisition of Land (Assessment of Compensation) Act, 1919], to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature

had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest ”;

and VISCOUNT CAVE in his speech said (*ibid.*, at p. 38):

“ But even if it were otherwise, and if it could be said that the land was ‘ authorised to be acquired compulsorily ’, it would still, in my opinion, stand outside the Act of 1919. The rule is clear that a general statute will not, in the absence of clear words, be construed as derogating from special provisions in a previous statute. *Generalia specialibus non derogant*, and when the legislature has given its attention to a particular subject and made provision for it, the presumption is that a subsequent and general enactment is not intended to interfere with the special provision unless the intention so to do is clearly manifested (see the rule as stated by LORD HOBHOUSE in *Barker v. Edger* (9)). ”

The Blackpool Improvement Act, 1917, had enacted for the benefit and protection of a certain company, as owners of certain land, what provisions were to be applicable when the owners sold the land to the corporation. It was held that in the dealings between the owners and the corporation the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, did not apply for the reason that the Act of 1917 had specified which provisions were to apply. But that was a very different case from the present one. There had in that case been a specific and individual bargain. In my view the Act of 1934 enumerated its own exceptions and, at a date when the provisions of rent restriction legislation were much in operation, it contained no words which would prevent the application of the Act to a cause of action possessed by a tenant for the recovery of rent which he had paid over and above what was properly due. I therefore consider that the appeal should be allowed.

Appeal allowed.

Solicitors: *Randolph & Dean* (for the plaintiff); *Pettiver & Pearkes* (for the defendant).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

A **MACPHERSON TRAIN & CO., LTD. v. HOWARD ROSS & CO., LTD.**

[QUEEN'S BENCH DIVISION (McNair, J.), April 27, 1955.]

Sale of Goods—Description—Contract containing clause, "Shipment and destination: Afloat per s.s. Morton Bay due London approximately June 8."—Condition of contract.

B By a contract contained in a letter written by the sellers to the buyers on June 1, 1954, and confirmed by the buyers in a memorandum received by the sellers on June 4, 1954, the sellers agreed to sell to the buyers 5,064 cases of cans of Australian quick frozen peaches. The contract contained a clause, "Shipment and destination: Afloat per s.s. Morton Bay due London approximately June 8," and it was provided that 1,250 cases should be delivered immediately on arrival and the balance in equal quantities at intervals of seven days. The owners of the Morton Bay, in their published itinerary dated Mar. 3, 1954, had said that the ship would arrive in London on June 8, 1954, but in their published itinerary dated May 31, 1954, they stated that the ship was due in London on June 19. C The Morton Bay was not reported in London until June 21, and, owing to certain difficulties with the Customs authorities, the goods were not available for delivery until after July 19. The buyers refused to take delivery, and claimed that the words "Afloat per s.s. Morton Bay due London approximately June 8" formed a condition of the contract in the sense that they were part of the description of the goods, and that, accordingly, the sellers were in breach of contract. The sellers claimed that the words merely identified the ship and the voyage on which the goods were being imported and that June 8 was not intended to be a delivery date. D E

Held: the whole of the phrase "Afloat per s.s. Morton Bay due London approximately June 8" was part of the description of the goods, and the words "due approximately June 8" made it a condition of the contract that the goods should be shipped on a ship of which it could truly be said, at the date of the contract, that she was due to arrive on, approximately, June 8, 1954; and on the facts, having regard also to the shipowners' itinerary which was published on the day before the date of the contract and stated that the ship was due in London on June 19, it was shown that the sellers were in breach of a condition of the contract and the buyers were entitled to reject the goods. F G

[As to stipulations as to time, see 8 HALSBURY'S LAWS (3rd Edn.) 164, para. 280, and 29 HALSBURY'S LAWS (2nd Edn.) 56, para. 69; and for cases on the subject, see 39 DIGEST 422, 423, 547-553, and 425-427, 561-570.]

Cases referred to:

- H (1) *Hartley v. Hymans*, [1920] 3 K.B. 475; 90 L.J.K.B. 14; 124 L.T. 31; 12 Digest (Repl.) 402, 3112.
(2) *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 All E.R. 420; [1950] 1 K.B. 616; 2nd Digest Supp.

Special Case.

I This was a Special Case stated, at the request of both parties, by an umpire in an arbitration in a dispute arising out of a contract between the sellers, MacPherson Train & Co., Ltd., and the buyers, Howard Ross & Co., Ltd.

By an offer contained in a letter, dated June 1, 1954, from the sellers to the buyers, and accepted and confirmed by the buyers in a memorandum received by the sellers on June 4, 1954, the sellers agreed to sell to the buyers 5,064 cases of cans of "Chelsea" brand Australian quick frozen sliced peaches in syrup at the price of "1s. 7½d. per pound ex Chambers' Cold Store, London. Twenty-eight days free rent from date of arrival." The contract also contained the following clauses:

"Shipment and destination: Afloat per s.s. Morton Bay due London approximately June 8. Delivery: To be effected to buyers as follows: 1,250 cases immediately on arrival. Balance in equal quantities at intervals of seven days. Performance of contract: Non-performance of this contract by the sellers to be excused in the case of force majeure and government intervention and/or control. In the event of any of the above-mentioned contingencies arising sellers may at their option cancel or postpone this contract . . ."

There was also an arbitration clause. A dispute having arisen between the parties as to the construction and effect of the clauses of the contract relating to shipment and destination and to delivery, the parties appointed their arbitrators who, being unable to agree, appointed an umpire. The following facts were found by the umpire.

The owners of the Morton Bay, in their published itinerary dated Mar. 3, 1954, stated that the due date of arrival of the ship in London was June 8, 1954; in the itinerary dated May 14 the ship was stated to be due in London on June 18, and in the itinerary dated May 31, 1954, it was stated to be due in London on June 19. The ship was reported in London on June 21, 1954. The Customs entry was dated June 23, and the goods were unloaded and conveyed in insulated craft to Chambers' Cold Store between June 24 and June 30. By a letter dated July 7, 1954, the sellers were informed by their agents that the Customs authorities had placed a "stop" on the goods. The buyers had contracted to re-sell the goods at a profit to themselves of £839 13s. 6d. On July 8, 1954, they wrote to the sellers saying:

"We purchased this consignment with the understanding that the goods would arrive on June 8 and anticipated weekly deliveries starting about the middle of June for approximately four weeks. It is now one month since the date of arrival of the steamer mentioned in your contract and we have not had delivery of any of the contracted goods. We would like to inform you that we expect difficulties with our buyers as they will not be able to use the full quantity before the new supply of fresh or canned peaches is available. Will you please tell us whether you will agree to a reduction of the quantity should we have this request of reducing the quantity put to us by our buyers."

By a letter dated July 9, the sellers replied regretting the delay in delivery and offering to supply the buyers in the meantime with an initial quantity from stocks which were available, to be later deducted from the Morton Bay shipment. This letter was not acknowledged by the buyers. By a letter dated July 17 the sellers' agents informed the sellers that the "stop" placed on the goods by the Customs authorities had been removed. The sellers, on receiving this advice on July 19, made out a delivery order in favour of the buyers for 1,250 of the cases and, on July 21, invoiced these to the buyers at the contract price. By a letter dated July 20, received by the sellers on July 22, the buyers, referring to their letter of July 8, said that their customers now found it practically impossible to utilise the goods in view of the lateness of delivery, and, after explaining why it was impossible to use the goods, they said, in conclusion, that they were "prepared to try, without prejudice, to see if the first instalment, at least, could not be taken up." The sellers insisted that the buyers should take up the goods in accordance with the contract, on the ground that the delay was entirely beyond their control. The buyers, in a letter dated July 28, returned the invoice for 1,250 cases, and, in a letter dated Aug. 24, they claimed that the sellers "failed to conform to the delivery term of the contract."

The umpire made certain alternative awards depending on the decision of the court on the questions of law involved, and, in the event of the Special Case not coming before the High Court, he made his award in favour of the buyers.

A *Dorothy Dix* for the sellers.
F. Hallis for the buyers.

McNAIR, J., stated the facts, and said: It is not very clear what are the precise questions of law which are submitted, but both the buyers and the sellers requested that the award should be so stated as to raise the question of law whether on the true construction of the contract the buyers were entitled to reject the goods tendered. One of the contentions put forward by the buyers in support of their case was that it was a condition of the contract that the goods were afloat per s.s. Morton Bay due approximately June 8. On the other hand, the sellers, on that point, contended that the goods sold were, under the express terms of the contract, described as "Afloat per s.s. Morton Bay due London approximately June 8"; that these words identified the ship and the voyage on which the goods were being imported and that June 8 was not, and was not intended to be, a delivery date. It seems to me that the first question which arises on this award is whether or not this court takes the view that the words "due London approximately June 8" were merely words which, as the sellers contend, identified the ship and the voyage on which the goods were being imported, or whether, as the buyers contend, they formed a condition of the contract in the sense that they were, in effect, part of the description of the goods. It is quite plain, in my opinion, that the words must be taken as part of the description of the goods as soon as it is admitted, as it was properly admitted, that the words "afloat per s.s. Morton Bay" are part of the description of the goods. Once it is admitted, as it must be admitted, that, if the goods had not been shipped by the Morton Bay but by some other ship, a fundamental term of the contract would have been broken, it follows necessarily that the whole of that phrase is also part of a description of the goods, and there is good commercial sense in that, inasmuch as a description of the goods as being "afloat per s.s. Morton Bay due London approximately June 8" does give the buyers, not an absolute guarantee of arrival on June 8, but at least some indication of the date on which the goods may be expected to be in London.

Another form of description which has come before the court in other well-known cases* is a description of the goods as being shipped or to be shipped on a certain ship "expected ready to load on" a certain date. There is no doubt at all that in a contract containing such a phrase those words "expected ready to load" are part of the description and are not merely an identification of the voyage on which the ship was. I feel no difficulty in holding that the words "due London approximately June 8" made it a condition of the contract that the goods should be shipped on a ship of which it could truly be said at the date of the contract that she was due to arrive on approximately June 8, 1954; and, having regard to the umpire's finding that in the shipowners' published itinerary dated May 31, 1954 (that is, the day before the contract), the ship was stated to be due in London on June 19, it is also clear that that condition was broken, with the result that, if the matter remained there, the buyers, when goods were tendered to them which did not correspond with that description, were entitled to reject them.

It was contended, however, by counsel for the sellers (although it is not clear that this matter was raised by the award) that the buyers had put it out of their power now to take that point because by their letter of July 8, 1954, in particular, and, to a lesser extent, by their letter of July 20, the buyers had kept the contract alive, and, accordingly, had put it out of their power to say that a tender of goods by this particular ship would not be a good delivery. It seems to me that it is quite impossible to treat the letter of July 8, on which counsel strongly relied, as bringing the case anywhere near the reach of such authorities as *Hartley v. Hymans* (1) or *Charles Rickards, Ltd. v. Oppenheim* (2), because there

* See *Sanday & Co. v. Keighley, Maxted & Co.* (1922), 91 L.J.K.B. 624; 127 L.T. 327; 41 Digest 328, 1845.

is nothing in that letter, in my judgment, which shows that the buyers were attempting to keep the contract alive. Still less is there anything to show that the sellers, in reliance on that letter or on the letter of July 20, had altered their position in any way—which was an essential part of the findings in the two cases which I have mentioned. The letter of July 8 seems to me merely to give the sellers advance notice that, when they come to make their delivery by tendering a delivery order for the goods, there is a serious risk that the buyers will be compelled to object, and to suggest a method by which that risk may be reduced. The letter is in no sense, in my judgment, capable of being construed as an affirmation of the contract or as an attempt to keep the contract alive: still less can those results be properly deduced as a matter of construction from the letter of July 20, in which serious complaints are made about the lateness of the delivery order, and, at most, there is a “without prejudice” suggestion that the buyers may succeed in getting their sub-buyers to take up the first consignment.

In my judgment the sellers are wrong on those two points, and, accordingly, it becomes unnecessary for me to decide whether they are right in their submission that the “stop” placed on the goods by the Customs brought the sellers within the protection of a clause in the contract which provides: “Non-performance of this contract by the sellers to be excused in the case of force majeure and government intervention and/or control”. I express no view on that because it seems to me that the sellers were in breach in tendering goods which did not comply with the condition of the contract, inasmuch as they tendered the goods by the Morton Bay, which, at the date of the contract, was wrongly described as being due on approximately June 8. That being the conclusion at which I have arrived on the questions of law submitted by the Case, it follows that the award stated by the umpire in para. 12 (2) of the Case takes effect, namely, that, the court having decided that the buyers are entitled to treat the contract as wholly broken by the sellers, the umpire awards that the sellers pay the buyers the sum of £839 13s. 6d., which is the umpire’s estimate “of the loss directly and naturally resulting from the sellers’ breach of contract”.

Order accordingly.

Solicitors: *Holt, Beever & Kinsey*, agents for *S. Thornhill Tracey*, Steyning, Sussex (for the sellers); *Tarlo, Lyons & Co.* (for the buyers).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

A

CARPENTER v. CARPENTER (HOLDEN intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), May 4, 5, 6, 1955.]

B

Divorce—Cruelty—Deception of wife by husband—Association with another woman without intent to injure wife—Desertion by husband—Discovery of true facts after husband's disappearance—Aggravation of shock to wife—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (c).

C

The wife met the husband in 1949 and he told her that all his family had been killed during the war, that he was an orphan, and that because he was in the army he had not found time to get married. They were married in July, 1950. The husband described himself in the marriage register as a bachelor, and the best man was one J.D., his business partner. The parties lived together happily. On June 9, 1953, the husband told the wife that he was going away on business but would be back in time to start their holiday on June 11, 1953. The husband did not return as promised and the wife became anxious and began to make inquiries of J.D., amongst other people. She then discovered that the husband had been twice married, the first marriage having been dissolved on the ground of his cruelty, and the second on the ground of his adultery with E.C.; that on Aug. 21, 1950, E.C. had obtained against a man who was, by inference, the husband, an affiliation order in respect of a child born to her on Oct. 8, 1949; that his mother, brother and sister were still alive and that his father had only recently died; and that since November, 1952, the husband had been associating with the intervener, having become engaged to be married to her in December, 1952, that he took a lease of a flat where they would live after their "marriage", and that he induced her to visit Jersey with him to arrange for their wedding to take place there on June 13, 1953. The intervener had not seen the husband after June 7. The discovery of these facts seriously injured the wife's health. On Oct. 8, 1953, the husband put a note under the door of the matrimonial home and sought to be received back by the wife; she refused and he had not been seen or heard of again.

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On a petition by the wife for a divorce on the ground of the husband's cruelty,

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Held: neither the deception of the wife by the husband's fraudulent statements (since they were made before the marriage), nor the husband's association with the intervener (since it was carried on by him for his own gratification and not with intent to injure the wife (*Cox v. Cox* ([1952] 2 T.L.R. 141) applied), nor the husband's desertion in June, 1953 (since desertion was a separate ground for divorce when of sufficient duration), amounted of itself to cruelty; nevertheless where, as in the present case, deception was followed by a suspicious association and by complete disappearance of the husband, with the natural consequence that the shock to the wife would be gravely aggravated by the manner in which the previous deception would come to her knowledge, the husband's conduct amounted to cruelty, and, accordingly, the wife was entitled to a decree.

I

[As to single acts accumulatively amounting to cruelty, see 10 HALSBURY'S LAWS (2nd Edn.) 650, para. 955; and for cases on the subject, see 27 DIGEST (Repl.) 297, 298, 2423-2433.

For the Matrimonial Causes Act, 1950, s. 1 (1) (c), see 29 HALSBURY'S STATUTES (2nd Edn.) 389.]

Cases referred to:

- (1) *Eastland v. Eastland*, [1954] 3 All E.R. 159; [1954] P. 403.
- (2) *Westall v. Westall*, (1949), 65 T.L.R. 337; 27 Digest (Repl.) 296, 2416.
- (3) *Cox v. Cox*, [1952] 2 T.L.R. 141; 3rd Digest Supp.
- (4) *Warburton v. Warburton*, (1953), *The Times*, July 7.

- (5) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; A 27 Digest (Repl.) 299, 2447.
- (6) *Cackett (otherwise Trice) v. Cackett*, [1950] 1 All E.R. 677; [1950] P. 253; 27 Digest (Repl.) 281, 2259.

Petition for divorce.

The parties met in 1949, the wife being then twenty and the husband thirty years of age. The husband told the wife that all his family had been killed during the war, that he was an orphan and that because he was in the army he had not found time to get married. Three months later they became engaged, and on July 22, 1950, they were married. The husband described himself as a bachelor in the marriage register. The best man was one J.D. the husband's business partner. The marriage was happy until June, 1953. It was arranged that on June 11, 1953, the parties would leave for a holiday at Lucerne. On June 9, 1953, the husband left home saying that he was going to Bradford on business and would return in time for the holiday. The husband did not return as promised. The wife became extremely anxious and sought information from J.D., and from the police with whom she registered the husband as missing. As a result of these and other inquiries the wife discovered on June 14, 1953, and subsequently, the following facts: On Sept. 6, 1939, the husband married in Middlesex one I.C. by whom he had two children, one born in February, 1941, the other born in June, 1942. On May 12, 1944, LORD MERRIMAN, P., granted a decree nisi dissolving that marriage on the ground of the husband's cruelty. On Apr. 13, 1946, the husband married in India one E.V. by whom he had one child born in February, 1947. On Apr. 21, 1950, His Honour JUDGE DONE granted a decree nisi dissolving that marriage on the ground of the husband's adultery with E.C. On Aug. 21, 1950, E.C. obtained an affiliation order against a man who, by inference, was the husband, in respect of a child born to her on Oct. 8, 1949. The wife also discovered that the husband's father had died after and not during the war, and that his mother, brother and sister were still alive; and that in December, 1952, the husband had become engaged to be married to the intervener without the wife's knowledge. The husband had in January, 1953, taken a lease of a flat where the intervener thought she and the husband were to live after their marriage; had induced the intervener to go with him to Jersey in May, 1953, to arrange for their marriage to take place there on June 13, 1953; and had lunched with the intervener and her parents on June 7, 1953. The intervener never saw the husband again after June 7, 1953. The discovery of these facts gravely injured the wife's health.

On Oct. 8, 1953, the husband put a note under the door of the matrimonial home. By that and by some telephone conversations and by a further note the husband sought to be received back by the wife, but she refused. The husband had not been seen or heard of again. The wife now petitioned for a divorce on the grounds of the husband's cruelty and of his adultery with the intervener.

Anthony Harmsworth for the wife.

A. R. Ellis for the intervener.

The husband did not appear.

SACHS, J., stated the facts and continued: From the facts which I have mentioned certain matters become abundantly clear. First, the husband is shown to be a congenitally amoral philanderer and an accomplished and plausible liar. Secondly, he is shown to be a menace to the happiness of any young woman with whom he associates and has, indeed, ruined the happiness of five women so far. Thirdly, it is clear that what he did to the wife in the present proceedings caused her to suffer grievously and everyone must have sympathy with her sufferings. Those facts, however, do not necessarily solve of themselves the question whether the husband has, to use the precise words of the Matrimonial Causes Act, 1950, s. 1 (1) (c)

A "since the celebration of the marriage treated the petitioner with cruelty."

I have had to bear in mind the passage in SIR WILLIAM SCOTT'S judgment* (1 Hag. Con. at p. 38) quoted by KARMINSKI, J., in *Eastland v. Eastland* (1) ([1954] 3 All E.R. at p. 164), that though much misery is produced the courts do not pretend to "furnish cures for all the miseries of human life," and the courts must of course be careful not to substitute a different ground for divorce for those provided by the legislature. The Court of Appeal in recent cases, *Westall v. Westall* (2), *Cox v. Cox* (3) and *Warburton v. Warburton* (4), have underlined the fact that the mere incidence of severe results to the wife following on acts of the husband do not of themselves necessarily constitute cruelty. In those circumstances it seems right to examine the components of what in the aggregate is charged as cruelty. The first is the deception of the wife by the husband's fraudulent statements before the marriage. The second the subsequent association with the intervener of the nature described and kept secret from the wife till June 14, 1953. The third, his desertion in June, 1953, by his complete disappearance. These must be regarded in conjunction with the fact that until June, 1953, he had undoubtedly treated the wife unexceptionably well.

D Considering each component on its own, it is obvious that pre-marriage fraud when revealed will often, whether it relates to sexual or to criminal or to other matters, inevitably result in pain and may thus impair the health of the spouse deceived. Assuming that the revelations be accidental or done in the way which a spouse hopes will be least hurtful to the wife, the realities of the case must be that the injury then flows from the pre-marriage deception. Thus the matter does not come within s. 1 (1) (c) as being treatment "since the celebration of the marriage". So one finds that fraud before marriage cannot of itself (and I underline the words, "of itself") be cruelty within the above sub-section. Further, as regards the continuation of the deception after the marriage, one is faced with the fact that the more successful the continuance of the deception the less the chance of injury to the wife.

F Then comes the association with the intervener. Since *Cox v. Cox* (3), it appears that the philanderer who associates with other women for his own gratification but to an extent that does not include adultery comes in one respect within the same class as the drunkard and the burglar. In each case, the association, the drunkenness and the crime, is not of itself, without other acts, cruelty unless the association, the drunkenness or the crime, is done with intention to injure the wife—and that although each of these things may cause grave distress and resultant ill health to the wife. In the present case the clear inference to be drawn from the facts is that the association of the husband with the intervener was carried on by him for his own gratification and not with intent to injure the wife. Then one comes to desertion. The remedy for desertion is laid down by s. 1 (1) (b) of the Matrimonial Causes Act, 1950. Desertion, of course, often creates great distress and always does so if the wife was and remained in love with her husband. Here again counsel for the wife conceded very properly that desertion was not of itself cruelty. Indeed, otherwise it would be only too easy to stultify the intention of the legislature that there must be three years' desertion in order that a petition for divorce may be properly grounded. I emphasise desertion of itself lest I be construed as saying that the act which constitutes desertion could never become an ingredient and a charge of cruelty, as for instance where the desertion took place just when the deserted spouse was critically ill.

It is because no one of these three components of itself constitutes cruelty that the case caused me considerable concern. At one time I was much inclined to the view that the present was a case in which the court could not be asked to add three components, each in effect equalling nought, and to find that taken

* In *Evans v. Evans*, (1790), 1 Hag. Con. 35; 161 E.R. 466.

together they constituted cruelty. Counsel for the wife very properly invited A me to examine certain particular aspects of the present case and especially he asked me to examine the matter on the footing that the present was a case of deception followed by a suspicious association, followed by complete disappearance of the husband, followed by a shock that was gravely aggravated on the particular facts by the way in which the husband had conducted himself. I have already said deception before marriage cannot of itself be cruelty nor, if B accident reveals it or if the husband makes a careful revelation in what he considers to be the best interests of the marriage, would one normally at any rate expect it to constitute cruelty. But if a man so deceives his wife before the marriage that he, as in the present case, must know that the revelation of the truth would have a great and perhaps disastrous shock on her, then he must at least be under a duty, having himself created the situation, not to aggravate C that shock. If his revelation for instance were by some unfeeling remark or some coarse jest that would be bound to create an aggravated shock and I do not think anyone would doubt that such conduct would constitute cruelty in the sense that it would be a cruel thing to do—using that word “cruel” in the way it was referred to in the extracts quoted by LORD MERRIMAN, P., in *Simpson v. Simpson* (5) ([1951] 1 All E.R. at p. 957), and as HODSON, J., referred to it in *Cackett (otherwise Trice) v. Cackett* (6) ([1950] 1 All E.R. at p. 680), that is to say D in its ordinary connotation and ordinary acceptance in the English language.

In the present case the husband did create by his deception a position in which he had at least a duty to use every effort to see that the ill consequences of that deception being discovered were not aggravated. By his deliberate acts he associates with and engages himself to the intervener and then disappears without E a word of explanation with the inevitable result that both the wife and the intervener will both go and make inquiries at his business address. Both would, in the natural course of events, come into contact with J.D.—who knew the second wife, knew the present wife, and would come to know the intervener and of her purported engagement. It was thus clear that his disappearance (and I think in the circumstances one could properly say his cruel disappearance) F from the wife's life would assuredly result in the shock of the discovery of his previous deceptions being aggravated to the maximum extent by the manner in which they would come to light. The inevitable result duly happened, and to my mind that aggravation was clearly a natural and probable consequence of an act of the husband's own volition. Again to paraphrase words which KARMINSKI, J., has quoted ([1954] 3 All E.R. at p. 163) in *Eastland v. Eastland* (1), G I think with approval, it is not a question in such a case whether the husband had an intention of being cruel but whether his intentional acts amounted to cruelty. Thus to aggravate the shock was to my mind something which I think any right minded jury could, and would, call cruel, and I so find it and accordingly find cruelty proved.

[HIS LORDSHIP considered the issue of adultery and found that there had been H no adultery between the husband and the intervener, and continued:] The result accordingly is that I grant a decree to the wife on the ground of cruelty, and dismiss the intervener from the suit.

Decree nisi.

Solicitors: *Gordon, Dadds & Co.* (for the wife); *Pettiver & Pearkes* (for the intervener).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A MERRICKS v. HEATHCOAT-AMORY AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), April 29, May 3, 1955.]

Crown—Relief against Crown—Injunction sought against Minister—Capacity of Minister in performing certain functions prescribed by statute—Whether acting as representative of Crown—Crown Proceedings Act, 1947 (10 & 11 Geo. 6 c. 44), s. 21.

Pursuant to the powers conferred by the Agricultural Marketing Act, 1931, s. 1, a draft scheme for the marketing of potatoes was approved by the Minister of Agriculture and Fisheries in July, 1954. On Apr. 6, 1955, the Minister, in accordance with the provisions of s. 1 (8), laid the draft scheme before each House of Parliament for its approval. In an action begun on Apr. 29, 1955, the plaintiff moved for a mandatory injunction against the Minister restraining him from seeking approval of the scheme by either House of Parliament on the ground that it was in parts ultra vires the powers conferred by the Act.

Held: in carrying out his functions under the Agricultural Marketing Act, 1931, s. 1, the Minister was acting as an officer representing the Crown, and as, by virtue of the provisions of the Crown Proceedings Act, 1947, s. 21, the court could not grant an injunction against the Crown, the motion would be dismissed.

Harper v. Secretary of State for the Home Department ([1955] 1 All E.R. 331) considered.

[For the Agricultural Marketing Act, 1931, s. 1, see 1 HALSBURY'S STATUTES (2nd Edn.) 235-238; and for the Crown Proceedings Act, 1947, s. 21, see 6 HALSBURY'S STATUTES (2nd Edn.) 61.]

Case referred to:

(1) *Harper v. Secretary of State for the Home Department*, [1955] 1 All E.R. 331.

Motion.

The plaintiff, Jack Simmons Merricks, moved for an injunction that the defendants, the Minister of Agriculture, Fisheries and Food* and the Right Hon. Derek Heathcoat-Amory and each of them might (1) be ordered to withdraw the draft of a scheme entitled "Scheme under the Agricultural Marketing Acts, 1931 to 1949, regulating the marketing of potatoes" and laid before each House of Parliament on Apr. 6, 1955, by the first defendant purporting to act in his capacity as Minister of Agriculture, Fisheries and Food, from each House of Parliament; (2) be restrained from seeking approval of the said scheme by either House of Parliament and from making an order under s. 1 (8) of the Agricultural Marketing Act, 1931, approving the said scheme.

The facts appear in the judgment.

Derek Walker-Smith, Q.C., and Ian Percival for the plaintiff.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), and W. F. Waite for the defendants.

UPJOHN, J.: This is a motion by the plaintiff, Jack Simmons Merricks, against the Right Honourable Derek Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food, seeking to restrain him from carrying out certain functions (to use a neutral expression) which are cast on him by the Agricultural Marketing Act, 1931.

It is necessary to refer only to the first section of that Act. Section 1 (1) is in these terms:

"A scheme regulating the marketing of an agricultural product by the producers thereof may be submitted to the Minister in accordance with

* The style of the Minister was changed to Minister of Agriculture, Fisheries and Food by the Transfer of Functions (Ministry of Food) Order, 1955 (S.I. 1955 No. 554).

Part 1 of Sch. 1 to this Act, and the Minister may, subject to the provisions of this section, approve the scheme." A

Sub-section (3) says that before approving a proposed scheme, the Minister shall cause it to be published. Sub-section (4) provides:

"Every objection must be sent to the Minister in writing and must state the grounds of objection and the specific modifications required." B

Sub-section (5):

"The Minister, after considering any scheme duly submitted to him and any objections and representations duly made with respect thereto and after holding such inquiries (if any) as he thinks fit, may make such modifications in the scheme as he thinks proper . . ." C

Sub-section (6):

"Any inquiry under this section shall be held in accordance with rules made by the Minister for the purpose by a competent and impartial person appointed by the Minister, and those rules may contain provisions as to the costs of the inquiry, and such expenses of any such inquiry as may be incurred by the Minister with the approval of the Treasury shall be defrayed out of moneys provided by Parliament." D

Sub-section (8)* is the important sub-section and is in these terms:

"If the Minister, after making such modifications (if any) as aforesaid, is satisfied that the scheme will conduce to the more efficient production and marketing of the regulated product, he may lay before each House of Parliament a draft of the scheme, and if each House resolves that the scheme shall be approved, the Minister shall make an order approving the scheme in terms of the draft, and the scheme shall (subject to the provisions of this Act) come into force on such date after the date of the passing of the last of such resolutions of approval as may be specified in the order, and the making of the order shall be conclusive evidence that the requirements of this Act have been complied with and that the order and the scheme approved thereby have been duly made and approved and are within the powers conferred by this Act." E F

Sub-section (9) deals with the position where there is a substitutional scheme.

Pursuant to the powers conferred by that Act, a potato marketing scheme was prepared and received the approval of both Houses; an order was made bringing the scheme into force on Dec. 20, 1933, and a board, the Potato Marketing Board, was thereby constituted to administer the scheme. Recently the board were minded to propound a substitutional scheme to which the provisions of s. 1 would be applicable. The substitutional scheme was propounded in July, 1954, and objection was taken by a number of persons. The Minister duly appointed a competent and impartial person, Mr. Arthur Capewell, who held an inquiry which concluded on Jan. 12, 1955. He duly made his report to the Minister who approved the draft scheme and laid it, as provided by sub-s. (8), before each House of Parliament on Apr. 6, 1955. G H

The action, the writ in which was issued as recently as Apr. 29, 1955, seeks to restrain the Minister from proceeding with the matter. The defendants are Mr. Heathcoat-Amory and the Minister, who is, in fact, Mr. Heathcoat-Amory, sued as a corporation sole constituted under the Act of 1919† which set up the Ministry. The notice of motion asks: I

* The sub-section is printed as amended by s. 14 and s. 20 of the Agricultural Marketing Act, 1949, 28 HALSBURY'S STATUTES (2nd Edn.) 130, 135.

† I.e., the Ministry of Agriculture and Fisheries Act, 1919, which established the Minister as the successor to the Board of Agriculture and Fisheries; see 7 HALSBURY'S LAWS (3rd Edn.) 398.

A "that the defendants and each of them may

" 1. Be ordered to withdraw the draft of a scheme entitled ' Scheme under the Agricultural Marketing Acts, 1931 to 1949, regulating the marketing of potatoes ' and laid before each House of Parliament on Apr. 6, 1955, by the first defendant purporting to act in his capacity as Minister of Agriculture, Fisheries and Food, from each House of Parliament

B " 2. Be restrained from seeking approval of the said scheme by either House of Parliament and from making an order under s. 1 (8) of the Agricultural Marketing Act, 1931, approving the said scheme."

The ground on which the plaintiff seeks that order is that the draft scheme now before the Houses of Parliament is in certain parts ultra vires the powers conferred by the Act of 1931. He submits that whereas the Act is an Act to control the marketing of agricultural produce, the scheme seeks to control not the marketing but the actual production of potatoes by imposing on registered producers a heavy monetary sanction if they have any excess over a certain acreage under production. I do not propose to express any views on that, because the Attorney-General has submitted as a preliminary point that the action is misconceived in that the relief sought cannot be obtained against the defendants. It is conceded by counsel for the plaintiff that, having regard to the provisions of the Crown Proceedings Act, 1947, he cannot succeed against the Minister if he is acting as representative of the Crown for two reasons. First, because under s. 17 of the Crown Proceedings Act, 1947,* the right defendant would be the Ministry of Agriculture and the Ministry is not before the court. Secondly, because even if the Ministry were before the court, s. 21 would preclude the plaintiff from obtaining any injunction, although no doubt, if this action proceeds, the plaintiff may be able to obtain some declaratory order. That is subject always to the possible effect of the concluding words of s. 1 (8) of the Agricultural Marketing Act, 1931.

E Counsel's submission is that this action is not against the Minister in his representative capacity but in another capacity. He submits that the Minister has two other capacities: first, he may have an official capacity, not as representing the Crown but as a person designated to carry out certain functions prescribed by Act of Parliament, that is to say, a person designated to carry out the function of laying before each House of Parliament a draft of the scheme, and, if the scheme be approved, of making an order. That function, he submits, is performed by the Minister as a person designated and not as a representative of the Crown. Alternatively, he submits that the functions of the defendant are purely personal and not performed in any official capacity at all.

G In support of those submissions counsel naturally relies on the statement of ROXBURGH, J., in his judgment in *Harper v. Secretary of State for the Home Department* (1), which so far has not been published in any report, but of which I have a transcript. I need not go into that action in any detail; it was an action to restrain the Home Secretary from taking a draft Order in Council, which had already been approved by resolutions of both Houses of Parliament, for the approval of Her Majesty. ROXBURGH, J., said this:

I " Secondly, it appears to me that the Secretary of State, if and when he submits a draft Order to Her Majesty in Council, is not doing it in his general capacity as Secretary of State, but is doing it as a person to whom the duty of so doing is expressly delegated by the provisions of this Act which contains the machinery which is to be used. I do not as at present advised think that the Crown Proceedings Act has any bearing on the present case. If

* Section 17 provides that proceedings against the Crown are to be instituted against the appropriate authorised government department. The name of the appropriate department in the list officially published under s. 17 was the Ministry of Agriculture and Fisheries, not the Minister; but the Ministry, as such, has no corporate capacity apart from the Minister who is a corporation sole.

I am wrong in this conclusion I hope to be excused in the light of the fact that it is now 5.30 p.m., and in the light of certain other facts to which I shall shortly be referring."

It is material to notice that that conclusion was reached by ROXBURGH, J., on an ex parte application by the plaintiff, the judge not having heard arguments from the defendant. ROXBURGH, J., granted an ex parte injunction; the defendant appealed to the Court of Appeal, and this point was left open by SIR RAYMOND EVERSHEDE, M.R. He said this ([1955] 1 All E.R. at p. 339):

"I return at the end of my judgment to the point which I mentioned earlier and on which I would say one final word, viz., the question of the defendant to this action. I have said that the defendant is 'the Secretary of State for the Home Department'—sued, that is to say, by his official title as a Minister of the Crown. It is said by counsel for the plaintiffs that, since the report disregarded the rules in the Act of 1949, therefore it is not a report within the meaning of the Act, and that the Secretary of State has neither the duty to the House or to anyone else nor the power or authority to take this proposed Order in Council to Her Majesty. I am not myself satisfied that counsel for the plaintiffs is not in this respect on the horns of a dilemma. If the whole thing is a nullity and all he seeks to do is to restrain a particular individual, who happens at the moment to be the Secretary of State, I am not satisfied that he ought not to sue him in his personal capacity as for an ordinary wrong—though in that case it would not be clear to me what breach of duty to the plaintiffs he was engaged on committing. On the other hand, if he does sue him, and rightly sues him, in his capacity as Secretary of State, then I am not satisfied, though I express no final view on it, as we have not heard full argument, that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947, will lie. Moreover I am not satisfied, having regard to s. 21 of that Act, that on this alternative the plaintiffs could in any event obtain an injunction . . ."

I have heard full arguments from counsel for the plaintiff and from the Attorney-General, and I think in those circumstances I can properly express my own views as to the capacity in which the Minister acts in carrying out or proposing to carry out the relevant functions under s. 1 of the Agricultural Marketing Act, 1931. It seems to me clear that in carrying out his functions under that section he is acting as representative or as an officer of the Crown. He is the Minister of Agriculture who is responsible for the conduct of agricultural matters in this country. As part of his general responsibility, he is the person who would naturally be designated in the Agricultural Marketing Act as the person to carry out the functions, purposes and policy of that Act. It was no doubt for that reason that it was the Minister who was to approve any scheme under s. 1 (1). It was his duty, not, as I venture to think, merely as a delegated person, but acting in his capacity as Minister of Agriculture, that he had to consider the scheme, that he had to hear objections and representations, and hold inquiries, and he had the power and duty of making such modifications as he thought fit. It was his duty in his capacity as Minister of Agriculture and not merely as a delegated person that, if he were satisfied—with the satisfaction he felt in his capacity as Minister of Agriculture and an official of the Crown—that the scheme would conduce to the more efficient production and marketing of the regulated product, to lay before the Houses of Parliament a draft scheme, and so ultimately in the same capacity to make an order bringing the scheme into effect. It seems to me that from start to finish he was acting in his capacity as an officer representing the Crown. That being so, it is conceded that no injunction can be obtained against him, and therefore the motion fails in limine.

A I am not at all satisfied that it is possible to have the three capacities which were suggested. Of course there can be an official representing the Crown and that is plainly this case. But if he were not, it was said that he was a person designated in an official capacity but not representing the Crown. The third alternative was that his capacity was purely that of an individual. I understand the conception of the first and the third categories, but I confess I find it very difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the ordinary case where the relevant or appropriate Minister is directed to carry out the function or policy of some Act, it seems to me that he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of the middle classification.

B A number of other points of great interest have been argued before me. Amongst them was the question whether the court had any jurisdiction, and if so whether it would be proper in any event to interfere with the proceedings now before Parliament by making an order on the Minister to withdraw the draft scheme, or restraining him from seeking approval of the scheme. I say no more than this, that I see much force in the arguments put forward by the Attorney-General; but in this delicate and difficult branch of the law I think it is much better to express no opinion on any matter which does not directly arise for decision. As I have come to the clear conclusion that the Minister throughout is acting as a Minister of the Crown, and it is conceded that no injunction can be granted in those circumstances, it is much better that I should say no more. I therefore dismiss the motion with costs.

Motion dismissed.

Solicitors: *Collyer-Bristow & Co.*, agents for *Elliott & Gill*, Hastings (for the plaintiff); *Treasury Solicitor*.

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

McCOMBE v. READ AND ANOTHER.

[QUEEN'S BENCH DIVISION (Harman, J., sitting as a judge of the Division), April 19, 20, 21, May 9, 1955.]

Nuisance—Adjoining premises—Roots of trees causing damage to neighbour's house—Remedy of injunction—Continuing damage.

Injunction—Nuisance—Continuing damage—Roots of trees causing damage to adjoining premises.

The plaintiff and the defendants were tenants of adjoining house properties. The defendants' house had been built in 1904 and the plaintiff's in 1912. On the defendants' property, at a distance of some twenty feet from the plaintiff's house, was a black Italian poplar tree which was already well established before 1912, and, at a distance of between six and eight feet from the boundary between the two properties, there was a row of Lombardy poplars, which were planted in 1912 after the plaintiff's house was built. In and since 1948 the plaintiff's house underwent considerable settlement causing damage to it. The roots of the poplar trees growing on the defendants' land had extended under the plaintiff's land and caused the subsidence by undermining the foundations of the plaintiff's house or by withdrawing the moisture underneath the foundations so as to cause the clay soil to shrink. In 1949 the plaintiff's house was underpinned in order to remedy the subsidence. In August, 1950, the plaintiff brought an action for damages for trespass and nuisance and for an injunction. In 1953, further settlements having occurred, a specification of necessary work to the plaintiff's house was prepared, but the work had not been begun before the trial. On the question whether the plaintiff was entitled to an injunction and on the question of damages,

Held: (i) the encroachment of the roots of the poplar trees into and under the plaintiff's land and the abstraction of water from the soil by the roots constituted a continuing nuisance for which the remedy of injunction would lie.

Middleton v. Humphries (1913) (47 I.L.T. 160) and dictum of LEWIS, J., in *Butler v. Standard Telephones & Cables, Ltd.* ([1940] 1 All E.R. at p. 130, letter G) applied.

(ii) damages for the further damage which occurred after the issue of the writ were recoverable in the action in so far as the damage resulted from the same continuing nuisance, and the plaintiff would be put to his election whether to have judgment for the sum claimed for damages before action brought or an inquiry as to damages sustained.

[**Editorial Note.** No question arose in the present case as regards the measure of damages as the defendants did not dispute the amount claimed as having been suffered before action. In actions for nuisance, however, the measure of damages may not be the expense of repairs but the difference between the money values of the owner's interest before and after the damage (see *Moss v. Christchurch Rural District Council*, [1925] 2 K.B. 750). As a general proposition the measure of damages is the direct consequence of the wrong (see 24 HALSBURY'S LAWS (2nd Edn.) 88, para. 155). In view of the further damage after the issue of the writ and before judgment the plaintiff elected to have an inquiry as to damages, i.e., as to the whole damage down to the time of assessment, including the damage before action brought which he had accordingly to put to risk as the price of having the inquiry.

As to the liability for damage caused by over-hanging trees or by tree roots, see 3 HALSBURY'S LAWS (3rd Edn.) 368, para. 704; and for cases on the liability for over-hanging trees, see 2 DIGEST 64, 65, 403-412.

A As regards when an injunction is granted in respect of a nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 91, para. 162; and for cases on the subject, see 36 DIGEST (Repl.) 327-329, 712-725.

As regards damages for a continuing nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 90, para. 158; ANNUAL PRACTICE (1955), R.S.C., Ord. 36, r. 58.]

B Cases referred to:

(1) *Lemmon v. Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; 58 J.P. 716; *affd. in part*, H.L., [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 2 Digest 64, 405.

(2) *Smith v. Giddy*, [1904] 2 K.B. 448; 73 L.J.K.B. 894; 91 L.T. 296; 2 Digest 64, 407.

C (3) *Butler v. Standard Telephones & Cables, Ltd.*, *McCarthy v. Standard Telephones & Cables, Ltd.*, [1940] 1 All E.R. 121; [1940] 1 K.B. 399; 109 L.J.K.B. 238; 163 L.T. 145; 2nd Digest Supp.

(4) *Middleton v. Humphries*, (1913), 47 I.L.T. 160; 36 Digest (Repl.) 329, 238.

Action.

D The plaintiff was the owner and occupier of a leasehold property consisting of a dwelling-house and garden, and the defendants, a brother and sister, were the occupiers and joint owners of a leasehold property adjoining that of the plaintiff. The plaintiff brought an action against the defendants for trespass and/or nuisance and/or negligence, alleging that the roots of poplar trees growing in the defendants' garden had encroached on the plaintiff's land and had caused extensive damage to his house by undermining the foundations of the house or by withdrawing the moisture underneath the foundations so as to cause the clay soil to shrink. The plaintiff claimed (a) an injunction restraining the defendants, their servants and agents, from continuing or suffering or permitting to continue the nuisance and/or trespass complained of, and (b) damages.

E The action was originally brought only against the first defendant (the brother), but during the course of the trial, with the leave of the judge and by consent, F the second defendant was added on the term that the claim against her was only for an injunction. The facts appear in the judgment.

S. O. Olson for the plaintiff.

H. G. Garland for the defendants.

Cur. adv. vult.

G May 9. **HARMAN, J.**, read the following judgment: The parties to this suit are neighbours. The plaintiff's house is known as Wissenden and it fronts a high road called Uplands Park Road, Enfield. The defendants' house lies to the south of the plaintiff's and is known as Highfield House; it stands in grounds of three-quarters of an acre, roughly triangular in shape and bounded on the south-west by Uplands Park Road, on the south-east by another road called H Chase Ridings and on the north by the plaintiff's property. Both properties are of long leasehold tenure at nominal rents. It appears likely that the defendants' house was built in about 1904 and the plaintiff's in about 1912. The boundary between the properties has probably never been accurately ascertained and there is no means by which the plans on the documents of title can be reconciled. I This boundary is or was marked by a fairly broad band of shrubs. The largest feature near the boundary is a black Italian poplar tree which was growing there before either of the houses was built. This is about twenty feet distant from the south-west corner of the plaintiff's house and must have been an old-established tree considerably before 1912. It appears that when the plaintiff's house was built the then owner of Highfield House decided to screen his boundary from the plaintiff and with that object he planted a row of Lombardy poplars between six and eight feet from the boundary and a lime tree in the middle somewhere very near the boundary line. These trees are now over forty years old and the plaintiff's

complaint in this action is that their roots, growing under the boundary fence, have either undermined the foundations of the house, which at its nearest point is only six feet or so from the boundary, or have so withdrawn the moisture underneath the foundations as to cause the clay soil to shrink. Whatever may be the cause, the plaintiff's house has, undoubtedly, in and since 1948 undergone considerable settlement, and for this the plaintiff seeks to make the defendants responsible. The defendants do not put in issue the fact of the settlement, but argue that this is caused by water in the soil rather than the extraction of water from it. They add that the soil, being boulder clay on a considerable slope from north to south, is particularly prone to bring about settlements and that many of the houses in the immediate neighbourhood have suffered in this way.

The plaintiff occupied his property in 1944 and until 1949 apparently suffered no inconvenience. In that year, however, he noticed several cracks, notably one across the kitchen wall, between the kitchen and the dining-room, which was an internal wall on the north side of the house. He also noticed cracks in the southern wall of the house nearest the boundary under the bay window of the sitting-room. He says, and I see no reason to doubt him, that he had had previous experience of damage caused to property by the roots of poplar trees and that he immediately suspected the defendants' trees of being the cause of the trouble. He further says, and his wife corroborates, that each of them spoke to the first defendant, asking him to come and see the trouble and also to cut down his poplar trees. At this point, however, there is a violent conflict of evidence. The first defendant says that the plaintiff's wife never spoke to him on the subject at all and that when the plaintiff consulted him it was as an architect, asking him to make a survey of the plaintiff's house and to advise him on remedies for its damp condition. I was by no means impressed by the attitude of the first defendant in the witness-box and I prefer the plaintiff's evidence to his where they conflict. There was a meeting in September, 1949, at which the first defendant was shown the cracks, and he advised the plaintiff to fill them up and do nothing about it. I find that he was also asked to cut the trees down and that he gave permission to the plaintiff to cut the roots but no more. The first defendant says that he was only asked to top the trees because they interfered with the plaintiff's greenhouse, but this I do not believe. The first defendant also says that the hall was under water and the floor-boards rotted away. This also I disbelieve.

Evidently the first defendant's attitude was not satisfactory to the plaintiff, for he consulted his solicitors who wrote to the first defendant on Oct. 14, 1949. Before that, however, the plaintiff had consulted a builder, Mr. Judd, who inspected the property in September, 1949, and gave evidence before me. He said that he found both exterior and interior walls badly cracked, also ceilings, and that they were cracked both upstairs and downstairs. He dug out four inspection pits three feet deep, one on each side of the bay window already mentioned, one at the south-east corner of the house and one on the west front. He said that there was no trouble with water except at the south-east corner, the cause of which was a fractured drain. He also said that the soil was very dry and that there were fibrous roots from the nearby poplars under the foundations. He found the bottom of these foundations three feet down with twelve inches of concrete, rather more than would be used today. He decided to underpin the whole of the south and part of the west wall. At this juncture [Oct. 14, 1949] the plaintiff's solicitors wrote to the first defendant the following letter:

"Dear Sir, Our client and your neighbour, Mr. S. J. McCombe, has consulted us regarding damage done to his property 19 Uplands Park Road, by reason of the roots of poplar trees planted on your land having spread over his land and under the foundations of his house. We are instructed that by the movement of these roots and their abstraction of water from the soil, the supports of our client's house have been seriously weakened;

A certain ceilings and walls have cracked; and drains have been displaced and broken. We also understand that, as advised by our client's surveyor, inspection-holes were dug on his land by a builder to a depth of three to four feet and that the roots above mentioned were seen to be passing under the house. Since then, the builder has been underpinning preparatory to the repair of the premises and whilst so doing further roots spreading from your land have been found. We are informed that both before and after the inspection-holes had been dug, our client spoke to you about the trees drawing water from under his house, but that you have not yet taken any step to prevent the nuisance continuing. On our client's behalf, we now give you notice that he claims damages against you for the nuisance, trespass and for wrongful interference with the foundations and support of his premises."

The plaintiff's solicitors received no reply and wrote further on Oct. 27 as follows:

D "We refer to our letter to you of [Oct. 14]. Our client's builder is progressing with the underpinning and repair of the premises and drains mentioned. In case you wish to inspect the premises or dug-up land, or to instruct a surveyor or builder to do so on your behalf, whilst the work in question is being done or before its completion, we write to say that facilities for such an inspection will willingly be given."

E Still receiving no reply, the plaintiff's solicitors wrote a reminder on Nov. 4. This produced a formal answer, dated Nov. 8, from solicitors, who, however, wrote on Nov. 16 that the first defendant had decided to handle the matter himself and discharged them. He, however, did nothing about it and did not avail himself of the opportunity to view the inspection pits, or to make any denial of liability.

F In October and November, 1949, Mr. Judd dug a trench all round the south and west fronts of the house, not less than three feet below the concrete foundations, and he asserted that, however deep he went, and even to nine feet at the south-west corner, he still found fibrous roots and bigger roots up to one inch in diameter against or under the foundations. The roots of the black poplar which I have mentioned were much larger and had gone right under the house. It seems to me likely that they were under the site before the house was built. G Mr. Judd gave it as his opinion that the considerable movement that he discovered was due to the roots of the Lombardy poplar trees opposite the house and also to the roots of the black poplar. After completing the underpinning Mr. Judd carried out decorative repairs rendered necessary by the settlement, and his bill amounted to £678. The writ was issued in August, 1950, and claims damages to the extent of this bill, which is described as special damage, though H why I do not know. The plaintiff also claims an injunction restraining the defendants from allowing what is alleged to be a nuisance and a trespass to continue. The nuisance and trespass alleged is abstraction of water from the plaintiff's land and the breaking of drains and water pipes and consequent damage. The defence, delivered in November, 1950, puts the whole of the plaintiff's case in issue and, in addition, does not admit that the black poplar I tree is growing on the defendants' property. I do not know why this case was not brought to trial long ago. During the interval further settlements occurred at the plaintiff's premises. This was in 1952 and 1953. As a result, Mr. Judd was called in in October, 1953, and prepared a specification of further necessary work amounting to £1,032. None of this work has been done, but the plaintiff seeks to recover it in this action as general damages.

The plaintiff, in 1952, sought expert advice and called in Mr. Harold Desch, a surveyor who has an Oxford degree in forestry and experience as forest officer to the Malayan government. He is now in private practice as an adviser on

problems connected with trees and in particular, as I understand, with their effect on adjacent buildings. He inspected the property three times, beginning in May, 1953, and gave it as his opinion that the extent of the internal cracks pointed to the action of tree roots draining moisture from the clay. He stated that the shrinkage bringing about the settlement, being more than five feet six inches down (that is to say under the foundations as underpinned in 1949) could not be shrinkage due to normal causes. He dug an inspection trench rather more than three feet deep and took samples of roots which he found there against the house and which proved on analysis to be either poplar or lime. He stated that the roots of poplars normally extend one and a half times the height of the tree. These trees are something between thirty to forty feet high, and of the nine of them with which I am concerned none is more than about twenty-five feet from the house while the nearest is about nine feet away. Mr. Desch was emphatic that the damage described to him by Mr. Judd and also the damage which he himself saw was due to tree root action. According to him, this is particularly prevalent where the soil is of a boulder clay of this type, more especially on a slope, and the reason of the subsidence is, not the action of the tree roots in breaking up or disturbing the foundations, but the shrinkage of the clay due to the abstraction of water by the fibrous roots at the end of the trees' range. Mr. Desch said that a poplar tree will transpire twelve thousand gallons of water in a season and that these poplars in particular, being in a row, would compete with one another and send their roots straight out before them. He further said that the roots would grow under any barrier which might be put in the soil. He had met Mr. Judd and had seen his second specification, to which he gave a general blessing. He said that it was now not possible to patch the brickwork on the south and east sides of the house which must be taken down. Finally, he said that the black poplar was the smallest cause of the damage, because established before the house was built, and that it probably took its water beyond the house foundations. Mr. Desch was not cross-examined in any detail on the characteristics of the neighbourhood. It was suggested to him that the foundations were waterlogged and that there had been an underpinning of the house within a few years of its construction. No evidence which I accept was subsequently given on either of these points.

The defendants' answer to this case was, as to the black poplar, that it was really on the plaintiff's side of the boundary and that they were not responsible for it and, as to the Lombardy poplars, that the evidence that they were the cause of the trouble was mere guesswork, and that in this neighbourhood houses frequently subsided without any trees to assist the process. The first defendant made a number of reckless statements to the effect that all the houses in Chase Ridings and the whole estate on the other side of the hill had been underpinned. He further alleged that about seventy-five per cent. of the houses in the neighbourhood were either coming down or had been underpinned and that the cause of the fall was the saturation of the clay. I do not accept any of this evidence on the first defendant's word. He declined to inspect the foundations when he might have done so and his attitude was altogether unsatisfactory.

The defendants called, however, two persons practising locally as architects. First of these was a Mr. Nielson. He, however, had merely been concerned to try to ascertain the boundary between the properties and the exact position of the trees. He said that it was never within his province to look at the plaintiff's house and he was unwilling to express a view about it. He did, however, say that, practising in the neighbourhood, he had experience of settlements in a number of houses in the district which had to be underpinned, notably two which he marked on the ordnance map, and which were only a year and three years old respectively. The defendants also called a Mr. Reeves, a Fellow of the Royal Institute of British Architects, who practises at 30, Old Burlington Street as a chartered architect, and who lived opposite these houses for four

A years and has lived for the last twenty years fifty yards up the road. He said that the whole of the hill was very much subject to settlement and that in his view the less burrowing one did the better off one was. His firm had built four houses within three hundred yards of the plaintiff's house. He told me that the plaintiff's house was built in 1912, that in 1920 some work, but not much, was done by the owner to support the south wall, and he said that, seeing the work going on which was done in 1949, he thought to himself, " You are digging for trouble ". In his view the further settlement of 1953 was brought about by the underpinning of 1949. He said that he knew at least four houses in Chase Ridings which had slipped and that the house on the other side of Uplands Park Road had also at one time been so unstable that twelve years ago it was condemned. He added that it was now perfectly sound. He agreed that tree roots might have contributed to the result, but did not think that they were the main cause. He was cross-examined about what he called the " thirst " theory which he said he had not considered. Further cross-examined, he agreed that tree roots might cause shrinkage of the clay below the foundations but added that the house opposite settled without any trees. He said that this hill is full of springs and that, in his view, underpinning was no cure for soil movement.

D As to the black poplar, the defendants' case was that, if the boundary between the two properties were drawn straight as the plans show it, the tree would be north of the line. It was, however, proved that since at least as far back as 1927 the tree has been treated as being on the defendants' property, and the first defendant himself helped the plaintiff to fix the fence to its northern face where it still remains; the defendants have made no offer to readjust it and must, in my judgment, be treated as responsible for this tree.

E In this state of the evidence, does the plaintiff prove his case ? In my judgment he does. I have on the one hand evidence of two persons, one an experienced builder and the other a man who has made a special study of the subject and both of whom made a careful examination of the locus in quo, that the cause of the subsidence of the plaintiff's house is the exhaustion of water from the boulder clay by the roots of the trees growing on the defendants' property. On the other hand, I have testimony from persons with wide local experience who assert that owing to local conditions houses are very prone to subsidence in this immediate area. In addition, one of them advanced the opinion that, although the trees might have contributed, the soil (that is to say the nature of it, I suppose) was the main cause of the trouble. It is to be observed that neither of these people had examined the plaintiff's property, and the first defendant, although given an opportunity to do so, did not, by himself or by any of his advisers, take advantage of the opening up of the ground, and he has no one but himself to blame that the evidence about the state of things immediately round and under the plaintiff's house is all on one side. In my judgment, I must prefer the evidence on behalf of the plaintiff. This house had, apparently, not proved unstable for thirty-five years and it would, in my judgment, be fanciful to reject as a cause of the trouble the impact of the roots of these poplars. This, after all, is a well-known source of trouble where houses are built on a clay soil. Accordingly, in my judgment, the plaintiff proves his case. To what remedy is he entitled ?

I It is very old law that if my neighbour's trees encroach on my ground, either by overhanging boughs or by undermining roots, I may cut the boughs or the roots so far as they are on my side of the boundary. In *Lemmon v. Webb* (1) it was pointed out in the Court of Appeal that this kind of encroachment is not a trespass which may ripen into a right in the course of time*, but is a nuisance which raises a cause of action only on proof of damage. Moreover, the case decides that the nuisance may be abated without notice. Following on this, a Divisional Court, in *Smith v. Giddy* (2), granted a new trial where a county court judge had held that the only remedy of an adjoining landowner was to

* See per KAY, L.J. ([1894] 3 Ch. at p. 24).

lop the trees and that an action on the case would not lie. It is clear, therefore, that an action for damages will lie in these circumstances, but there appears to be no English decision where an injunction has been granted. In *Butler v. Standard Telephones & Cables, Ltd.* (3), the plaintiffs claimed damages for the abstraction of water from under their houses by the roots of poplar trees and were held entitled to them. It is, however, noticeable that in that action the plaintiffs claimed an injunction but, apparently, abandoned that part of the claim at the trial. LEWIS, J., however, in his judgment ([1940] 1 All E.R. at p. 130) mentioned with approval an Irish decision, *Middleton v. Humphries* (4), where the chancery judge in Ireland [Ross, J.] apparently had no doubt that an injunction could be granted. In my opinion this must be right. If an action on the case will lie, then the remedy of injunction must be available if the nuisance be a continuing one, as is clearly the case here. It could not be right to throw on the plaintiff the burden of watching for further subterranean encroachment. In my judgment, however, the plaintiff is not entitled to an unqualified injunction, for he has no remedy unless a nuisance be caused. The injunction will, therefore, be to restrain the defendants from allowing the roots from any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.

There remains the question of damages. The first defendant was willing to submit, if wrong in law, to judgment for the amount claimed as special damages, namely, £678 ls. The plaintiff, however, seeks to recover damages in respect of the damage discovered on the 1952 and 1953 inspections and which has occurred since the issue of the writ. If this be new damage he cannot do that, but if it be continuing damage from the same nuisance then he can recover in respect of the damage suffered by him up to the date of judgment. On the evidence I am of opinion that the damage is all one. It is true that the builder in 1949 dug a trench round the house five feet deep and cut off the ends of the roots which he found, but the exhaustion of water from the clay soil underlying the house would continue, as the evidence shows, and the further subsidence would result from that. There is, however, a doubt introduced by the evidence of Mr. Reeves who, with his wide local experience, suggested that the underpinning done in 1949 was the wrong treatment and that this may have caused or, at least, contributed to the further settlement. I am, therefore, not in a position to say that the first defendant must be liable for the whole aggregate damage, and I put the plaintiff to his election either to have judgment now for the sum specified in his claim or to take an inquiry as to damage which in this Division, I suppose, will be referred to the official referee. On that inquiry it will be open to the first defendant to suggest that at any rate part of the damage was caused by ill-judged operations in 1949. I do not find that that was so, but am of opinion that it is a consideration still open to the first defendant to put forward.

[The plaintiff having said that he would prefer that there should be an inquiry as to damages, HIS LORDSHIP continued:] The whole damage (that is to say, not merely as regards the claim for £1,032, but also as regards the claim for £678) will be subject to an inquiry. The plaintiff puts his whole claim in risk by having the inquiry, as it will be open to the defendant to say that the plaintiff's builder did all the wrong things. Prima facie, however, the plaintiff has suffered some damage, and I grant him an injunction accordingly. If the plaintiff should change his mind as regards the inquiry before the order has been drawn up, the matter can be mentioned to me.

Judgment for the plaintiff for an injunction against both defendants and for an inquiry as to damages against the first defendant.

Solicitors: *Goldingham, Wellington & Co.*, agents for *Granville Jones & Co.*, Barnet (for the plaintiff); *Vanderpump & Sykes*, Enfield (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

PROBATE, DIVORCE AND ADMIRALTY DIVISION (Divorce).

B

PRACTICE DIRECTIONS.

Divorce—Evidence—Foreign marriage—Proof by certificate—Evidence (Foreign, Dominion and Colonial Documents) Act, 1933 (23 & 24 Geo. 5 c. 4), s. 1.

C With the object of avoiding unnecessary costs, the attention of practitioners is directed to the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, and the Orders in Council* made under it [in particular the Evidence (Belgium) Order, 1933 (S.R. & O. 1933 No. 383), and the Evidence (France) Order in Council, 1937 (S.R. & O. 1937 No. 515)] and to the case of *North v. North* (1936), 105 L.J.P. 56.

D The effect of these orders is, inter alia, that expert evidence is not normally required to establish the validity of Belgian or French marriages in matrimonial proceedings.

B. LONG,
Senior Registrar,
May 16, 1955.

E

Divorce—Maintenance of wife—Application—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 44 (1).

Divorce—Settlement of wife's property—Application—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 44 (1).

F In future applications under the Matrimonial Causes Rules, 1950, r. 44 (1), should be made to a registrar on affidavit†.

B. LONG,
Senior Registrar,
May 17, 1955.

G

H

I *The orders will be found in 7 HALSBURY'S STATUTORY INSTRUMENTS 213 et seq. At the present time (May 23, 1955), only three such orders are in force; two are mentioned above and the third is the Evidence (Commonwealth of Australia) Order, 1938 (S.R. & O. 1938 No. 739). As to the proof of foreign law generally, see 7 HALSBURY'S LAWS (3rd Edn.) 176 and 13 HALSBURY'S LAWS (2nd Edn.) 613 et seq.

†Practice Direction [1954] 2 All E.R. 349 is cancelled and the Direction set out above supersedes it. In *Simmonds v. Simmonds* (post p. 481), LORD MERRIMAN, P., said that it was undesirable that applications for leave to apply for maintenance out of time should be made ex parte, and the former Practice Direction is modified accordingly.

ATTORNEY-GENERAL v. PARSONS AND OTHERS. A

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.JJ.), May 9, 10, 1955.]

Company—Foreign company—Mortmain—Acquisition of lease—Residue of lease for ninety-nine years—Forfeiture to Crown. B

Crown—Forfeiture of lease—Mortmain—Disclaimer by Crown—No acceptance or entry by Crown—Liability of Crown under lessee's covenants—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1 (1)—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

In 1953, A. Ltd., a company incorporated in Eire, was registered under the Land Registration Act, 1925, as the proprietor of a leasehold interest in land in England for the residue of a term of ninety-nine years from 1858. A. Ltd. had not delivered to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, nor did it hold a licence to hold land in mortmain. The reversioners claimed that breaches of covenant had occurred on the part of the lessees, and, on the footing that the assignment to A. Ltd. had caused the lease to be forfeited to the Crown, claimed that the Crown was liable for such breaches. The Crown had not entered on or otherwise taken possession of the demised premises nor had any commission of inquiry in mortmain been issued. C

Held: (i) the assignment to A. Ltd. caused an automatic forfeiture and the demised premises were vested in the Crown for the unexpired residue of the term. D

Morelle, Ltd. v. Waterworth ([1954] 2 All E.R. 673) and *Morelle, Ltd. v. Wakeling* ([1955] 1 All E.R. 708) followed. E

(ii) the Crown was liable under the lessee's covenants contained in the said lease because it was incompatible with the decisions of the Court of Appeal last cited either that the Crown could divest itself of the legal estate by disclaimer or that the vesting of the legal estate in the Crown should be dependent or conditional on any prior holding of an inquisition or finding of an office, or that the Crown's liability should be dependent on possession of the premises having been taken or some step having been taken showing an intention to assume and enjoy the benefits of the lease. F

Per SIR RAYMOND EVERSLED, M.R.; I am disposed to agree with HARMAN, J., that the liability towards the reversioners follows from the vesting, is a result of the privity of estate, and that possession is not requisite to give rise thereto (see p. 474, letter A, post). G

Williams v. Bosanquet (1819) (1 Brod. & Bing. 238) considered.

Appeal dismissed.

[As to the law relating to mortmain, see 9 HALSBURY'S LAWS (3rd Edn.) 73, paras. 144 et seq.; and for cases on the subject, see 13 DIGEST 371, 1025-1028. H

For the Mortmain and Charitable Uses Act, 1888, s. 1 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 910.]

Cases referred to:

(1) *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook*, [1954] 2 All E.R. 673.

(2) *Morelle, Ltd. v. Wakeling*, [1955] 1 All E.R. 708.

(3) *Sackill v. Evans*, (1674), Freem. K.B. 171; 89 E.R. 123; 24 Digest 734, 7619. I

(4) *Buckley v. Pirk*, (1710), 1 Salk. 87, 316; 91 E.R. 75, 279; 24 Digest 642, 6681.

(5) *Wollaston v. Hakewill*, (1841), 3 Man. & G. 297; 10 L.J.C.P. 303; 133 E.R. 1157; 31 Digest (Repl.) 448, 5755.

(6) *Stratford-upon-Avon Corp'n. v. Parker*, [1914] 2 K.B. 562; 83 L.J.K.B. 1309; 110 L.T. 1004; 24 Digest 639, 6650.

- A (7) *Williams v. Bosanquet*, (1819), 1 Brod. & Bing. 238; 129 E.R. 714; 31 Digest (Repl.) 452, 5785.
(8) *Cook v. Harris*, (1698), 1 Ld. Raym. 367; 91 E.R. 1142; 31 Digest (Repl.) 457, 5833.
(9) *Turner v. Richardson*, (1806), 7 East, 335; 103 E.R. 129; Digest Supp.
(10) *Bellasis v. Burbriche*, (1697), 1 Ld. Raym. 170; 91 E.R. 1010; 31 Digest (Repl.) 57, 2136.
- B

Appeal.

Appeal by the plaintiff, the Attorney-General, from an order of HARMAN, J., dated Apr. 6, 1955.

The plaintiff issued an originating summons for the determination of the following questions:

- C (i) Whether on the true construction of the Mortmain and Charitable Uses Act, 1888, the Mortmain and Charitable Uses Act, 1891, and of the Land Registration Act, 1925, certain land at Hammersmith (a) was vested in the defendant, Arffe, Ltd., for the unexpired residue of a term of ninety-nine years from Oct. 29, 1858, created by a lease dated Aug. 11, 1862, or (b) ought to be deemed to be so vested, or (c) was vested in Her Majesty the Queen for such unexpired residue.
- D (ii) If the answer to para. (i) (c) should be in the affirmative, whether on the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891, and of the Queen's Remembrancer Act, 1859, Her Majesty the Queen was in the events which had happened liable under the lessee's covenants contained in the said lease notwithstanding that Her Majesty had not, nor had anyone on her behalf, entered into possession of any part of the said land nor had there been any inquisition made or office found in relation to Her Majesty's title to the said land or any part thereof.
- E

By a lease dated Aug. 11, 1862, land at Hammersmith in the county of London was demised for a term of ninety-nine years from Oct. 29, 1858, subject to the rent and the covenants on the part of the lessee therein reserved and contained.

- F The freehold reversion expectant on the determination of the term was now vested in the Official Trustee of Charity Lands by virtue of a scheme of the Charity Commissioners for the Odiham Consolidated Charities of which the first fifteen defendants were the managing trustees. The leasehold title to the land was registered at the Land Registry on Oct. 12, 1917, and had ever since remained so registered as a good leasehold title. On Feb. 22, 1953, the defendant, Arffe, Ltd., was registered as proprietor of the land as a transferee for valuable consideration. That company was incorporated in the Republic of Ireland on July 26, 1950, having its registered office in Dublin. The company had not delivered to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, nor had it been granted a licence to hold land in mortmain. The managing trustees alleged that there had been breaches of the covenants on the part of the lessee contained in the lease, and that the leasehold term created by the said lease had by virtue of the Mortmain and Charitable Uses Act, 1888, s. 1, become and was now vested in the Crown. The Crown had not entered on or otherwise taken possession of the demised premises nor had any commission of inquiry in mortmain been issued. HARMAN, J., held that the premises were vested in the Crown, and that the Crown was liable under the lessee's covenants contained in the lease.
- G
- H
- I

Denys B. Buckley for the plaintiff, the Attorney-General.

F. E. Skone James for the first fifteen defendants, the managing trustees of the Odiham Consolidated Charities, and for the seventeenth defendant (joined by leave of the Court of Appeal), the Official Trustee of Charity Lands.

The sixteenth defendant, Arffe, Ltd., did not appear.

SIR RAYMOND EVERSLED, M.R.: Some few years ago ingenious persons conceived the idea of transferring, or purporting to transfer, the unexpired

residues of terms of years in residential property in London to companies incorporated in Eire, which companies had neither a licence to hold land in England nor had availed themselves of the appropriate provisions of the Companies Act, 1948, as to registration which would have enabled them so to do. One result was an action of *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1), an action in the county court in which the plaintiff company, Morelle, Ltd., being a company with the characteristics that I have indicated, sought to recover alleged arrears of rents from occupants of property in London. By way of answer the defendants asserted that by virtue of the Mortmain and Charitable Uses Act, 1888, s. 1, as amended, the interest in the property which the plaintiff company had purported to acquire had been absolutely and automatically forfeited to Her Majesty and that, therefore, the plaintiff company was disabled from suing. The defence succeeded in the county court. The result, according to HARMAN, J., was to startle the legal profession. It may also have startled the plaintiff company, Morelle, Ltd., who thereupon appealed to this court. Since it is in my view important to arrive at a conclusion what this court decided and what was inherent in the reasoning of the decision, I will read certain passages from the judgments. SINGLETON, L.J., who delivered the first judgment, dealt first with the question whether a leasehold term of years, of which a short residue remained unexpired, was within the provisions of the Mortmain and Charitable Uses Act at all, and he concluded this part of his judgment thus ([1954] 2 All E.R. 677):

“ This case falls within the provisions of s. 1 (1) of the Act of 1888. The plaintiff company was a company registered in Eire and not in this country. It had no licence or authority, and consequently there was a breach of the terms of that sub-section. It seems to me that it follows from the wording of the Act that, if the land is so assured otherwise than as aforesaid, ‘ the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly ’. The appeal of the plaintiff company fails.”

Later he recited the following passage from the judgment of the county court judge (*ibid.*):

“ ‘ I am invited to dismiss these actions on grounds urged by counsel for the defendants that the plaintiff Irish companies have no right to own the properties. Before a company can hold land as part of its permanent possessions a licence in mortmain is necessary. The principal Acts are those of 1888 and 1891. Under those Acts land may not be held by a corporation save by licence from the Crown unless the company is incorporated or registered under the Companies Act. Companies not incorporated or registered have no right to hold land unless they have a licence.’ ”

SINGLETON, L.J., said (*ibid.*, at p. 678): “ I agree with the learned county court judge, and, in my view, the appeal should be dismissed.”

DENNING, L.J., said (*ibid.*, at p. 679):

“ I cannot help observing that in this particular case we have a modern instance of a dead hand. Here is a foreign company which does not establish any business office in England and does not register itself in any way. By so doing it puts itself in a position, if not to defeat its obligations entirely, at least to make it most difficult for its dues to be collected from it. It makes it difficult for the tenant to recover on the landlord’s covenants. It makes it difficult for the rating authority to obtain rates, or the housing authority to see that the houses are kept in proper condition, or even for the Revenue authorities to obtain their proper taxes. So far as all those matters are concerned, it is like unto a dead hand. We have a modern application of the law of nearly seven hundred years ago. The transfer to this company is void without a licence from the Queen, and no licence has been granted.”

A I should here interpolate that (as counsel for the Attorney-General pointed out) by "void" the learned lord justice must have meant that it was liable to be forfeited, because nobody has suggested that the transfer was void in the sense that the estate remained in the transferor. That appears I think from the next paragraph which says (*ibid.*):

B "In the old days the forfeiture was not automatic, but under the wording of this statute it is quite clear that the forfeiture is from 'the date of the assurance,' so that it operates at once without any entry by the Crown, and the tenant can take advantage of it, because he is liable to the Crown for the rent from that date. I agree, therefore . . . that the appeals should be dismissed."

C MORRIS, L.J., confined himself to expressing his full concurrence with the two judgments already delivered.

In my judgment this court in the first *Morelle* case (1), then, held that, whatever the effect of the old law as to mortmain was, Parliament had so enacted by the Act of 1888 as amended that (i) a short unexpired residue of a term of years in land was within the scope of the Act; (ii) that the interest in the land which the company had purported to acquire had been automatically and immediately from the date of the purported assurance forfeited so as to vest in Her Majesty without any necessity for any inquisition held or office found, as would or might have been requisite under the old law, and without any other step on the part of Her Majesty by way of acceptance, entry or otherwise. In my judgment, it was also inherent in the reasoning of the decision of this court in the first *Morelle* case (1), (iii) that by virtue of the Mortmain and Charitable Uses Act, 1888, s. 1 (1), the Crown thereupon became, without more, entitled to all the benefits of the leases under which the land was held and also subject to all the burdens by way of liability for rent and covenants imposed thereby; and it was not contemplated by the terms of the judgments which I have read that the legal estate should be vested in the Crown, but that the reversioners should be unable to enforce against anyone any of the obligations of the leases.

F In adding this third point I am aware that I am by way of anticipation rejecting the main contention on behalf of the Attorney-General before us. It is true that the Crown was not a party to the first *Morelle* decision (1), and it is true that counsel's main contention with which I will hereafter deal was not then raised and not therefore, as such, decided; but I am of opinion that such was the effect of the decision in the first *Morelle* case (1) and that it was so regarded by this court in *Morelle, Ltd. v. Wakeling* (2) to which I now come.

G The result of the first *Morelle* case (1) for obvious reasons raised difficulties for the Crown, and in the second *Morelle* case (2), pursuant to an opportunity which this court gave, the Attorney-General appeared as *amicus curiae* (indeed he also asked to be added as a party). In this second *Morelle* case (2), it was contended by the Attorney-General that the decision in the first *Morelle* case (1) had been arrived at *per incuriam*. (I should have said that, save for one point which I will mention in a moment, it was not contended that there was any difference on the facts between the two *Morelle* cases.) In particular, the Attorney-General contended that the court in the first *Morelle* case (1) had neglected properly to consider the history of the English law in regard to mortmain and the requirement of that law that any effective forfeiture to the Crown *inter alia* followed only on the holding of an inquisition and the finding of an office. I add that the argument put before us on the present occasion by counsel was also not suggested to us in the argument in the second *Morelle* case (2), but counsel has not suggested that the second *Morelle* case (2), like the first, ought therefore on that ground to be regarded as in any respect decided *per incuriam*. I add also that in the second *Morelle* case (2) this court rejected the view that any different result should be reached because the land in question was registered land and because the Irish company had been registered in respect thereof with a

possessory leasehold title, and no point on this matter so far as I know now remains outstanding. A

I now proceed to read from certain passages in the judgment of the Court of Appeal which consisted of DENNING, JENKINS, MORRIS, ROMER, L.J.J., and myself and which was read by me. I stated the questions for determination in the first *Morelle* case (1) thus ([1955] 1 All E.R. at p. 711):

"In the case just mentioned . . . two distinct points were raised: (i) Was the assurance to the plaintiff of the unexpired residue of a term of years in house property in London an assurance of land in mortmain within the terms of the Mortmain and Charitable Uses Act, 1888, s. 1 (1) ? (ii) If so, was the term so assured automatically forfeited to the Crown by virtue of the same sub-section ? Both these questions were answered affirmatively by this court. Both questions turned on the proper interpretation of the relevant terms of the Mortmain and Charitable Uses Acts, 1888 and 1891." B C

I turned next to deal with the Crown's application, to which we did not in the end accede, to be added as a party. I said (*ibid.*, at p. 712):

"We decided to postpone our decision on this application until we had heard the argument on the whole case, and we shall deal hereafter with it. It may be stated, however, that though the apparent interest of the Crown would be to support the Court of Appeal's conclusion in the first *Morelle* case (1), in reality this is found not to be so: for, if the leasehold terms in question have vested in the Crown, then the Crown would presumably be liable on the covenants contained in the leases, including the covenants relating to repairs and delivery up. As we have stated, the alleged interests of the plaintiff in the present case and in the first *Morelle* case (1) are interests in the unexpired residues of terms of years." D E

Reading further the judgment of the court, I summarised the arguments which were put forward or intimated by the Attorney-General which included (*ibid.*, at p. 713):

"(c) the penalty for infringing the provisions of the law relating to mortmain was liability to forfeiture (following a distinct and established procedure) and not an automatic forfeiture; (d) moreover, the right of forfeiture in the Crown was subject to the prior like rights, in gradation, of the mesne lords, if any; (e) the subject-matter forfeited was in all cases the fee itself." F G

The judgment then proceeded to state the conclusion that, notwithstanding that these points were points of great difficulty on which on the former occasion it had been suggested that counsel had not been fully instructed, none the less we could not say that the first *Morelle* decision (1) had been arrived at per incuriam. The judgment then passed to a consideration of the second point raised, which I have already mentioned, namely that there was a distinction in the second *Morelle* case (2) by virtue of the fact that the land was registered. The judgment states as follows (*ibid.*, at p. 722):

"For these reasons, the fact that the present case concerns registered land does not in our opinion afford any valid ground for distinguishing the first *Morelle* case (1). The express provisions of the Act relating to the effect of registration of a disposition for valuable consideration, that is to say (so far as leaseholds are concerned) the provisions of s. 23, include no provision which can properly be construed as freeing the land from the forfeiture incurred by the registered transfer to the plaintiff. Accordingly, by virtue of s. 80 of the Act, such forfeiture took effect on the registration of the transfer, just as it would have done on the execution and delivery of an assignment of unregistered leaseholds, and, as we are bound to hold following the first *Morelle* case (1), took immediate and automatic effect I

A without any act or proceeding on the part of the Crown to assert or establish it. This forfeiture being, as we have held, unaffected by the provisions of the Land Registration Act, 1925, it follows that it took effect without rectification of the register and was not suspended pending an order for rectification or contingent on such an order being obtained."

B The result of the two *Morelle* cases has been unfortunate for the Crown, for it clearly appears, in my view, that as a consequence in all cases in which the unexpired residues of terms of years have been transferred, or purport to have been transferred, to Irish companies having no licence in mortmain and not having availed themselves of the powers of registration under the Companies Acts, the Crown would be held or would be likely to be held liable to the reversioners on the covenants as to rents, repairs, etc. So has opened the third chapter of events.

C In the present proceedings, having received demands for rent and for compensation for breach of covenants in respect of other land, viz., land at Hammer-smith, which had been the subject of a transfer or purported transfer to another Irish company called Arffe, Ltd., the Crown took the initiative and issued an originating summons. The parties to the summons were, as to defendants numbers one to fifteen, the managing trustees of a certain charity. The land itself, i.e., the reversion subject to which the lease in question is held, is vested in the Official Trustee of Charities under a scheme. The last defendant, No. 16, is the Irish company, Arffe, Ltd., which has not appeared in this court. It was suggested that having regard to the nature of the questions raised it might be desirable that the person in whom the legal estate of the freehold was vested should be added, and liberty has been given to add the Official Trustee so that his name could be added to Mr. Skone James' brief.

E The questions raised by the Attorney-General on this summons were these:

F "1. Whether on the true construction of the Mortmain and Charitable Uses Acts and of the Land Registration Act, 1925, [the land in question] (a) is now vested in the defendant Arffe, Ltd., for the residue remaining unexpired of [the term of years mentioned] or (b) ought now to be deemed to be vested in the defendant Arffe, Ltd., for such unexpired residue . . . of the said term or (c) is now vested in Her Majesty the Queen for the unexpired residue . . . of the said term. 2. If the answer to para. 1 (c) hereof be affirmative whether on the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891 and of the Queen's Remembrancer Act, 1859, Her Majesty the Queen is in the events which have happened now liable under the lessee's covenants contained in the said lease notwithstanding that Her Majesty has not, nor has anyone on her behalf, entered into possession of any part of the said land, nor has there been any inquisition made or office found in relation to Her Majesty's title to the said land or any part thereof."

H Having regard to the decision of this court in the first *Morelle* case (1) and second *Morelle* case (2), HARMAN, J., answered the first question in the terms of para. 1 (c) of the summons, and counsel for the Attorney-General has admitted, while preserving all the arguments intimated in the second *Morelle* case (2), that this court must give a like answer to that question. But counsel has also raised a further argument which, as I have already said, was not made in the earlier two cases and under that head he has put two points before us. The first point is based on the general proposition that a man cannot irrevocably foist on an unwilling or unconscious grantee gifts or other transfers of property, particularly *damnosae hereditates* such as interests in lands subject to onerous covenants; and that the proposed recipient is always able, not only to express his fear of the Greeks and their bearing of gifts, but also by appropriate disclaimer to repudiate the proposed disposition altogether, and so either to prevent the vesting taking effect or at least to cause a re-vesting in the proposing assignor. In case that

point is not sufficiently raised by the form of question 2 of the summons it was also agreed that any necessary amendment could be made to its form. It was further conceded by counsel for the defendants that the necessary disclaimer must be treated as having been made on Her Majesty's behalf at least by the argument of counsel for the Attorney-General in this court. A

In support of that proposition, counsel referred to passages in SHEPPARD'S TOUCHSTONE (7th Edn.), vol. 2, entitled "Of a Feoffment, Gift, Grant, and Lease". I take two short extracts from that passage as sufficient for the purposes of my judgment. Thus, it is said (chapter 15, p. 284): B

"for no estate can be made to a man of any thing in fee simple, for life, or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void . . . And if it be but a lease for years that is made, he may waive and avoid that by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his use." C

Counsel also cited to us a considerable passage in DAVIDSON'S CONVEYANCING PRECEDENTS (3rd Edn.) Vol. 5, Part II, a footnote beginning at p. 661. Again I will confine myself to a selection of two short passages. First (ibid.): D

"Every estate given by deed, will, or otherwise is supposed, prima facie, to be beneficial to the donee; consequently it is also supposed, until there is proof to the contrary, that every estate is accepted by the donee. But every donee is at liberty to refuse the gift, for the law will not, of course, compel a man to take an estate against his will."

And then the annotator refers to the passage in SHEPPARD'S TOUCHSTONE which I have already read. Then (ibid., at p. 663): E

"For it is of no moment at what time evidence of the disclaimer is committed to writing, the actual disclaimer or refusal of the estate will be held to have been made at the time of the gift, if the disclaiming party has never done any act inconsistent with the refusal of the estate." F

Whatever may be the validity and scope of this argument as a general proposition its present application is in my view negatived, necessarily, in the present case by the decisions, right or wrong, in the two *Morelle* cases. As I have already said the effect in such a case as the present of the Mortmain and Charitable Uses Acts, 1888 and 1891, as interpreted by this court is that the land in question vests automatically and irrevocably in Her Majesty, and it is in my judgment incompatible with those decisions and the reasoning on which they are based that Her Majesty could thereafter disclaim and cause the unexpired terms either to remain vested, or to be re-vested, in the Irish companies which the court held to be incapable of acquiring such interests. G

It is also in my view incompatible with those decisions and their reasoning that the vesting in Her Majesty should be dependent or conditional on any prior holding of an inquisition or finding of an office. That result follows inevitably from the passages which I have read from the judgments on the automatic nature of the forfeiture. As ROMER, L.J., observed during the argument, there would indeed appear to be in such a case as the present no question which could be the subject of any such inquisition. H

On this matter again I agree with HARMAN, J., notwithstanding the passage which the learned judge quoted from ROBERTSON'S book on CIVIL PROCEEDINGS BY AND AGAINST THE CROWN. The passage cited by the learned judge was (p. 431): I

"... the principle [that there must be still an inquisition before the Crown may enter on forfeiture] would seem still to apply to the land of alien corporations, and any other corporations, who are compelled to obtain a licence in mortmain to hold land and have not done so, and it does not appear to

- A the author that the terms of the Mortmain and Charitable Uses Act, 1888, s. 1, which confer a right of entry on the Crown in such a case, do away with the necessity of an inquisition."

HARMAN, J., continued after reading that passage:

- B "If this were right, the Crown would have no more than an interesse termini in the property, but I do not think I am free to decide the point in this way having regard to the decision of the Court of Appeal that the forfeiture was automatic which seems to assume that not only the possible rights of mesne lords are overridden, but that an inquisition or office cannot be necessary."
- C I think the same answer applies to the passage to which counsel referred us from CHITTY ON THE PREROGATIVES OF THE CROWN, p. 246.
- In the circumstances, it is unnecessary for me to express any view whether in any case the necessity for an inquisition is removed by the Queen's Remembrancer Act, 1859, s. 25, referred to in the second question in the summons, or on the point made by counsel thereunder that in the case of an interest such as is
- D here in question, viz., the unexpired residue of the term, the word "re-entry" in that section is in any case inappropriate.
- I also agree with HARMAN, J., that cases cited by counsel for the Attorney-General on the interest taken by executors (*Sackill v. Evans* (3); *Buckley v. Pirk* (4); *Wollaston v. Hakewill* (5); and *Stratford-upon-Avon Corp'n. v. Parker* (6)) do not advance counsel's argument. These cases no doubt establish that an
- E executor of a lessee or an assignee in possession of a term of years will only be liable on the covenants to the extent of the testator's assets, that is, de bonis testatoris, unless he has taken the further step of personally entering into possession. In the latter case he will be fully liable personally de bonis propriis in an action at common law in the debet as well as in the detinet. As HARMAN, J., observed, the case of executors is indeed somewhat special, for it is natural
- F enough that, if a testator had assumed liability under a lease that liability should pass to his estate. There is no doubt that the property is vested in the executor. The question is, according to the executor's conduct, whether it is so vested in him in his representative character only or personally in the full and ordinary sense.
- Counsel for the Attorney-General also submitted a second point of some force
- G and, as presented by him, if I may say so, some attraction, viz., that although the terms in question were, in accordance with the judgments in the first *Morelle* case (1) and the second *Morelle* case (2), vested at law in Her Majesty, nevertheless the Crown was not liable on the covenants unless and until possession had been taken or at least some step had been taken showing an intention to assume and enjoy the benefits of the leases. As I have already said this point also was not
- H suggested on the occasion of the hearing of the second *Morelle* case (2) and I accordingly note the use of the word "presumably" in the passage I earlier read from the judgment of the court.
- The point has clearly a significance and a marked significance on the general question whether, and, if so, on what terms and conditions, the Mortmain and Charitable Uses Acts apply to such cases as the present, and the point will of course
- I be open if this case should hereafter go to the House of Lords. I think, however, that we should take the point as really concluded against the Attorney-General by the necessary implications in the earlier decisions. I cannot think that it could be fairly contemplated from the terms of those decisions that the leasehold interests were vested as it were in a state of suspense in the Crown, and that the Crown was not entitled to the benefit, nor subject to the liabilities, of the leases. Such a result would, in my judgment, produce indeed a state of unreality.
- Taking that view it is strictly unnecessary for me to say more; but I think it

right to add that as at present advised I am disposed to agree with HARMAN, J.,* A that the liability towards the reversioners follows from the vesting, is a result of the privity of estate, and that possession is not requisite to give rise thereto. I found myself, as did the learned judge, on the decision in *Williams v. Bosanquet* (7). That was a case in which one who was possessed of a term of years assigned it by way of mortgage and as security for money advanced and the question was whether the mortgagee became liable on the covenants in the lease. DALLAS, B C.J., delivering the judgment of the court, said (1 Brod. & Bing. at p. 257):

"And so, by LORD HOLT, in *Cook v. Harris* (8) (1 Ld. Raym. 367), 'the assignee has the estate in him before entry, though not to bring trespass,' that being an action founded upon possession; but as between lessor and lessee, with respect to rent, this reason does not apply, for, the right to the rent and the liability to pay, vest by the lease and not by the occupation." C

Later, after referring to certain other cases, DALLAS, C.J., observed (*ibid.*, at p. 263):

"It has been further said, that there is no privity of estate, because possession was not taken; nor privity of contract, in respect of which the original lessee would be liable without possession. But it is not so; for D there is privity of estate, if legal possession, that is, acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry,

* On this point HARMAN, J., said: The decision in *Williams v. Bosanquet* (7) was that a person who took an assignment of a term by way of security for a mortgage took the whole burden of the term on him and became liable for the covenants in the lease whether he chose to enter or not. In that case the property was always in the occupation of the tenants and so the mortgagee had never entered into occupation, but they were held, nevertheless, to be liable as assignees of the term for the covenants in the lease. DALLAS, C.J., at Common Pleas, gives the judgment of the court and comes to the conclusion that entry is by no means necessary. He cites from *Bellasis v. Burbriche* (10) (1 Ld. Raym. at p. 171) in these terms (1 Brod. & Bing. at p. 258): E

" 'In cases of leases for years, the rent becomes due by the lease, and not from the entry, and there is no need to aver occupation, because, the lessee is liable to pay the rent, whether he occupies or not, but, in cases of leases at will, occupation must be averred.' The doctrine in COKE ON LITTLETON, and the cases, to which I have already referred, are in point to show, that actual possession is not necessary to render the lessee liable, under the lease, to payment of rent, and this leads to the question, whether there be any difference in this respect between the lessee and his assignee, or, as in this case, an assignee taking an assignment by way of security for a debt." F

DALLAS, C.J., comes to the conclusion that there is no difference in that respect. That seems to be a good authority, if further authority were needed, that taking possession is not a necessary ingredient in the liability of an assignee. [His LORDSHIP also read the passage in the judgment of the court cited by SIR RAYMOND EVERSHED, M.R., 1 Brod. & Bing. at p. 263]. His LORDSHIP continued:] It is quite true that the Crown has not accepted the forfeiture which here has the same effect according to the Master of the Rolls as if there had been a legal assignment of the term to it [see [1955] 1 All E.R. at p. 722, letter G]. As the Crown has not accepted the forfeiture, there would, I suppose, be a strong argument to say that acceptance by the Crown is necessary before the term could pass. That really was what counsel for the Attorney-General was in part arguing here. That is not open to him because the Court of Appeal has said that the term has vested and has overridden the question whether acceptance be necessary or not. The term then being vested by the forfeiture by operation of law in the Crown the question of acceptance is gone and all that remains is the question whether an entry into possession is necessary. G

In my judgment, the facts that an executor is only liable *de bonis testatoris* until entry and that the assignee in bankruptcy was held in *Turner v. Richardson* (9) not to have the term vested in him at all do not provide any reliable guides on this question. It is evident, in my opinion, on the cases so far as they have been quoted to me, that although when an original lease is made it is not perfected in the absence of assent until entry by the lessee who has only an *interesse termini*, yet once the term is properly created in the first lessee it will pass by assignment without any entry on the part of the assignee. That is what has happened here if the Court of Appeal, as I must assume, rightly decided *Morelle's* case (1). I, therefore, conclude that this point also must be decided against the Crown. H I

A which it is, if there be justness in the observations already made; and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns . . .”

B If it were necessary I should be disposed as at present advised to agree with HARMAN, J., that according to the decisions in the first *Morelle* case (1) and the second *Morelle* case (2) there has been such acceptance on behalf of Her Majesty, by virtue of the forfeiture for which the statute provides, as renders beneficial possession unnecessary to impose on Her Majesty the liabilities of the leases. In my judgment, however, the second point like the first is really concluded against the Attorney-General in this court by the earlier decisions, and I therefore think that the appeal should be dismissed.

C I add that I have not referred specifically to the bankruptcy cases to which counsel for the Attorney-General alluded before HARMAN, J., because as I understood counsel in this court he did not think that those cases really advanced his argument.

D HODSON, L.J.: I agree. The learned judge in his judgment referred to *Turner v. Richardson* (9), a case under the old bankruptcy law, which indicated that the assignees of a bankrupt are not bound to accept a term of years which may be burdensome instead of profitable to their trust, the position being that under the old law the property did not vest in the Commissioners of Bankruptcy at all. As I understood him, counsel for the Attorney-General conceded that this and similar cases did not really assist the Crown.

E ROMER, L.J.: I also agree that the appeal should be dismissed, and have only a word or two to add. In the first *Morelle* case (1), this court held that a lease similar to that which is in question in the present case was forfeited to the Crown from the date of the assignment to the Irish company which was there concerned. Having regard to the view which the court took of the effect of s. 1 of the Act of 1888, I do not think that it can be contended before us that the Crown can subsequently by disclaimer divest themselves of the legal interest which became F vested in them by virtue of the forfeiture, because the court in the first *Morelle* case (1) held that the term passed to the Crown automatically and at once, and clearly took the view, in my opinion, that it so passed once and for all.

G As SIR RAYMOND EVERSHERD, M.R., has said, it was not suggested in either of the two *Morelle* cases that, if the forfeiture did operate to vest the term in the Crown, it was only the bare legal interest that so vested and that the Crown had what HODSON, L.J., described yesterday as a locus poenitentiae in which to rid themselves of the interest by disclaimer. It seems to me, however, that for this court to hold today that such is the true position would nullify the decision of the court in the first *Morelle* case (1), which was in effect (as particularly appears, I think, from the judgment of DENNING, L.J., and also from the comments on the first *Morelle* case (1) which appear in the decision of this court in the second *Morelle* case (2) and to which my Lord has referred) that on the forfeiture operating the Crown became landlords of the sub-tenants. If in fact the view was—it did not arise there for actual decision—that the Crown became the landlords, quite clearly they could not now say before this court that they can rid themselves of their liabilities as landlords by disclaiming.

I Further, as SIR RAYMOND EVERSHERD, M.R., has indicated, the relevant passages in the judgments in both the *Morelle* cases show that the Crown cannot before this court contend, because it is not open to them so to contend, that entry is necessary before liability attaches to the Crown under the lessor's covenants in the lease.

It is clear that the arguments which counsel for the Attorney-General has addressed to us in this case may well be relevant to the main issue which appears now in question 1 of the present originating summons, i.e., the question whether the legal interest, or any interest in fact, in the events which have happened,

vested in the Crown at all. If that matter is presented for debate to the House of Lords, no doubt those arguments will be considered. In those circumstances, I would prefer to express no opinion as to the validity of the view which counsel for the Attorney-General submitted to us, either that the Crown, if there was a vesting, could subsequently divest the interest from the Crown, or that in any event they became under no effective liability by reason of the fact that they never accepted the lease or entered on the benefits of the demise. Nor do I wish to express any opinion as to the applicability to the present position of the Queen's Remembrancer Act, 1859, save only to say that, as in the first *Morelle* case (1), the decision of this court was that the forfeiture was instant and automatic, the implication is that the court was expressing the view that no inquisition held or office found was necessary. As I say, for my part I prefer to express no opinion on that or the other matters which counsel suggested in the Crown's case before us yesterday.

Having regard to the decisions of this court in the first *Morelle* case (1), as explained or expounded in the second *Morelle* case (2), I think that it is not open to this court to accept the submissions which have been put before us and I agree, therefore, that this appeal must fail.

Appeal dismissed. Leave to appeal to the House of Lords granted. D

Solicitors: *Treasury Solicitor* (for the plaintiff); *Johnson, Meredith, Hardy & Hutchison*, agents for *Lamb, Brooks & Bullock*, Basingstoke (for the first fifteen defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BOND AIR SERVICES, LTD. v. HILL. E

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), May 3, 4, 11, 1955.]

Insurance—Policy—Condition—Breach of condition—Onus of proof.

Condition 7 of an aircraft insurance policy provided that the insured should duly observe the statutory regulations and directions relating to air navigation, and condition 8 provided that the observance and performance of the conditions of the policy by the insured were conditions precedent to the insured's right to recover thereunder.

The aeroplane insured under the policy crashed, and the owners claimed to be indemnified by the respondent, a Lloyd's underwriter who had subscribed the policy, for his proportion of the resulting loss and damage. In arbitration proceedings arising out of the claim, the respondent alleged breaches of condition 7 and of other conditions and contended that the burden of proof that the conditions had been fulfilled rested on the claimants.

Held: the burden of proof of breaches of conditions was on the respondent in accordance with the ordinary rule that the onus of proving a breach of a condition of an insurance policy which would relieve the insurer from liability in respect of a particular loss was, unless the policy otherwise provided, on the insurer; and the effect of condition 8 of the policy was to give to the claimants' obligations under conditions of the policy the quality of warranties but not to alter the incidence of the burden of proof.

Stebbing v. Liverpool & London & Globe Insurance Co., Ltd. ([1917] 2 K.B. 433) followed.

Geach v. Ingall (1845) (14 M. & W. 95) and *Ashby v. Bates* (1846) (15 M. & W. 589) explained.

[**Editorial Note.** In relation to the incidence of the burden of proof of breach of conditions which are warranties, reference to cases on implied warranties, such as those concerned with seaworthiness or roadworthiness may be useful. An example is *Barrett v. London General Insurance Co., Ltd.* ([1935] 1 K.B. 238) where the burden of proof was said to lie on the insurers; but the drawing of analogy between law relating to ships at sea and law to be applied

A to vehicles on roads has been deprecated (see *Trickett v. Queensland Insurance Co.*, [1936] A.C. 159) and, presumably, the same view may be taken of analogy between law for aircraft and for other means of transport.

As to the burden of proof of conditions of non-marine insurance policies, see 18 HALSBURY'S LAWS (2nd Edn.) 439, para. 628.]

Cases referred to:

- B (1) *Barrett v. Jermyn*, (1849), 3 Exch. 535; 18 L.J. Ex. 215; 12 L.T.O.S. 494; 154 E.R. 957; 29 Digest 331, 2695.
 (2) *Geach v. Ingall*, (1845), 14 M. & W. 95; 15 L.J. Ex. 37; 153 E.R. 404; 29 Digest 356, 2876.
 (3) *Ashby v. Bates*, (1846), 15 M. & W. 589; 15 L.J. Ex. 349; 7 L.T.O.S. 232; 153 E.R. 984; 29 Digest 351, 2841.
 C (4) *Crogate's Case*, (1609), 8 Co. Rep. 66b; 77 E.R. 574.
 (5) *Stebbing v. Liverpool & London & Globe Insurance Co., Ltd.*, [1917] 2 K.B. 433; 86 L.J.K.B. 1155; 117 L.T. 247; 29 Digest 415, 3249.
 (6) *Re Hooley Hill Rubber & Chemical Co., Ltd. & Royal Insurance Co., Ltd.*, [1920] 1 K.B. 257; sub nom. *Hooley Hill Rubber & Chemical Co. v. Royal Insurance Co.*, 89 L.J.K.B. 179; 122 L.T. 173; 29 Digest 322, 2639.
 D

Special Case.

This was a Special Case stated for the decision of the court by an arbitrator under the Arbitration Act, 1950, s. 21 (1) (a).

E By a Lloyd's aircraft policy dated Nov. 13, 1947, the respondent, Ernest Reginald Hutchinson Hill, and other Lloyd's underwriters, insured the claimants, Bond Air Services, Ltd., who were the owners of an aeroplane, against loss or damage to the aeroplane and third-party liability of the claimants arising from the use of the aeroplane. By condition 7 of the policy

F "The insured and all persons in his employment or for whom he is responsible shall duly observe the statutory orders regulations and directions relating to air navigation for the time being in force",

and by condition 8

G "The observance and performance by the insured of the conditions of this policy so far as they contain anything to be observed or performed by the insured are of the essence of the contract and are conditions precedent to the insured's right to recover hereunder."

By its original terms the policy insured the claimants from Nov. 15, 1947, to Feb. 14, 1948, but, by agreements between the parties thereto, it was extended from time to time so as to continue in operation up to Aug. 14, 1948.

H On May 23, 1948, the aeroplane was engaged in a flight from Valencia, Spain, to Bovingdon Airport. Whilst engaged in this flight, it crashed in a field containing a growing crop of barley at a place approximately six miles north of Bovingdon Airport, and became a total loss. In crashing, damage was caused by the aeroplane to the crop of barley and the claimants became legally liable to pay compensation to the owners of the crop. The claimants claimed, inter alia, a declaration that the respondent was liable to indemnify them under the policy up to his proportion thereof. By para. 5 of the points of defence, the I respondent alleged that the claimants were put to proof of the observance and performance by them of the conditions precedent of the policy in four respects:—
 (i) and (ii) that the aircraft was at all material times being flown in compliance with the Air Navigation Order, 1923, art. 3 (ii) and (iii) and Sch. 2, para. 8 and para. 9, and by a qualified pilot; (iii) that there were at all material times carried in the aircraft and maintained in a fit condition for immediate use in compliance with art. 14 of the Air Navigation Order, instruments prescribed by the Air Navigation Directions, 1936; (iv) that the claimants had complied with the condition of the policy which provided that after any accident the insured

should produce to the insurers all such log books, estimates, vouchers, explanations and information as the insurers should reasonably require and should verify the correctness thereof. By para. 6 of the points of defence, the respondent alleged that he was not liable to the claimants under the policy because, in breach of some or all of the conditions of the policy, (i) the aircraft was at all material times loaded in excess of the weights permitted in the Certificate of Airworthiness thus invalidating the certificate and offending against the Air Navigation Order, 1923, art. 3 (ii); (ii) the artificial horizon of the aircraft was not at all material times maintained in fit condition for immediate use; (iii) the claimants did not produce such estimates, vouchers, explanations and information as the respondent might reasonably require as to the load and weight of the aircraft but, on the contrary, (a) produced a weight and balance sheet made out after the accident and supported by no contemporaneous record or document, and insufficient to establish the correct load and weight of the aircraft; (b) on the respondent's request to be furnished with immediate oral information from the crew of the aircraft in relation to the accident, and in verification of the explanations and information given by the claimants, failed to ensure that such members of the crew as were able, should furnish such immediate information, and untruly stated, by a letter dated June 10, 1948, that several of the crew were still in hospital and were likely to remain so for weeks.

The respondent contended that the claimants could not recover the sum claimed without proving the matters stated in para. 5 of the points of defence and that they had not committed the breaches of condition alleged in para. 6. The claimants contended that it was not obligatory for them to prove compliance with the conditions, but that it was for the respondent to prove, if he could, that they had failed to comply with them, and that the burden of such proof was on the respondent. The arbitrator was of the opinion that the respondent's contention was unsound. He was further of the opinion that condition 8 had no effect on the burden of proof; that its sole effect was to give the claimants' undertakings the character of warranties or conditions and that it left the burden of proof untouched.

The question for the court was whether, as the respondent contended, the claimants could not recover the sum claimed without proving the matters stated in para. 5 of the points of defence and that they had not committed the breaches of condition alleged in para. 6, or whether, as the claimants contended, it was not obligatory on them to prove compliance with the conditions, but that it was for the respondent to prove, if he could, that they had not complied with the conditions, and that the burden of such proof was on the respondent.

N. R. Fox-Andrews, Q.C., and S. H. Noakes for the claimants.

J. R. Bickford Smith for the respondent.

Cur. adv. vult.

May 11. **LORD GODDARD, C.J.**, read the following judgment: This is a Special Case stated by a learned arbitrator on a point of law arising in the course of a reference, and raises an interesting question with regard to the burden of proof in a claim under a policy of insurance. The policy in question was a Lloyd's aircraft policy, and the claim is made in respect of the total loss of the plane covered, which was the property of the claimants, and for a small amount for which the owners are said to be liable in respect of some damage to crops caused by the crash of the plane. The loss occurred as long ago as May 23, 1948, and, though arbitration proceedings were started soon after and the points of claim and defence were delivered in July, 1949, the reference did not come on for hearing until the end of last year. The accident happened on a flight from Spain to this country and quite near to the aerodrome to which the plane was bound.

The policy contained several general conditions, and condition 8 provided:

"The observance and performance by the insured of the conditions of

- A this policy so far as they contain anything to be observed or performed by the insured are of the essence of the contract and are conditions precedent to the insured's right to recover hereunder."

Condition 7 provided that:

- B "The insured and all persons in his employment or for whom he is responsible shall duly observe the statutory orders regulations and directions relating to air navigation for the time being in force."

The respondent has sought to put the claimants to the proof that this condition was fulfilled in respect of four specified matters, and further alleges three breaches of other conditions. Before the arbitrator, the respondent contended that, as the observance and performance of the conditions by the claimants and their

C servants were conditions precedent to their right to recover, the burden of proving compliance was on them. The learned arbitrator has held against that contention, and that it is for the respondent to prove the breach of all or any of the conditions. He held that the sole effect of condition 8 is to give to the claimants' undertakings the character of warranties or conditions, and that it leaves the onus of proof untouched.

- D I do not think it can be doubted that, ordinarily, it is for the underwriter to prove a breach of condition, at least where he is not contending that the policy is void on the ground that there has been a breach of a condition precedent to the formation of the policy. So, too, it is for him to prove an exception. The difference between a condition and an exception is that the former places some duty or responsibility on the assured, while the latter restricts the scope of the
- E policy. That it is for the insurers who allege that the conditions were broken to prove it, has, I think, always been accepted, at least since PARKE, B.'s judgment in *Barrett v. Jermyn* (1) (3 Exch. at p. 542). Counsel for the respondent has contended in a learned and interesting argument that, as the policy provides that the observance of the conditions is a condition precedent to the assured's right to recover, it is for him to prove observance so that the onus is shifted. For this,
- F he relies mainly on *Geach v. Ingall* (2), and *Ashby v. Bates* (3). Both these cases were concerned with conditions precedent of the policy and related to the truth of the answers made in the proposal forms. The new Rules of 1834,* which were supposed to do so much towards simplifying special pleading, if not practically to abolish it, and were unfortunately proved to have exactly the opposite effect, were then in force, and a perusal of the amusing skit of *Crogate's Case* (4) and the
- G dynamic results which a replication de injuria could have, written by HAYES, J., and to be found in SIR WILLIAM HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 9, p. 417, will show how, notwithstanding the rules, the learned Baron Surrebutter, a thin disguise for LORD WENSLEYDALE, managed to retain the niceties and the almost unintelligible subtleties of the special pleader's art. These rules, however, did make it unnecessary for a plaintiff to set out all the
- H conditions precedent in detail in his declaration, and enabled a general averment of conditions precedent to be sufficient. In the hope, however, that the real issue would emerge from the pleadings, a defendant had distinctly to specify in his plea any condition precedent, the performance or occurrence of which was intended to be contested. It was held in both these cases that, as the plaintiff
- I had averred the performance of the conditions, it was for him to prove performance, the actual decision being that he had the right to begin. The substance of the new rules on this point was afterwards included in the Common Law Procedure Act, 1852, and is still preserved by R.S.C., Ord. 19, r. 14. In both the cases cited, the insurers were repudiating the policies, and they were not concerned with conditions precedent to the liability of the insurers on a valid and existing policy. What I think they decided was that, where, on the pleadings, the issue was whether there was an existing policy, the plaintiff had to prove it

* *Regulæ Generales* of the Hilary Term, 1834.

and prove the performance of conditions necessary to establish it. I cannot find that these cases have ever been regarded, either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss. The respondent's contention, no doubt, is that, by providing that the observance of conditions is to be a condition precedent to his liability to pay, the policy has shifted the onus on to the claimants. It is enough to say that in this court *Stebbing v. Liverpool & London & Globe Insurance Co., Ltd.* (5) concludes the matter. In that case there were words to exactly the same effect as here, namely, that compliance with the conditions should be a condition precedent to any liability on the part of the insurer, and the court decided that the burden of proving the falsity of an answer which amounted to a breach of warranty was on the insurer. It is true that this case also was one concerning a false answer in a proposal, and it may be that an appellate court will some day have to decide whether there is a conflict between the two cases in *MEESON & WELSBY* [*Geach v. Ingall* (2) and *Ashby v. Bates* (3)], which I have cited, and *Stebbing's* case (5). As those two cases were not in the Exchequer Chamber, they are open to review in the Court of Appeal. The learned arbitrator in the present case has held that the effect of the provision as to the observance of the claimants' undertakings is to give to them the quality of warranties, so that a breach would absolve the respondent of liability for a loss occurring when the claimants were in breach, but has held that the onus of proof is not affected; and I agree with him. The parties to a policy can use words which will relieve insurers of the onus and cast it on the assured, as they may with regard to any other matter affecting an insurer's liability; see, for instance, the judgment of SCRUTTON, L.J., in *Re Hooley Hill Rubber & Chemical Co., Ltd. & Royal Insurance Co., Ltd.* (6) ([1920] 1 K.B. at p. 273). But, in my opinion, much clearer words than are used here would be necessary to change what I think, certainly for a century and probably for much longer, has always been regarded as a fundamental principle of insurance law, namely, that it is for the insurers who wish to rely on a breach of condition to prove it. I have not thought it necessary to refer to the many other authorities quoted during the argument because, as I have said, I think *Stebbing's* case (5) concludes the matter in this court, and also because I entirely agree with the clearly expressed conclusions of the arbitrator.

I, therefore, answer the question submitted by saying that the claimants' contention is right, and they must have the costs of the argument and of the Special Case.

Solicitors: *Gouldens* (for the claimants); *William Charles Crocker* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

SIMMONDS v. SIMMONDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), March 2, 3, 4, May 13, 1955.]

Divorce—Maintenance of wife—Ancillary relief—Application out of time—Delay—“On any decree for divorce”—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 19 (2), (3)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 44 (1).

The rules governing the time for making applications for maintenance and providing for leave to apply out of time, and the cases dealing with these questions, ought to be read on the assumption that with due expedition the application will lead to an order which can fairly be said to be made “on” the decree, and that there is no warrant for the notion that any rights whatever are preserved to the wife by the mere making of an application, albeit timely, which is deliberately allowed to lie dormant (see p. 491, letter D, post).

The parties were married in 1931. In May, 1939, they entered into a deed of separation. In May, 1940, the wife obtained a decree nisi which was made absolute in December of that year. In January, 1941, the wife gave notice of application for maintenance under enactments now replaced by the Matrimonial Causes Act, 1950, s. 19 (2) and (3). The husband filed affidavits of means, but no appointment was then taken before the registrar for consideration of the wife’s claim. On Apr. 12, 1948, the parties entered into a deed which stated that the husband had paid to the wife the sum of £250 which she accepted in full and final discharge of all claims of whatsoever nature under and by virtue of the deed of separation and any outstanding orders of the Divorce Division, and in satisfaction of any claim which she might have against the husband by way of permanent maintenance. By this deed the wife consented to an order being made by the Divorce Division in such form as the husband might require for the purpose of discharging him “from the said claims whether the same may have accrued or might accrue in the future”, but no such order was ever made. The wife having reinstated her application, the husband issued a summons calling on her to show cause why her application dated Jan. 8, 1941, should not be dismissed, pursuant to the deed of Apr. 12, 1948,

Held: since the deed was an attempt to settle by a lump sum payment the wife’s outstanding claim for maintenance, it was ineffectual to oust the court’s statutory jurisdiction under s. 19 (2) and (3) to hear her application for maintenance (observations of SIR WILFRID GREENE, M.R., in *Mills v. Mills* ([1940] 2 All E.R. at p. 261), *Bennett v. Bennett* ([1952] 1 All E.R. 413) and *Hyman v. Hyman* ([1929] A.C. 601) applied); further, to dismiss the wife’s application without her consent now would be in effect to order payment of a lump sum without her consent (which the court had no jurisdiction to order) and, in view of the former, though erroneous, practice of the court whereby a timely application for maintenance was treated as preserving for the future the right to proceed with the claim, the wife’s application of January, 1941, would not now be dismissed, although the delay would be taken into consideration when the application was before the registrar on the merits; accordingly the husband’s summons would be dismissed.

Hasting v. Hasting ([1947] 2 All E.R. 744) explained.

Per CURIAM: applications under the Matrimonial Causes Rules, 1950, r. 44 (1), for leave to apply for ancillary relief out of time should not be made ex parte (see p. 491, letter G, post).

[As to applying for maintenance after decree absolute, see 10 HALSBURY’S LAWS (2nd Edn.) 786, para. 1245; and for cases on the subject, see 27 DIGEST (Repl.) 631, 5911-5921.

For the Matrimonial Causes Act, 1950, s. 19 (2), (3), see 29 HALSBURY'S A STATUTES (2nd Edn.) 407.

For the Matrimonial Causes Rules, 1950, rr. 8 (2), 9 (1) (c), 44 (1), see 10 HALSBURY'S STATUTORY INSTRUMENTS 202, 219.]

Cases referred to:

- (1) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 27 Digest (Repl.) 235, 1888. B
- (2) *Bennett v. Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.
- (3) *Mills v. Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 27 Digest (Repl.) 615, 5759.
- (4) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest (Repl.) 631, 5917. C
- (5) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 27 Digest (Repl.) 631, 5918.
- (6) *Hasting v. Hasting*, [1947] 2 All E.R. 744; [1948] P. 68; [1948] L.J.R. 119; 27 Digest (Repl.) 631, 5921.
- (7) *Shott v. Shott*, [1952] 1 All E.R. 735; 3rd Digest Supp.
- (8) *Charles v. Charles*, (1866), L.R. 1 P. & D. 260; 36 L.J.P. & M. 17; 15 D L.T. 416; 27 Digest (Repl.) 269, 2154.
- (9) *Sidney v. Sidney*, (1866), L.R. 1 P. & D. 78; *reversd.* H.L., (1867), 36 L.J.P. & M. 73; 27 Digest (Repl.) 634, 5950.
- (10) *Robertson v. Robertson & Favagrossa*, (1883), 8 P.D. 94; 48 L.T. 590; 27 Digest (Repl.) 614, 5753.
- (11) *Stephen v. Stephen*, [1931] P. 197; 100 L.J.P. 86; 145 L.T. 541; 27 E Digest (Repl.) 628, 5885.

Appeal.

This was an appeal by the husband against an order of Mr. Registrar TOWNLEY MILLERS dated Nov. 3, 1954, whereby he dismissed a summons issued by the husband calling on the wife to show cause why her application for maintenance dated Jan. 8, 1941, should not be dismissed. The appeal came before LORD MERRIMAN, P., in chambers. HIS LORDSHIP adjourned the case into court and invited the assistance of the Queen's Proctor.

The facts appear in the judgment.

G. C. Tyndale, Q.C., and *G. H. Crispin* for the husband.

A. K. Kisch for the wife.

R. F. Ormrod for the Queen's Proctor.

Cur. adv. vult.

May 13. LORD MERRIMAN, P., read the following judgment: The parties were married in September, 1931. There are no children of the marriage. On May 11, 1939, the parties entered into a deed of separation. This was not produced before me, and, save as hereafter appears, it is of no importance. On Jan. 11, 1940, the wife presented a petition for divorce on the ground of the husband's adultery with a named woman, on many specified occasions in 1939 and also in 1940 on several dates immediately preceding the presentation of the petition. There was no prayer for the exercise of the discretion of the court in the wife's favour, nor has there been, so far as I am aware, the slightest suggestion of any misconduct on her part. Indeed, although the husband entered a general appearance, he filed no answer. Decree nisi was pronounced on May 27, 1940, and was made absolute on Dec. 9, 1940. The petition contained no prayer for the maintenance of the wife. However, on Jan. 8, 1941, the wife gave notice of an application for maintenance. It is common ground that this notice, together with the requisite further notice to file evidence*, was served on the husband.

* Under the present rules these notices are in accordance with r. 3 (3), r. 8 (2) of the Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), and Forms 2, 10 in Appendix 3 to those rules. Service is governed by r. 9 (1) (c) of those rules.

- A Accordingly, on Jan. 24, 1941, the husband filed an affidavit of means. An order for discovery by the husband was made on Feb. 6, 1941, and various other steps followed which it is unnecessary to mention particularly, until, on June 9, 1941, the husband filed a further affidavit of means. The learned registrar says in his written judgment that from the affidavits filed it might be supposed that the husband was not in a position to pay very much—at least, so long as the war lasted.
- B The husband is a member of a bookmaking firm. It was suggested that, apart from the general effect on the business of a bookmaker caused by the curtailment of horse-racing during the war, the husband's position was specially affected by the fact that he was only a junior partner to his father. Indeed, it was suggested that the present proceedings had only arisen because his position had been greatly improved by the recent death of his father. However that may be, no appointment before a registrar for the consideration of the wife's claim for maintenance was taken in 1941; and, so far as the registry was concerned, nothing more was heard of the application until May, 1954, that is to say, after the lapse of almost thirteen years.

- It may be well, before dealing with the subsequent history, to emphasise that the wife had made her application well within the time prescribed by the rules; that, so far as the "conduct of the parties" was concerned, there appeared to be no obstacle to the wife's claim for maintenance, and whatever the affidavits may have disclosed as to the "ability of the husband" that the wife, instead of allowing her application to go to sleep, could have proceeded without difficulty to obtain at least a nominal order, which the court could subsequently have varied to meet any change in the circumstances. Meanwhile, however, on
- E Apr. 12, 1948, the parties entered into a deed. The recitals are curious. In the first place it was recited that there "might" be a liability for the payment of certain sums by the husband under the deed of separation already mentioned (dated May 11, 1939); secondly, that by virtue of an order, or orders, of this Division, certain sums "might" be due and payable by the husband to the wife; and, thirdly, that for the purpose of discharging any sum, or sums, which might
- F be due as aforesaid, either under the deed of separation or orders of the said court "whether already obtained or which might be obtained in the future, the parties had agreed as follows: . . ." There was no ground for the suggestion that any sums whatever were due from the husband to the wife, either under the deed of separation or under any orders of this court. When, therefore, it was stated in the agreement that the husband, on the signing of the deed, had paid
- G to the wife the sum of £250 in full and final discharge of all claims of whatsoever nature under and by virtue of the said deed of separation, and any outstanding orders of this Division, and in satisfaction of any claim which the wife might have against the husband by way of permanent maintenance, it is plain that in substance the deed represented an attempt to settle, by a lump sum payment, the wife's outstanding claim for maintenance, and nothing else. At any rate, if there
- H were any other claims of "whatsoever nature" under the deed of separation or any outstanding orders, I have not been made aware of them. By cl. 2 of the agreement the wife thereby consented to an order being made by this court in such form as the husband might require for the purpose of effectually discharging him from the said claims whether the same might have accrued or might accrue in the future. It is this clause that gave rise to the wording of the present
- I summons of Oct. 21, 1954, which calls on the wife to show cause why her application dated Jan. 8, 1941, should not be dismissed, pursuant to the deed in question.

I should add that it was suggested that the wife, who was said to be without independent advice at the time, signed the deed in the belief that the agreement did not relate to maintenance at all, but was intended to settle some question of a rebate of income tax, to which she was entitled. At one stage of the argument it appeared that it might be necessary for me to hear evidence about the circumstances in which the deed came to be executed. However, as this appeal must,

in my opinion, be decided on other grounds of more general application, I do not express any opinion at all about the merits of this suggestion. It is only necessary to say that if the deed gives effect to a mutual agreement to dispose of the wife's claim to maintenance for the lump sum of £250, counsel for the Queen's Proctor has satisfied me that it is ineffectual to oust the statutory jurisdiction of the court which is now contained in s. 19 of the Matrimonial Causes Act, 1950 (see *Hyman v. Hyman* (1); *Bennett v. Bennett* (2)). As SIR WILFRID GREENE, M.R., pointed out in *Mills v. Mills* (3) ([1940] 2 All E.R. at p. 261) there is no jurisdiction in the court to order payment to the wife of a lump sum. Such payment can only be consensual. That being so, he thought that it was undesirable that the court should direct the payment of such a lump sum, and that there was no necessity for the court to appear to be making an order which it has no jurisdiction to make at all. He suggested that a proper and regular procedure would be by making an order discharging an existing order for maintenance. Thus, if the agreed sum has already been paid in full satisfaction of any sums payable under that order, all that is necessary is a recital to that effect in an order by consent that the existing maintenance order be discharged. On the other hand, if the sum had not already been paid, the order for discharge could take the form that, on payment of the agreed sum, the existing order should stand discharged, in which case it would merely be necessary to satisfy the registrar of that fact for the discharge of the existing order to become effective. It may well be, as the learned registrar said, that if in 1948 or 1949 the husband had applied to dismiss the wife's application for maintenance, and the wife had consented, no difficulty would have arisen. He rightly appreciated, however, that to make an order without her consent would in effect be to make an order for a lump sum payment, which the court has no jurisdiction to do (*Mills v. Mills* (3)). In effect, therefore, he decided the summons on the ground that after the intervening lapse of time the wife is not disentitled to withhold her consent, notwithstanding the agreement.

The learned registrar, however, did not consider the question which in my opinion is the cardinal question in this appeal, viz.: whether the dismissal of the husband's summons might have the effect of leading to the making of an order for maintenance, which, after such a lapse of time, ought not to be regarded as being made "on any decree for divorce".* It is right to say, however, that it is common ground that no such point was taken before him. On the other hand, if the wife is not bound by the deed in relation to maintenance by reason of the alleged absence of a consensus ad idem, or otherwise, the deed disappears from the history of her claim for maintenance. This would mean that a continuous period of thirteen years has elapsed while her application has been in abeyance, instead of two separate periods of seven and six years respectively before and after the deed of 1948. The main contention put forward by counsel for the wife was that, having made and served an application for maintenance in due course under the rules aforesaid without any necessity for obtaining the leave of the court to make an application out of time, she has done all that is necessary to ensure that any order made for her maintenance is made "on" the decree. In effect, the contention is that whether the claim for maintenance is made in the petition itself or is made by a timely notice, the wife's right to proceed to the obtaining of an order is preserved, and, however protracted may be the delay in pursuing the application, that the court is only concerned with the bearing, if any, of such delay on the amount of the order; but has no discretion to hold otherwise than that the order is made, whatever the interval of time, "on" the decree, provided the application was originally made in the prescribed time. Counsel for the wife faced frankly the implication that this was substituting for the words of the statute "on any decree"—interpreted as:

* I.e., within s. 19 (2), (3) of the Matrimonial Causes Act, 1950, which provide that "on any decree for divorce" the court may order secured maintenance or maintenance.

- A they have been by the courts to mean "on any decree or within a reasonable time thereafter"—the words "on any application made on a decree or within a reasonable time thereafter". In support of this contention he relied on a practice said to be regarded by practitioners generally as being recognised by the Principal Probate Registry, that a wife may make a timely application so as to "preserve her rights" to an order for maintenance, even though she has no
- B intention of proceeding with it for the time being.

- I confess that this statement took me completely by surprise, but it was confirmed categorically by counsel on all sides, speaking from their own very considerable experience. My inquiries from the registry tend to confirm the statements of counsel. It appears, however, that there is some diversity of practice, inasmuch as the senior registrar, at any rate, makes a point of calling
- C for evidence explaining any considerable lapse of time between the dates of the application and the taking of an appointment to deal with it. It is sufficient for the moment to say that, as the present case shows, this particular variation of the practice is by no means universal, and that counsel for the wife has argued that there is no justification for it. He submits that delay, however protracted, is relevant solely to the question of amount. Leaving this aside, however, it is
- D plain that the registry and practitioners have been acting on the assumption that the lapse of time between the decree and the moment at which the court actually makes an order for maintenance is of no consequence provided only that the wife has "preserved her rights" by making a timely application in one form or another. It may well be that the number of cases affected by this practice at any given time was over-estimated during the argument. For example, I am
- E satisfied that under the existing rules, the suggestion that a respondent husband can be kept in ignorance, maybe for years, of the very fact that any application has been made, is erroneous. Moreover, in the nature of things it would seem to be unlikely that there is any considerable number of cases in which wives who have a real claim for maintenance would allow a timely application to become dormant, and those in which the husband stands by and allows the
- F application to hang over him indefinitely must presumably be still fewer. Be that as it may, this case may be useful if it induces parties who are affected to put matters in order.

- Counsel for the wife rightly admitted that if the practice is erroneous the court could not be bound by it. At the same time he invoked the existence of the practice as a cogent circumstance in relation to the question whether the
- G court can hold that an order made after a delay encouraged by the practice is nevertheless made "on the decree". I will return to this aspect of the matter later. In support, however, of his argument that it is the date of the application that matters in relation to the date of the decree, and not the date of the order, he pointed out, quite truly, that most of the cases dealing with the limitation imposed by the words "on any decree" relate to applications made out of time
- H for leave to file a separate petition for maintenance, as was formerly necessary, or, more recently, for leave to give notice of application for maintenance. This is no doubt true; but it seems to me that it is almost inevitable that it should be so. Some process must be prescribed to lead to an order for maintenance, and it is obvious that the process must be initiated by some form of application. I realise that in several of the cases dealing with leave to make application for
- I maintenance out of time there are passages which refer to the application, rather than to the order, as being made on the decree, but in *Mills v. Mills* (3) SIR WILFRID GREENE, M.R., said ([1940] 2 All E.R. at p. 257):

"At the outset, one matter must be remembered with regard to the jurisdiction of the court under the provisions of s. 190 [of the Supreme Court of Judicature (Consolidation) Act, 1925], to which I have referred. That jurisdiction can only be exercised on any decree for divorce or nullity of marriage. Accordingly, if an application is made by a wife of which it

can fairly be said that an order made upon it would not be made 'on' A
such a decree, the court has no power to accede to the application."

Conversely, it follows, in my opinion, that the court ought not to accede to
an application for leave to apply out of time for maintenance unless it can fairly
be said that the order made on it would be made "on" the decree, in the
sense that it would be made within a reasonable time after the decree, having
regard to all the circumstances of the case; see *Scott v. Scott* (4), *Fisher v. Fisher* B
(5), *Hasting v. Hasting* (6) and *Shott v. Shott* (7).

I appreciate, however, that this leaves untouched the question whether a
timely application for maintenance deliberately allowed to become dormant can
fairly be said to lead to an order made on the decree. The statutory condition
that the order itself shall be made on the decree has been constant throughout,
beginning with s. 32 of the Matrimonial Causes Act, 1857, down to s. 19 of the C
present Matrimonial Causes Act, 1950. Indeed, the wording of this last section
emphasises the point, inasmuch as the three sub-sections dealing respectively
with alimony pendente lite, a secured provision for the wife, and with the
payment of ordinary periodical maintenance, all begin with the word "on".
It is for the rule-making authority for the time being to prescribe and regulate
the process; but it must act intra vires of the statute. It may be useful at the D
outset to consider the practice in force at the time of the passing of the Matri-
monial Causes Act in June, 1866 (29 Vict. c. 32). By s. 1 of that Act the court
was, for the first time, empowered to make an order on a husband to pay to the
wife during their joint lives such monthly or weekly sums of maintenance as the
court might think reasonable, with the proviso that the court might discharge,
modify or suspend the order temporarily, and again revive the same order, wholly E
or in part, as to the court might seem fit. The Act was passed, as appears from
the preamble, because the experience of nine years had shown that the securing
of a gross or annual sum, as provided by s. 32 of the Matrimonial Causes Act
1857 (20 & 21 Vict. c. 85), was not invariably the best way of providing main-
tenance for a wife, since it sometimes happened that a decree for dissolution of
marriage was obtained against a husband who had no property on which payment F
of any such gross or annual sum could be secured, but who nevertheless would
be able to make a monthly or weekly payment to the wife during their joint lives.
It was the Act of 1866 also which provided (by s. 3) that no decree nisi for a
divorce should be made absolute until after the expiration of six months, unless
the court fixed a shorter time. Section 7 of the Matrimonial Causes Act, 1860
(23 & 24 Vict. c. 144) had first introduced the decree nisi, not to be made absolute G
for three months, in place of the single decree provided for by the Act of 1857.
From the fact that the substance of s. 32 of the Act of 1857 is recited almost
verbatim in the preamble of the Act of 1866, and that s. 1 began with the words
"In every such case", it is clear that the words "on any such decree" are
imported from s. 32 into the new provisions for the periodical payment of
maintenance. So things remained, in substance, until both sections were con- H
solidated in s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act,
1925,* and so they remain, in substance, today.

On Dec. 26, 1865, LORD PENZANCE, who was then, as judge ordinary, the rule-
making authority, made a comprehensive revision of the rules and regulations,
to come into force on Jan. 11, 1866. The relevant rules in the section headed
"Maintenance and Settlements" are r. 95 and r. 96. Ignoring the references to I
the settlement of a wife's property in s. 45 of the Act of 1857, and to the variation of
settlements in s. 5 of the Matrimonial Causes Act, 1859, the effect of these two rules
was that applications to the court to exercise the authority given by s. 32 of the Act

* Section 190 of the Act of 1925 is repealed by the Matrimonial Causes Act, 1950, and
replaced by s. 19 thereof; s. 32 of the Act of 1857 and s. 1 of the Act of 1866 were
repealed by the Matrimonial Causes Act, 1907 (7 Edw. 7 c. 12) which in turn was repealed
by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 and Sch. 6, and
replaced by s. 190 of that Act.

- A of 1857 were to be made in a separate petition, which might be filed as soon as a decree nisi had been pronounced, but not before, and must, unless by leave of the judge, be filed within one month thereafter. As I have already said, when these rules came into force, the power to order weekly or monthly payments of maintenance had not been added to the powers given by s. 32 of the Act of 1857, and the interval between decree nisi and decree absolute was still three months. These rules, however, were still in full force when the 2nd (1868) Edition of Mr. BROWNE's treatise on the PRINCIPLES AND PRACTICE OF THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES was published, and remained in force at the time when the 5th Edition was published by Mr. POWLES in 1889. Meanwhile, as appears from the text of the 2nd Edn., at p. 143, it was considered that it was obligatory to embody any provision for the wife under s. 32, in the actual decree dissolving the marriage: that is to say, the decree absolute and not the decree nisi—see *Charles v. Charles* (8); *Sidney v. Sidney* (9). On appeal, however, the House of Lords expressly reversed the decision of the full court in *Sidney v. Sidney* (9) and impliedly overruled *Charles v. Charles* (8). The decision arose out of an attempt to appeal to the House of Lords against the amount of maintenance embodied in the decree absolute. The point of the decision was that, although the appeal would lie against the decree of dissolution itself, that part of the decree which dealt with maintenance was separate and subsidiary.

LORD WESTBURY said (36 L.J.P. & M. at p. 75):

- E “ . . . if, as a matter of convenience and to save expense, one order only is drawn up, or one decree recorded, in which the court, having first finally pronounced for the dissolution of the marriage, goes on to exercise the supplementary jurisdiction of ordering an allowance, still that second part of the decree, though for convenience it is all contained in one piece of parchment, is in reality the exercise of a different jurisdiction and of a different judicial power and consideration; and the one jurisdiction and its exercise is wholly distinct from the other jurisdiction and the exercise thereof.
- F It would be absurd, therefore, and we should be allowing ourselves to be caught by mere forms of expression, if we were to hold that that portion of the decree which relates to the maintenance is a decision of the court upon a petition, that is, a petition for the dissolution of a marriage. As I have already observed, the petition for the dissolution of the marriage must be finally decided first, before the right to exercise the auxiliary or supplementary discretionary power can by possibility arise. It is absurd, therefore,
- G to confound the one thing with the other, and to ascribe to the discretionary order which follows upon the judgment the character of being an order pronounced upon a petition for the dissolution of the marriage. In fact, although it may not be so in terms, it is really an order pronounced upon an application to the discretionary power of the court, which application can only
- H be made after the other and more important jurisdiction has been exercised.”

- I Thus, although the supposed obligation to embody the maintenance order in the decree was shown to have been erroneous, the provision which enabled the application to be made as soon as the recently instituted decree nisi had been pronounced tends to emphasise the necessity for proceeding to the conclusion of the requisite inquiries as expeditiously as the circumstances of the case permitted. In my opinion it is inconceivable, apart altogether from the erroneous idea that it was necessary to embody the order for maintenance in the decree itself, that LORD PENZANCE in making the rules in 1865 even contemplated that the only material consideration was that the application, as distinct from the resultant order, should be made “on” the decree.

The same observation applies to s. 29 of the Matrimonial Causes Act, 1950, and the rules thereunder, reproducing s. 10 (1) of the Matrimonial Causes Act, 1937, whereby the necessity for a separate petition for maintenance was abolished,

and it was provided that a prayer for maintenance might be included in the petition for divorce or nullity. There is, however, the significant proviso that, apart from an interim order, no order shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute. The manifest object of this provision was to facilitate the preliminary investigations, while at the same time emphasising the vital connection between the effective order for maintenance and the decree absolute. If no prayer for maintenance is included in the petition the wife can file a notice under r. 3 (3) of the Matrimonial Causes Rules, 1950. But it is necessary to serve, either with the petition or the notice of application, as the case may be, notice in the appropriate form, calling on the husband to file evidence of means (r. 8 (2)). The application for maintenance, when no prayer therefor is included in the petition itself, may be made after the time for entering an appearance to the petition has expired, but not later than two months after the final decree except by leave (r. 44 (1)). The period had been extended from one month to two months by the Rules of 1947*, which also abolished the necessity for making the application to a judge.

It is unnecessary to examine in detail the cases in which the words "on any decree" have been interpreted. A very cursory summary will suffice. In 1883 in *Robertson v. Robertson & Favagrossa* (10) JESSEL, M.R., said (8 P.D. at p. 96):

"It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on'. 'On', if not confined to the time of making the decree, must mean shortly after."

In *Scott v. Scott* (4) the Court of Appeal held that "shortly after" must be defined as "within a reasonable time after, having regard to all the circumstances of the case". In that particular case the circumstances were held to preclude the granting of leave after seven years. On the other hand, in *Fisher v. Fisher* (5) distinguishing *Scott v. Scott* (4), the wife was allowed to apply after seven years on the ground that she had refrained from making her application earlier in reliance on a continuance of alimony paid by the husband and an alleged undertaking to settle certain property on her. LORD GREENE, M.R. ([1942] 1 All E.R. at p. 440) said that it was fair to regard the wife as having been lulled into a sense of security by what had taken place. In *Hasting v. Hasting* (6) ten years elapsed between the decree and leave to make the application, in circumstances to which I will recur shortly. Finally, in *Shott v. Shott* (7), it was recognised that the decisions on the consideration of the words "on any decree" showed great latitude, and that it was not possible to lay down any general rule that an application eighteen years out of time must be refused, although the decision of the judge to refuse the application was, in the circumstances of the case, upheld.

On final analysis, the contention of counsel for the wife that what matters is the relation between the time of the making of the application and the decree appears to depend on a couple of passages in the judgment of TUCKER, L.J., with which BUCKNILL, L.J., agreed, in *Hasting v. Hasting* (6) ([1947] 2 All E.R. at p. 745), in which he spoke of the *application* being made within a reasonable time so as to enable the court to consider *it* (my italics) as being made on the making of the decree. Before considering *Hasting v. Hasting* (6), however, it will be useful to refer to an earlier decision of the Court of Appeal in *Stephen v. Stephen* (11). That case dealt with the then prevailing attempt to keep alive the jurisdiction to deal with maintenance by giving "liberty to apply". It was

* Matrimonial Causes Rules, 1947 (S.R. & O. 1947 No. 523), r. 44 (1), since revoked.

A decided at a time when it was necessary to present a separate petition for permanent maintenance, and, I may add, at a time when the practice of the ecclesiastical courts to give the wife one-third of the joint incomes was more generally followed than is now the case. The report shows that the wife's petition in that behalf was presented "in due course". On the basis that two children of the marriage, of whom the wife had the custody, were entitled to a substantial

B income arising out of funds provided by the husband's father under the marriage settlement, that the husband had a salary of £350 free of income tax under an engagement as secretary which was terminable at a month's notice, and the wife had a small income of about £25 a year, the registrar made an order for the husband to pay the wife by way of maintenance of the children £120 per annum free of tax. But the order proceeded:

C "No order for maintenance of wife; but liberty to apply thereon."

These words, "liberty to apply", were evidently intended to keep the wife's application open without the taking of fresh proceedings. On appeal from the registrar LORD MERRIVALE, P., ordered that the words "liberty to apply" should be expunged from the order on the ground that it was obvious that the

D means of the wife exceeded the amount of any order that would ordinarily be made on the basis of the total joint income, and that no case had been shown for keeping the matter open. The wife subsequently applied to vary the order of the registrar by directing that a nominal sum might be ordered to be paid as permanent maintenance in order to preserve the jurisdiction of the court to increase the amount in the event of an increase in the husband's means. LANG-

E TON, J., dismissed the wife's application, considering himself bound by the previous decision of the President. Special leave was granted by the Court of Appeal to appeal against the two orders of the President and LANGTON, J. The Court of Appeal held that the President was right in expunging the words "liberty to apply", but that he did so for the wrong reason, as he had ignored the fact that the husband's income was subject to the chances and changes of life and of his

F business, and that he was wrong in holding that in the case of periodical payments of maintenance, as distinguished from a secured provision, the legislature had intended that finality in the financial position should be reached at the time of the decree of divorce. They held that it was irrelevant and incorrect to insert the words "liberty to apply" in the order, and that these words did not enable the wife at a subsequent date to make an effective application for increased

G maintenance.

In dealing with the two appeals, LORD HANWORTH, M.R., said ([1931] P. at p. 203):

"In short, therefore, the question before us is this: Is this a case in which an order should be made under s. 190 (2) of the [Supreme Court of Judicature (Consolidation) Act, 1925], in order to enable the court to

H retain its jurisdiction and thereby safeguard the possibility of a change in the circumstances under which it might become right to order a sum to be paid to the wife if the husband should obtain an increase in his salary, or correlatively to enable the husband to bring the matter before the court under the section if his income should be diminished?"

I Accordingly, the court allowed the appeal from LANGTON, J., and ordered that the husband should pay to the wife maintenance at the rate of 2s. 6d. a month. The express object of the Court of Appeal in making a nominal order in a case in which the original application was made in due time was to enable the wife to obtain an increased order if circumstances changed in her favour; but if it is the law that the making of a timely application enables the wife to proceed on her application at any time favourable to herself, that object would have been attained by simply striking out of the registrar's order the words "No order for maintenance of the wife", and allowing her application to stand adjourned, since

the intermediate stage of nominal order and variation was unnecessary if, apart from the useless words "liberty to apply", the wife's original application could lead to an order at any time, provided that the words "No order for maintenance of wife" were struck out. A

In *Hasting v. Hasting* (6) for about nine years after the decree absolute obtained by the wife, in whose favour the court had exercised discretion, the husband had voluntarily paid maintenance of varying amounts. On the cessation of payment the wife applied, as was then necessary under r. 44 (1) (of the Rules of 1944)*, to a judge for leave to make an application for maintenance out of time. Leave was granted by WALLINGTON, J., but when the application came before the registrar the latter decided that the lapse of time between the decree and the application deprived him of jurisdiction to entertain it. He said, however, that he would have awarded 30s. a week if he had had jurisdiction. JONES, J., reversed the registrar's decision, and made an order for that amount. His decision was upheld by the Court of Appeal, on the ground that WALLINGTON, J., by granting leave to apply out of time, had thereby decided that the application was in the circumstances an application made on the decree within the meaning of the statute, thus giving the registrar jurisdiction to entertain and report on it. At the same time, the court held that the delay was a matter to be taken into account in considering the merits of the application. TUCKER, L.J., delivering the leading judgment, with which BUCKNILL, L.J., agreed, said ([1947] 2 All E.R. at p. 745): B C D

"It is to be observed that the jurisdiction of the court under s. 190 (1) to make an order is 'on any decree'. Questions have arisen from time to time as to what period of time must, or may, elapse so as to render it impossible for the court to say that it is making an order 'on' the decree. As a great deal more than one month had elapsed from the making of the decree in the present case, it was necessary to obtain the leave of the judge before the application by the wife for maintenance could be made, and, accordingly, application was made to WALLINGTON, J. Under the rules, these applications are not ex parte, but are considered in the presence of both parties. WALLINGTON, J., having considered the affidavits filed by both sides, gave leave to make the application. The result of that, in my view, was that he decided that, in the circumstances of the particular case, the *application* [my italics] could be considered as being made on the making of the decree, and thereafter it would be for the judge who had to deal with the application on its merits, after considering the report made by the registrar, to decide whether or not an order for maintenance should or should not be made." E F G

After referring to *Fisher v. Fisher* (5), in which LORD GREENE, M.R., qualified certain observations that he had made in *Mills v. Mills* (3), TUCKER, L.J., said (*ibid.*, at p. 746):

"LORD GREENE, M.R., went on to consider the circumstances of that case and came to the conclusion that the application was made within a reasonable time so as to enable the court to regard *it* [my italics] as being made on the making of the decree." H

The reasoning of TUCKER, L.J. (*ibid.*, at p. 746) for upholding the reversal by JONES, J., of the decision of the registrar that he had no jurisdiction and for holding that the question of jurisdiction is decided when the application for leave to apply for maintenance out of time is granted is in exact accordance with the reasoning of LORD GREENE, M.R., in the passage already quoted from his judgment in *Mills v. Mills* (3) ([1940] 2 All E.R. at p. 257). After all, on such an application it is open to the court, as on any other application for an extension of time, to impose restrictions which will ensure that the matter proceeds expeditiously to a conclusion. It is plain, in my opinion, that TUCKER, L.J., used I

* S.R. & O. 1944 No. 389.

- A the word "application" and the word "it" in the passages which I have just quoted as meaning an application for leave to make out of time an application for maintenance, in respect of which it could fairly be said that any order for maintenance made thereon would be an order made "on the decree". But that is a very different thing from saying that an order made after years of unwarrantable delay can fairly be said to be made on a decree merely because the application
- B therefor was made in due time without any necessity to apply for leave. The same point clearly appears from the opening words of the judgment of COHEN, L.J. ([1947] 2 All E.R. at p. 747):

- C "I agree. At the end of his argument counsel for the husband said that the application had to surmount two hurdles, first, the procedural hurdle under r. 44, and, secondly, the statutory hurdle under s. 190 [of the Supreme Court of Judicature (Consolidation) Act, 1925]. He said that WALLINGTON, J., had, no doubt, successfully got the applicant over the first hurdle, but that it was still open to JONES, J., on the hearing of the wife's application, to reject it on the ground that he had no jurisdiction to make an order. I agree with my brethren in rejecting this argument . . ."

- D In my opinion, therefore, the true conclusion is that the rules governing the time for making applications for maintenance and providing for leave to apply out of time, and the cases dealing with these questions, ought to be read on the assumption that with due expedition the application will lead to an order which can fairly be said to be made "on the decree", and that there is no warrant for the notion that any rights whatever are preserved to the wife by the mere making
- E of an application, albeit timely, which is deliberately allowed to lie dormant.

Finally, I ought to refer in passing to a PRACTICE DIRECTION of May 21, 1954 (see [1954] 2 All E.R. 349)*, which reads as follows:

- F "In future applications under r. 44 (1) of the Matrimonial Causes Rules, 1950, for leave to apply for ancillary relief out of time may be made to a registrar ex parte on affidavit. Thereupon the registrar will decide whether to give leave forthwith or to require a summons to be issued and served on the respondent, the summons to be returnable before a registrar or a judge as he may direct."

- This PRACTICE DIRECTION, for which I take the responsibility, was intended to ensure that the explanation for any delay should be given by evidence on oath, and that in doubtful cases the courts should not give leave to make such applica-
- G tions out of time without giving the respondent the opportunity to be heard. Having regard, however, to what has already been said about the significance of the decision in *Hasting v. Hasting* (6), and to the fact that that case was decided on the basis that an order for leave to apply for maintenance out of time is made inter partes ([1947] 2 All E.R. at p. 745), I have come to the conclusion that it is undesirable that such applications should ever be made ex parte, and I direct
- H therefore that the words "ex parte" be deleted from the first sentence of the above PRACTICE DIRECTION, and that the second sentence be cancelled.

- On the basis that it is accepted that the practice has existed for many years, counsel for the Queen's Proctor did not contest the view that it was a circumstance to be taken into account in connection with the lapse of time since the making of the application. Counsel for the wife naturally adopted the same position,
- I but, of course, without prejudice to his contention that the practice itself is correct. Counsel for the husband agreed that the existence of the practice might be a circumstance to be taken into account, but, so far as the present case is concerned, submitted that it should only be so regarded if this wife could prove that the practice was the cause of her inaction. In other words, he submitted that the practice is only relevant in any given case if it has actually had the

* The Practice Direction has been superseded; see Practice Direction, dated May 17, 1955, p. 465, ante.

effect, to use the words of LORD GREENE, M.R. ([1942] 1 All E.R. at p. 440), in *Fisher v. Fisher* (5), of lulling the wife into a sense of security. I appreciate the force of the analogy, but if, as is suggested, it is the case that parties and their legal advisers have allowed timely claims for maintenance to lie in abeyance because there has been no immediate urgency, I think that, apart from the manifest inconvenience of flooding the court with numerous inquiries about the extent to which individual litigants have been affected by the existence of the practice, if the court itself has encouraged an erroneous practice, it should not put the burden on litigants, but should itself shoulder the responsibility squarely, correct the error, and do whatever is possible to ensure that the mischief is avoided in future. In the present case admittedly no point was taken before the registrar about any lack of jurisdiction based on the words "on any decree", nor did he himself inquire about the cause of the delay in the prosecution of the wife's claim. On the contrary, as I have already stated, the wife's present solicitors were advised by a responsible officer of the registry that all that was necessary in order to reinstate her application was to serve the husband with a fresh notice to file evidence. On the other hand, the husband's summons to dismiss the wife's application is based solely on the deed of 1948—that is to say, on the misconception that the court could order the wife to consent to the dismissal of her claim for maintenance as being barred by the deed. The wife's present solicitors have plainly been influenced by the practice in question, from the moment they assumed conduct of her affairs in May, 1954.

In my opinion it is altogether unnecessary, at this stage, to go further back. I shall therefore order that the wife be permitted to proceed with her application, leaving it to the registrar to consider what effect should be given to the history of delay in considering the merits of the application. The result is that the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Landau & Co.* (for the husband); *Moodie, Randall, Carr & Miles* (for the wife); *Queen's Proctor*.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A ENTORES, LTD. v. MILES FAR EAST CORPORATION.

[COURT OF APPEAL (Denning, Birkett and Parker, L.J.J.), May 2, 3, 17, 1955.]

Contract—Service of writ—Service out of jurisdiction—Contract—Whether made in jurisdiction—Acceptance by Telex in London.

Practice—Service—Service out of jurisdiction—Contract—Whether made in jurisdiction—Acceptance by Telex in London—Message from Amsterdam to London.

B An English company in London was in communication with a Dutch company in Amsterdam (acting as agent for an American principal) by Telex, each company having in its office a teleprinter machine by means of which, on the two machines being connected by the Post Office, a message typed by one company's clerk was simultaneously and automatically typed out on paper by the other's machine. The English company received an offer of goods from the Dutch company by Telex and made a counter-offer which the Dutch company accepted by Telex. The English company applied under R.S.C., Ord. 11, r. 1, for leave to serve notice of the writ in an action for damages for breach of the contract on the American principal out of the jurisdiction.

D **Held:** the contract was made at the place where the English company received the acceptance, which in this case was London, and therefore the contract was made within the jurisdiction and leave for service out of the jurisdiction could be properly given under R.S.C., Ord. 11, r. 1.

E Observations of HILL, J., in *Newcomb v. De Roos* (1859) (2 E. & E. at p. 275) disapproved.
Appeal dismissed.

[**Editorial Note.** An offer is accepted by the communication of the acceptance to the offeror; see 8 HALSBURY'S LAWS (3rd Edn.) 73, para. 126; and for cases on the subject, see 12 DIGEST (Repl.) 72, 397-406. The rule is modified where contracts are made through the post, for an offer made by letter may be accepted by letter and the Post Office is in effect the agent of the offeror for the purpose of communicating the acceptance; see 8 HALSBURY'S LAWS (3rd Edn.) 78, 79. In the present case the Court of Appeal do not extend this exception from the general rule to the case of contracts made by the Post Office Telex services.]

G Cases referred to:

- (1) *Newcomb v. De Roos*, (1859), 2 E. & E. 271; 29 L.J.Q.B. 4; 1 L.T. 6; 121 E.R. 103; 12 Digest (Repl.) 62, 339.
- (2) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 12 Digest (Repl.) 59, 323.
- (3) *Adams v. Lindsell*, (1818), 1 B. & Ald. 681; 106 E.R. 250; 12 Digest (Repl.) 86, 477.
- H (4) *Dunlop v. Higgins*, (1848), 1 H.L. Cas. 381; 9 E.R. 805; 12 Digest (Repl.) 86, 470.
- (5) *Re Imperial Land Co. of Marseilles, Harris' Case*, (1872), 7 Ch. App. 587; 41 L.J.Ch. 621; 26 L.T. 781; 12 Digest (Repl.) 85, 465.
- (6) *Household Fire & Carriage Accident Insurance Co. v. Grant*, (1879), 4 Ex.D. 216; 48 L.J.Q.B. 577; 41 L.T. 298; 44 J.P. 152; 12 Digest (Repl.) 72, 398.

I **Appeal.**

The defendants appealed against an order of DONOVAN, J., dated Mar. 3, 1955, dismissing an appeal from an order of Master LAWRENCE, dated Feb. 17, 1955, dismissing an application by the defendants for the discharge of an order dated Dec. 17, 1954, giving liberty to the plaintiffs to serve notice of a writ in an action for damages for breach of contract on the defendants out of the jurisdiction (in New York). The defendants contended that the contract, which was made

by Telex, the messages being conveyed between two teleprinter machines owned by the two companies and connected up by the Post Office, was made out of the jurisdiction and, therefore, could not be made the subject of leave for service out of the jurisdiction under R.S.C., Ord. 11, r. 1. A

Gerald Gardiner, Q.C., and *S. B. R. Cooke* for the defendants.

Maurice Lyell, Q.C., and *D. Lloyd* for the plaintiffs.

Cur. adv. vult. B

May 17. The following judgments were read.

DENNING, L.J.: This is an application for leave to serve notice of a writ out of the jurisdiction. The grounds are that the action is brought to recover damages for breach of a contract made within the jurisdiction or by implication to be governed by English law.

The plaintiffs are an English company. The defendants are an American corporation with agents all over the world, including a Dutch company in Amsterdam. The plaintiffs say that the contract was made by Telex between the Dutch company in Amsterdam and the plaintiffs in London. Communications by Telex are comparatively new. Each company has a teleprinter machine in its office, and each has a Telex number like a telephone number. When one company wishes to send a message to the other, it gets the Post Office to connect up the machines. Then a clerk at one end taps the message on to his machine just as if it were a typewriter, and it is instantaneously passed to the machine at the other end, which automatically types the message on to paper at that end. C

The relevant Telex messages in this case were as follows: Sept. 8, 1954: Dutch company: D

"Offer subject cable confirmation for account our associates Miles Far East Corporation Tokyo up to 400 tons Japanese cathodes sterling 240 longton c.i.f. shipment Mitsui Line Sept. 28 or Oct. 10 payment by Lc. . . . Your reply Telex Amsterdam 12174 or phone 31490 before 4 p.m. invited." E

Plaintiffs:

"Accept 100 longtons cathodes Japanese astm specification shipment latest Oct. 10 sterling 1 333 sterling 239. 10. 0 longton c.i.f. London/Rotterdam optional bladings payment letter credit stop Please confirm latest tomorrow." F

Dutch company:

"We received O.K. Thank you."

Sept. 9, 1954: Plaintiffs: G

"Regarding our telephone conversation a few minutes ago we are pleased to note that our bid for 100 tons Japanese cathodes for payment in French francs has been accepted stop Further we note that there is a query on the acceptance of our bid for 100 tons payment in sterling and you are ascertaining that your Tokyo office will confirm the price to be longtons we therefore await to hear from you further." H

Sept. 10, 1954: Plaintiffs:

"Is the price for the sterling cathodes understood to be per longton by Japan as you were going to find this out yesterday?"

Dutch company:

"Yes, price 239. 10. per longton." I

At that step there was a completed contract by which the defendants agreed to supply one hundred tons of cathodes at a price of £239 10s. a ton. The offer was sent by Telex from England offering to pay £239 10s. for one hundred tons and accepted by Telex from Holland. The question for our determination is: Where was the contract made?

When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter of acceptance is

A put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.

B The problem can only be solved by going in stages. Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound. I do not agree with the observations of HILL, J., in *Newcomb v. De Roos* (1) (2 E. & E. C at p. 275).

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off, because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails or something of that kind. In that case the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message "not receiving". Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or if the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.

My conclusion is that the rule about instantaneous communications between

the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received. A

In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have stated. Indeed they apply it to contracts by post as well as instantaneous communications. But in the United States of America it appears as if instantaneous communications are treated in the same way as postal communications. In view of this divergence, I think we must consider the matter on principle; and so considered, I have come to the view I have stated, and I am glad to see that Professor WINFIELD in this country (55 LAW QUARTERLY REVIEW at p. 514) and Professor WILLISTON in the United States of America (CONTRACTS I.S. 82) take the same view. B C

Applying the principles which I have stated, I think that the contract in this case was made in London where the acceptance was received. It was therefore a proper case for service out of the jurisdiction.

Apart from the contract by Telex, the plaintiffs put the case in another way. They say that the contract by Telex was varied by letter posted in Holland and accepted by conduct in England, and that this amounted to a new contract made in England. The Dutch company on Sept. 11, 1954, wrote a letter to the plaintiffs saying: D

"We confirm having sold to you for account of our associates in Tokyo . . . 100 metric tons . . . electrolytic copper in cathodes . . . £239 10s. per longton of 1016 kilos c.i.f. U.K./Continental main ports . . . prompt shipment from a Japanese port after receipt of export licence . . . payment by irrevocable and transferable letter of credit to be opened in favour of Miles Far East Corporation . . . with a first class Tokyo Bank . . . The respective import licence has to be sent directly without delay to Miles Far East Corporation." E

The variations consisted in the ports of delivery, the provisions of import licence and so forth. The plaintiffs say that they accepted the variations by dispatching from London the import licence and giving instructions in London for the opening of the letter of credit, and that this was an acceptance by conduct which was complete as soon as the acts were done in London. F

I am not sure that this argument about variations is correct. It may well be that the contract is made at the place where first completed, not at the place where the variations are agreed. But whether this be so or not, I think the variations were accepted by conduct in London and were therefore made in England. Both the original contract and ensuing variations were made in England and leave can properly be given for service out of the jurisdiction. G

I am inclined to think also that the contract is by implication to be governed by English law, because England is the place with which it has the closest connection. I think the decisions of the master and the judge were right and I would dismiss the appeal. H

BIRKETT, L.J.: I can state very briefly my agreement with the judgment just delivered by my Lord. The plaintiffs wished to bring an action against Miles Far East Corporation for damages for breach of contract. The plaintiffs are a company registered and resident in England, the registered office being in the city of London. The defendants are a corporation with headquarters at 150, Broadway, New York, in the State of New York. In September, 1954, a series of communications passed between the plaintiffs and the defendants by means of an equipment called Telex service, consisting of a teleprinter and signalling unit and certain necessary subsidiary apparatus possessed by both parties. The communications are virtually instantaneous, for the moment one party types out the message the other party ought to be receiving it in the ordinary course of things. I

A The plaintiffs claim they entered into a contract with the defendants for the purchase of copper cathodes and they seek to issue a writ claiming damages for the breach of the contract by the defendants. They were given leave to serve notice of a writ on the defendants in New York out of the jurisdiction. This appeal is against a decision of DONOVAN, J., dismissing the appeal against the order giving leave.

B The plaintiffs contend that the contract was made in England and therefore comes within R.S.C., Ord. 11, r. 1, whereby the court or a judge may allow service of a writ outside the jurisdiction, where the action is one brought against a defendant for damages for breach of a contract made within the jurisdiction. The defendants say the contract was not made in England but was made in Holland. There were several Telex communications but the important ones for
C this appeal are the counter-offer of Sept. 8, 1954, made by the plaintiffs in London, and the acceptance from the defendants received in London also, on Sept. 10, 1954.

I am of opinion that in the case of Telex communications (which do not differ in principle from the cases where the parties negotiating a contract are actually in the presence of each other) there can be no binding contract until the offeror receives notice of the acceptance from the offeree. Counsel for the defendants submitted that the proper principle to be applied to a case like the present could be thus stated: "If A makes an offer to B, there is a concluded contract when B has done all that he can do to communicate his acceptance by approved methods." He further submitted that great difficulties would arise if Telex communications were treated differently from acceptances by post or telegram.
E

In my opinion the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by Telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror and the place where the contract is made
F is the place where the offeror receives the notification of the acceptance by the offeree. If a Telex instrument in Amsterdam is used to send to London the notification of the acceptance of an offer, the contract is complete when the Telex instrument in London receives the notification of the acceptance (usually at the same moment that the message is being printed in Amsterdam) and the acceptance is then notified to the offeror, and the contract is made in London. Such
G were the facts in this appeal, and I agree with the judgment of DONOVAN, J., and this appeal should be dismissed.

PARKER, L.J.: I have come to the same conclusion, and would only add a few words on the basis that the contract sued on is that created by the Telex messages. As was said by LINDLEY, L.J., in *Carlill v. Carbolic Smoke Ball Co.*
H (2) ([1893] 1 Q.B. at p. 262):

"Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified."

BOWEN, L.J., said (*ibid.*, at p. 269):

I "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract."

Accordingly, as a general rule, a binding contract is made at the place where the offeror receives notification of the acceptance, that is where the offeror is.

Since, however, the requirement as to actual notification of the acceptance is for the benefit of the offeror, he may waive it and agree to the substitution for that requirement of some other conduct by the acceptor. He may do so expressly, as in the advertisement cases, by intimating that he is content with the performance of a condition. Again he may do so impliedly by indicating a contemplated method of acceptance, e.g., by post or telegram. In such a case he does not expressly dispense with actual notification, but he is held to have done so impliedly on grounds of expediency. Thus in *Adams v. Lindsell* (3) the court pointed out that, unless this were so (1 B. & Ald. at p. 683):

“ . . . no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum.”

Again in *Dunlop v. Higgins* (4) LORD COTTENHAM, L.C., pointed out that (1 H.L. Cas. at p. 400):

“ Common sense tells us that transactions cannot go on without such a rule . . . ”

and in *Re Imperial Land Co. of Marseilles, Harris' Case* (5), MELLISH, L.J. (7 Ch. App. at p. 594) referred to the mischievous consequences which would follow in commerce if no such rule was adopted. To the same effect is the judgment of THESIGER, L.J., in *Household Fire & Carriage Accident Insurance Co. v. Grant* (6), in which he points out (4 Ex.D. at pp. 223, 224) that, where the parties are at a distance, the balance of convenience dictates that the contract shall be deemed complete when the acceptance is handed to the Post Office.

Where, however, the parties are in each other's presence or, though separated in space, communication between them is in effect instantaneous, there is no need for any such rule of convenience. To hold otherwise would leave no room for the operation of the general rule that notification of the acceptance must be received. An acceptor could say: “ I spoke the words of acceptance in your presence, albeit softly, and it matters not that you did not hear me ”; or: “ I telephoned to you and accepted and it matters not that the telephone went dead and you did not get my message ”. Though in both these cases the acceptor was using the contemplated, or indeed the expressly indicated, mode of communication, there is no room for any implication that the offeror waived actual notification of the acceptance. It follows that I cannot agree with the observations of HILL, J., in *Newcomb v. De Roos* (1) (2 E. & E. at p. 275).

So far as Telex messages are concerned, though the dispatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other's presence, just as if they were in telephonic communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of the acceptance is received by the offeror. That being so and, since the offer—a counter-offer—was made by the plaintiffs in London and notification of the acceptance was received by them in London, the contract resulting therefrom was made in London. I would accordingly dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Allen & Overy* (for the defendants); *Smiles & Co.* (for the plaintiffs).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

NOTE.

DAVIDSON v. RODWELL.

[QUEEN'S BENCH DIVISION (Ormerod, J.), May 19, 1955.]

B Practice—Trial—Setting down action for new trial—Jury action—Jury having disagreed at original hearing.

Action.

C At the conclusion of the trial of an action the jury disagreed. The court made an order for further discovery and gave liberty to apply. A question arose what was the correct procedure for setting down or re-entering the action for trial. Apart from the note to fee No. 28A in s. 1 of the schedule to the Supreme Court Fees Order, 1930, reference was made in argument to R.S.C., Ord. 36, r. 11, r. 11A, r. 12 and r. 39.

Percy Bloomfield for the plaintiff.

J. G. Wilmers for the defendant.

D

ORMEROD, J. : This is a case where an action was tried by a jury and the jury failed to agree. At the end of the hearing some doubt was raised by counsel on both sides as to the proper procedure to be adopted, as a disagreement by a jury in a civil action is comparatively rare in these days.

E The Rules of the Supreme Court appear to offer no assistance at all on this matter, but there has been a certain amount of research in the Associates Office and it appears to be beyond doubt that the old practice was that the parties should be given leave or ordered to set down the case once again. The fee on setting down would have to be paid by the party setting down the action.

F That is borne out, I think, to some extent at least, by a note on p. 2862* of the 1955 edition of the ANNUAL PRACTICE, which is in the part of the Practice dealing with court fees and stamps and refers to a decision of the Treasury in July, 1904, when certain matters of this kind were submitted. The practice established then was that a second fee was payable on re-entry of a case for new trial after an order for new trial or after disagreement of a jury. That, of course, is not a statement of the practice but it does reflect what the practice was at that time, and, in my view, that is the practice which should be followed.

G In those circumstances, I think that it is essential here, if the parties wish this action to be tried once again, that the action should be set down and a further fee paid on setting down. I therefore propose to order that the plaintiff be at liberty to set down the action within twenty-one days and that, failing that, the defendant will have the right to set the action down.

Solicitors: *Paisner & Co.* (for the plaintiff); *Canter, Hellyar & Co.* (for the defendant).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

* I.e., the note to fee 28A in s. 1 of the schedule to the Supreme Court Fees Order, 1930 (S.R. & O. 1930 No. 579).

HARRIS v. RUGBY PORTLAND CEMENT CO., LTD.

[COURT OF APPEAL (Denning, Birkett and Romer, L.J.J.), May 12, 13, 1955.]

Factory—Staircase—Hand-rail—Need to provide second hand-rail—"Special circumstances" making staircase "specially liable to cause accidents"—Shiny metal strip at edge of top stair with adjoining hatchway—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 25 (2).

A staircase at a factory had a hand-rail on the open side but no effective hand-rail on the other side near the wall. At the edge of the floor at the top of the stairs was a three-inch strip of metal which was polished and shiny with use. Two feet away was a hatchway out of which grease in tins was periodically issued. The staircase was used forty or fifty times a day, and there had been no accident, since it was constructed fifteen years previously, on it or on any of the other fourteen similar staircases in the factory. No complaint of danger from the staircases had been made to the welfare committee set up in the factory and no previous instance of grease on the staircase had occurred. An employee, who had used the staircase constantly during his four years at the factory, slipped on some grease on the top sill of the stairs and was injured. In an action by him against the factory owners for breach of statutory duty under s. 25 (2) of the Factories Act, 1937,* by failing to provide an effective second hand-rail,

Held: the state of the metal strip at the top of the staircase was not such a "condition of the steps" as to render the staircase specially liable to accidents, and neither the proximity of the hatchway from which grease was issued nor the lone instance of grease on the staircase constituted "special circumstances" such as to render the staircase specially so liable, within s. 25 (2) of the Factories Act, 1937; accordingly the sub-section did not require the factory owners to provide an effective second hand-rail and they were not in breach of duty under the sub-section.

Appeal allowed.

[For the Factories Act, 1937, s. 25 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 1017; and for cases on the section, see 2nd DIGEST Supp.]

Appeal.

The defendants appealed against an order of OLIVER, J., dated Mar. 15, 1955, at Maidstone Assizes in favour of the plaintiff in an action for damages for negligence and breach of statutory duty. The plaintiff, an employee of the defendants, had slipped on some grease at the top of a staircase in the defendants' factory. OLIVER, J., found that the defendants had not been negligent at common law, and that they had discharged their duty under s. 25 (1) of the Factories Act, 1937, in that the staircase was properly constructed and properly maintained. He held, however, that by reason of a three-inch metal edge on the top step, which was highly polished and shiny, the "condition of the surface" was faulty and that, by reason of a hatchway two feet away from which grease was periodically issued, there were "special circumstances" making the staircase "specially liable to cause accidents" within the meaning of s. 25 (2) of the Act, and, therefore, that the defendants were under a duty to provide a second hand-rail for the staircase as required by that section and were liable for their breach of duty in failing to do so.

E. M. Jukes, Q.C., and M. J. Morris for the plaintiff.

T. M. Eastham for the defendants.

DENNING, L.J.: The plaintiff, Mr. Harris, claims damages because he slipped at the top of some stairs in a factory. He fell and broke his leg. The judge has found that the owners of the factory, his employers, were not guilty

* The terms of s. 25 (2) of the Factories Act, 1937, are set out at p. 501, letter E, post.

A of negligence at common law. He said it was an extremely well-run factory. The judge also found that the staircase and everything connected with it was of sound construction and properly maintained, and, therefore, that the plaintiff could not complain of any breach of s. 25 (1) of the Factories Act, 1937, but he held that there was a breach of s. 25 (2) because he thought that there ought to have been a hand-rail on both sides of the staircase, and for that reason he has

B held the defendants liable. The question is whether he is right in so holding.

At this factory there were fourteen other staircases of this kind. Each staircase had metal treads all the way up with indentations on them. No complaint was made of those treads. At the very top of the stair, where it was level with the first floor, there was a metal edge which was part of the supporting girder. It was three inches in width. Beyond those metal edges there was the

C concrete floor. The staircase in fact had two hand-rails, one on the open side and another on the side next to a corrugated iron wall, but so close that it touched the wall. No one could get his hand round it, and, therefore, it was not a hand-rail. On this account it is said there was a breach of this enactment, because there ought to have been a hand-rail on each side. The staircase had been put up in 1938, and there had never been an accident before of any kind on the

D staircase. It was kept well cleaned. A special rota of men was allotted to the task of cleaning. On the evening of Aug. 12, 1953, however, there was some grease on this topmost sill. As the plaintiff was making his way to go down the stairs, he slipped on the piece of grease and got his leg under him and his leg was broken. No grease has been seen on the stairs at any time before or after the accident except on this one occasion.

E Section 25 (2) of the Factories Act, 1937, provides:

“For every staircase in a building or affording a means of exit from a building, a substantial hand-rail shall be provided and maintained, which, if the staircase has an open side shall be on that side, and, in the case of a staircase having two open sides, or in the case of a staircase which, owing to the nature of the construction thereof or the condition of the surface

F of the steps or other special circumstances, is specially liable to cause accidents, such a hand-rail shall be provided and maintained on both sides.”

This was not a staircase with two open sides. The judge said the “condition of the surface” of the steps was faulty in that the top sill was shiny and highly polished owing to user, and that there were “special circumstances” in that

G there was a hatchway a couple of feet away from which grease was periodically issued. He held, therefore, that there ought to have been two hand-rails.

On reviewing the evidence, I find myself unable to agree with the learned judge's view. I do not think he has given sufficient effect to the words of the subsection “specially liable”. It is only when the condition of the surface of the steps or other special circumstances render it “specially liable to cause accidents”

H that two hand-rails must be provided. I will take the two points in order.

(1) The “condition of the surface” of the stairs. I can well see that, if the steps had become so slippery as to be a real danger, there ought to be two hand-rails. But the evidence falls far short of that. The cogent factor to my mind is that, ever since 1938 until this accident in 1953, i.e., fifteen years, there has never been a single accident on these stairs, nor indeed on the fourteen similar stairs in

I this factory, and, although there is a welfare committee of the men, there has never been any suggestion by anyone that there was anything in these steps making them specially liable to cause accidents. I take it that “specially liable” means more than usually liable, and I do not see how it can be said that the condition of the steps is specially liable to cause accidents when no accident has happened for all these years.

(2) “Special circumstances”. The mere fact that there was a hatchway was not likely to cause danger. The grease was always issued in tins from which it was not likely to escape. This one piece of grease was the only piece of grease

that was ever known to be on the steps all the time that the staircase had been there. I cannot see that that is a special circumstance requiring a double hand-rail. "Special circumstances" must be something which is being continually repeated or so often repeated as to be specially liable to cause accidents, so that a permanent protection is necessary. That is not the case here. A

On all the evidence in this case I come to a different conclusion from the judge. I cannot see any evidence that there was anything specially liable to cause accidents, and, therefore, there was no statutory obligation to have a double hand-rail. I would allow the appeal. B

BIRKETT, L.J.: I am of the same opinion. The obligation on the employers which the learned judge held that they had not fulfilled under s. 25 (2) of the Factories Act, 1937, was to provide a hand-rail and maintain it on both sides in certain circumstances. Such a hand-rail may be necessary because of the construction of the staircase under s. 25 (1), which provides: C

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

The judge found that under that sub-section the plaintiff had no cause of action, i.e., that no fault could be found with the construction or with the maintenance of the staircase. The second matter under the words in s. 25 (2) was: "or the condition of the surface of the steps". It was not argued before the learned judge that this particular strip of three inches of metal on the floor leading down to the first step of the staircase, was not part of the steps, although it might possibly have been contended that it was part of the concrete floor. I rather think that, when s. 25 (2) refers to "the condition of the surface of the steps", it is dealing with the staircase as a whole where there are highly polished wood treads or metal treads, or a surface which in some way is treacherous. But the matter was not argued and this was taken to be a step, and the three inches of polished and shiny metal to be part of a step. D E

The learned judge came to his conclusion on the third point under s. 25 (2), on the words "or other special circumstances" making a staircase "specially liable to cause accidents". Counsel for the plaintiff said that we had to consider three questions. (1) Did the judge direct himself properly when considering s. 25 (2)? We do not know how he directed himself, because he merely recited the section and said: F

"Now, the question I have to decide is whether this is a staircase which, while having only one open side, nevertheless, owing to the condition of the surface of the steps or other special circumstances, is specially liable to cause accidents." G

That was merely paraphrasing the wording of the section. (2) Were the answers which the learned judge gave justified by the evidence? (3) On those answers was there a breach by the defendants? As I understand it, the learned judge has said that this little three-inch strip made this staircase a staircase "specially liable to cause accidents", because of the highly polished bar or threshold at the top, and the controversy as to the presence of grease, the proximity of the hatchway from which the grease was issued, etc., does not really seem to have very much bearing, except, as I think both counsel for the plaintiff put it, as a sort of supplementary factor in the "special circumstances". H I

I feel that one must have regard to the history of a staircase of this kind. The plaintiff had used it for four years, and others for very much longer—I gather since 1938. In cross-examination he said:

"Q.—In the four years, you have, I suppose, gone up those stairs fairly frequently to go to the stores? A.—Yes. Q.—You had been up the stairs many times in those four years? A.—Yes. . . . Q.—Do you think it would

- A be an exaggeration to say that that flight of stairs is used between forty and fifty times a day? A.—No, I should not think that is an exaggeration.
- Q.—And it is right, is not it, that, quite apart from union methods of complaint, these particular employers have a welfare meeting once a month at which suggestions for improved safety can be made? A.—Yes, they have.
- Q.—And it is right, is not it, in the period that you have been there, during those four years, no single accident has ever taken place, apart from yours, on that flight of stairs? A.—Not on those stairs, no. Q.—Nor on any of the other fourteen which are similar in construction? A.—No, I do not think there has.
- Q.—And this was the first and, so far as you know, the last accident which has ever occurred on those stairs? A.—So far as I know, yes.
- Q.—Quite apart from the fact that there has been no accident, you have never mentioned these stairs to your chargehand, Mr. Thomas, as being in the slightest dangerous, have you? A.—No, I have not. Q.—Nor, so far as you know, have any of your workmates? A.—Not so far as I know."

In my view, it is very difficult to say that a staircase is "specially liable to cause accidents" in the face of testimony of that kind—a staircase used by this plaintiff himself for four years, and by other people between forty and fifty times a day, and in use since 1938. If those facts are proved, it really strains language to say that "Nevertheless this staircase was 'specially liable to cause accidents'."

Counsel for the plaintiff cited a case in which he was concerned yesterday, and no doubt there are cases in which a state of affairs has continued for a long time before an accident occurs. But that is not the point with which we have to deal. We have to construe the words "special circumstances . . . specially liable to cause accidents". If a staircase was "specially liable to cause accidents", one would have expected in fifteen years, or four years or twelve months, to receive a complaint or something of that kind; but there was no complaint despite the elaborate machinery for voicing complaints provided in this well-run factory, and there was no suggestion that the staircase was in any way faulty. There was no accident to anybody in four years, and, so far as the evidence went, none at any time since 1938.

The learned judge found that there was no common law negligence by the defendants, who had taken reasonable care for the safety of their employees, and that the staircase was properly constructed and properly maintained under s. 25 (1), but he held that there were "special circumstances" making the staircase "specially liable to cause accidents" in the face of the evidence which I have recited, and found the defendants liable under that sub-section. I think that he was wrong and that this appeal ought to be allowed.

ROMER, L.J.: I agree. After our very full discussion on the evidence and the construction of s. 25 (2) of the Factories Act, 1937, it really does not seem to me to be possible to say that this three-inch strip of metal at the top of the stairs was "specially liable to cause accidents", and I doubt whether it was liable to cause accidents at all. It certainly never had caused one since the stairs were built in 1938, and indeed it did not cause this accident. The plaintiff's accident came about by a conjunction of circumstances, slipping on the grease, which the judge found he had done, plus the presence of the strip. It cannot be said that the strip alone caused this accident. I am not satisfied that it could be said that it was liable to cause accidents, and a fortiori it seems to me it cannot be said that it was "specially liable to cause accidents". Therefore, so far as the strip itself is concerned, in my opinion the plaintiff cannot bring the case within the sub-section.

I desire to add nothing to what has been said as to the alleged "special circumstances" with regard to the presence of grease. It was merely a temporary incident which had never happened before and has never happened since, and I cannot believe that this mere lone instance of grease being found once can

amount to a "special circumstance" within the purview of the sub-section. I A agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Hugh-Jones & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.] B

Re NOTTINGHAM GENERAL CEMETERY COMPANY.

[CHANCERY DIVISION (Wynn-Parry, J.), May 12, 18, 1955.]

Burial—Burial rights in perpetuity—Onerous restrictions on cemetery company's land—Winding-up of company—Disclaimer by liquidator. D

Company—Winding-up—Disclaimer of onerous property—Company incorporated by special Act of Parliament—Freehold land constituting cemetery—Contracts with holders of grave certificates and for upkeep of graves—"Land . . . burdened with onerous covenants"—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 323 (1). E

A company was incorporated by special Act of Parliament for the purpose of establishing and maintaining a cemetery in Nottingham. The company, though successful for many years, subsequently sustained losses, and on May 11, 1953, an order was made for its compulsory winding-up. By its special Act, the company was empowered, by conveyance in the form prescribed, to confer on a purchaser an exclusive right of burial or interment in its vaults or places of burial and a right of erecting and making family vaults or places of burial with the exclusive right of burial or interment therein, either in perpetuity or for a limited period, subject to the payment of such fees as were payable by the rules and regulations of the company, and subject also to such rules, orders and regulations as should from time to time be made by the company for the better regulation of the cemetery. The special Act further provided that an exclusive right of burial or interment so purchased should, if in perpetuity, be considered as a personal inheritance, and might, whether granted in perpetuity or for a limited period, be sold and disposed of and assigned by the purchaser in his lifetime, or bequeathed by his will. F

The liquidator of the company applied for an order under the Companies Act, 1948, s. 323 (1), that he be at liberty to disclaim the land constituting the cemetery, all implied contracts with the holders of grave certificates (i.e., grantees of burial rights in the cemetery) and all contracts for the upkeep of graves. G

Held: (i) the land in question was "land . . . burdened with onerous covenants" within the Companies Act, 1948, s. 323 (1), because the grant of a right of burial conferred an exclusive right of burial in particular land which could not thereafter be used for a purpose conflicting with that right, and accordingly the grants of burial rights imposed, in effect, restrictions which touched and concerned the land. H

(ii) as the company's undertaking was by force of circumstances at an end, there was no reason for the company, although it had been incorporated by private Act of Parliament to conduct an undertaking for a public purpose, I

A to retain its land, and the power of disclaimer conferred on the liquidator (not on the company) by s. 323 of the Companies Act, 1948, applied.

Re Woking Urban Council (Basingstoke Canal) Act, 1911 ([1914] 1 Ch. 300) distinguished.

B (iii) the court would exercise its discretion under s. 323 by authorising the disclaimer because, on the facts, to refuse it would hamper the course of the liquidation without giving any corresponding benefit to those who opposed the disclaimer, regarding them for this purpose in the capacity of creditors of the company and not as persons who might be concerned with the future upkeep of the graves or land after the disclaimer.

C [**Editorial Note.** The principal decision in this case, viz., that the land of the cemetery was land subject to restrictions amounting, in effect, to onerous covenants, has its counterpart in *London Cemetery Co. v. Cundey* ([1953] 2 All E.R. 257), where McNAIR, J., at p. 262, letter H, intimated that the obligations on the grantee of burial rights, the grave-owner, for the maintenance of a grave, being positive obligations, would not pass to his successors in title. The obligation in question in that case, however, was an alleged implied obligation to maintain a tree.

D As a result of the disclaimer which the court allowed in the present case, the land disclaimed will vest in the Crown. Whether it will so vest subject to the liabilities of the company as regards upkeep was not decided, but on this question reference may well be made to *A.-G. v. Parsons* (ante, p. 466), where onerous leaseholds vested in the Crown on forfeiture under the mortmain legislation.

E A further question arose whether the court should refuse to allow disclaimer so that the liquidator should apply to Parliament for a local Act to settle the future of the cemetery. The court considered it not to be part of the liquidator's duties to make such an application (see p. 512, letter C, post) as the liquidator's functions were limited to concluding the liquidation.

F As regards the nature of an exclusive statutory right of burial which may be sold, see 4 HALSBURY'S LAWS (3rd Edn.) 62, para. 173; and for cases on the subject, see 7 DIGEST 543, 230, 231.

As to the disclaiming of onerous property in a liquidation, see 6 HALSBURY'S LAWS (3rd Edn.) 687, para. 1365, and as regards the exercise of the court's discretion, *ibid.*, para. 1368.

For the Companies Act, 1948, s. 323, see 3 HALSBURY'S STATUTES (2nd Edn.) 705.]

G Cases referred to:

- (1) *Re Mercer & Moore*, (1880), 14 Ch.D. 287; 49 L.J.Ch. 201; 42 L.T. 311; 5 Digest 939, 7680.
- (2) *Re Woking Urban Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300; 83 L.J.Ch. 201; 110 L.T. 49; 78 J.P. 81; 10 Digest 1164, 8246.
- (3) *Re Bradford Navigation Co.*, (1870), 5 Ch. App. 600; 39 L.J.Ch. 733; 23 L.T. 487; 10 Digest 851, 5658.
- (4) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; 62 L.J.Ch. 373; 68 L.T. 576; 10 Digest 735, 4597.
- (5) *Re Katherine et Cie, Ltd.*, [1932] 1 Ch. 70; 101 L.J.Ch. 91; 146 L.T. 226; Digest Supp.

I **Summons in compulsory winding-up.**

The Official Receiver as liquidator of the Nottingham General Cemetery Company, applied for an order that he might be at liberty to disclaim (a) approximately twelve acres of freehold land constituting the company's cemetery situate in the city of Nottingham; (b) the beneficial interest (if any) of the company in, and any implied contract to indemnify the trustees of, approximately a further two and a quarter acres of freehold land used for the purpose of the cemetery together with the said twelve acres; (c) all implied contracts with the holders of grave certificates in respect of graves in the cemetery as in the said two and a

quarter acres of freehold land; (d) all contracts by the company for the upkeep of graves in the cemetery on the said two and a quarter acres of freehold land. A

Raymond Walton for the applicant, the liquidator.

G. M. Parbury for Mr. A. S. Bright, a shareholder in the company.

C. N. Shawcross, Q.C., and *Elson Rees* for Nottingham Corporation.

Denys B. Buckley for the Imperial War Graves Commission. B

W. F. Waite for the Commissioners of Crown Lands.

C. J. Slade for Miss F. E. Clarke, a holder of a grave certificate.

Cur. adv. vult.

May 18. **WYNN-PARRY, J.**, read the following judgment: This is a summons by the Official Receiver as liquidator of the Nottingham General Cemetery Company (to which I will refer as "the company") for an order that he be at liberty to disclaim first approximately twelve acres of land constituting the company's cemetery in the city of Nottingham, secondly the beneficial interest (if any) of the company in and any implied contract to indemnify the trustees of approximately a further two and a quarter acres of freehold land used for the purpose of the cemetery together with the twelve acres: thirdly all implied contracts with the holders of grave certificates in respect of graves in the cemetery or the further two and a quarter acres: and fourthly all contracts for the upkeep of graves. C

The company was incorporated by special Act of Parliament (6 Will. 4 c. xlv) on May 19, 1836, for the purpose of establishing and maintaining a cemetery at Nottingham. The company's undertaking was successfully carried on for many years; but in 1923 by the Nottingham Corporation Act of that year (13 & 14 Geo. 5 c. c) certain restrictions on burials in the cemetery were imposed. In the result, the company sustained losses, and eventually it became clear that it could not continue. Accordingly a petition for the compulsory winding-up of the company as an unregistered company was presented under s. 399 of the Companies Act, 1948, and an order on that petition was made on May 11, 1953. D

According to the evidence the upkeep of the cemetery costs approximately £2,000 per annum. The liquidator has in hand £5,000, which will only be sufficient to maintain the cemetery for two and a half years. It is therefore clear that the undertaking of this company must come to an end within a short time for lack of the necessary funds to carry it on. The liquidator's application is, however, opposed by the respondent the Nottingham Corporation, by the respondent Miss Clarke as representing all persons entitled to grave certificates issued by the company and all persons who have contracted with the company for the maintenance of graves in perpetuity, and by the Imperial War Graves Commission. E

The Nottingham Corporation would be willing to withdraw their opposition provided that it were admitted on behalf of the Crown that the result of disclaimer by the liquidator would be that the freehold land vested in the Crown subject to the liabilities of the company in regard thereto. Counsel for the Commissioners of Crown Lands intimated that while he was prepared to admit that on disclaimer by the liquidator the land would vest in the Crown, he would contend that the Crown would only become involved in any liability if and when it entered into possession, a step which it was not intended should be taken. Counsel for Nottingham Corporation invited me to resolve this dispute in dealing with this summons, but I propose to decline this invitation. If I were to accede to the liquidator's application, the question might well have to be debated between the Crown and the Nottingham Corporation, as the local authority within whose area the cemetery lies, but that question does not arise on this summons. F

I propose to deal first with two submissions made by counsel on behalf of Miss Clarke and the class she represents, both of which go to the question of jurisdiction. His first submission was that the land in question could not be said to be "land . . . burdened with onerous covenants" within the meaning of G

A that phrase as used in s. 323 of the Companies Act, 1948. For the purpose of considering this submission it is necessary to consider s. 37, s. 38 and s. 39 of the special Act. Section 37 so far as material reads as follows:

B “And be it further enacted, That the conveyance of the exclusive right of burial or interment in all such vaults, catacombs, brick graves, graves, and places of burial and of the right and privilege of erecting and making any family vaults, catacombs, brick graves, graves, or places of burial, with the exclusive right of burial or interment therein, either in perpetuity or for a limited period, and of the right and privilege of erecting of any monuments or cenotaphs, shall be under the common seal of the said company, and shall and may be made in the words or to the effect following, with such variations therein as the circumstances of the case may render necessary, (that is to say):

C “The Nottingham General Cemetery Company By virtue of an Act passed in the (blank) year of the reign of His Majesty King William the Fourth, intituled (*here insert the title of this Act*) We, the Nottingham General Cemetery Company, incorporated by and under the said Act, in consideration of the sum of (blank) to us in hand paid by A.B., of (blank), Do hereby grant and convey unto the said A.B. the exclusive right of burial and interment (*or, as the case may be, the right and privilege of erecting and making, and the exclusive right of burial or interment when made*) in all (*here describe the vault, catacomb, or place of burial, or the ground intended for the construction of a vault, catacomb, or place of burial, or for the erection of a monument or cenotaph, as the case may be, so as to identify the same*), To hold the same to the said A.B. in perpetuity (*or for the period agreed upon*) for the purpose of burial (*or as the case may be*), subject to such rules, orders, and regulations, as have been or shall from time to time hereafter be made by the said company, for the management and regulation of the said cemetery and the catacombs or vaults therein. Given under our common seal ’ . . . ”

F and then there is provided a place for insertion of the date. The section continues:

G “And every such conveyance so made shall be good, valid and effectual, both at law and in equity, without words of inheritance, limitation, or representation, to vest the exclusive right of burial or interment in the catacomb or vault described therein, or to be erected or made in pursuance thereof, in the person purchasing the same, and his personal representatives, legatees, and assigns, in perpetuity or for the period agreed upon, without any faculty whatever, subject to the payment of such fees as may be by the rules and regulations of the said company from time to time payable, on the interment of any corpse in such vault or cemetery, and subject also to such rules, orders, and regulations, as shall from time to time be made by the said company for the better regulation of the said cemetery and the vaults and catacombs thereof; and an entry or memorial of every such grant or assignment, containing the date thereof and the names of the parties, with their proper additions, to whom the same shall have been made, with a sufficient description of the vault or catacomb, or of the piece of ground for the erection of a vault or catacomb comprised therein, so as to identify the same, and the amount of the sum paid for the purchase thereof, shall within twenty-eight days after the date thereof, be entered in some book to be kept by the clerk of the company.”

Section 38, in so far as material, reads as follows:

I “And be it further enacted, That the exclusive right of burial or interment in any vault, catacomb, and burial-place, which shall be so purchased as aforesaid, and, after such purchase, shall have been conveyed to the purchaser thereof, in the manner herein before directed, shall, if in perpetuity, be

considered as a personal inheritance, and shall and may, whether granted in perpetuity or for a limited period, be sold and disposed of and assigned in his lifetime, or bequeathed by his last will and testament, and every such assignment or disposition, except by will, may be made in the form or to the effect, following (that is to say) . . . ”

and then there follows a form of assignment which I need not read. Then the section proceeds as follows:

“ . . . And every such assignment, if made in the form or to the effect aforesaid, shall be valid and effectual in the law, without enrolment and without words of inheritance, limitation, or representation, to vest the exclusive right of burial or interment in the said vault or catacomb in the purchaser thereof, his personal representatives, legatees, and assigns, either in perpetuity or for the remainder of the period for which the same was originally granted, free from all claims whatever by or from the person making or executing the same, or any person claiming through, under, or in trust for him.”

By s. 39 it is provided that derivative assignments are to be registered. Counsel for Miss Clarke contends that there is to be discovered no more than an implied obligation on the company not to derogate from its own grant by using the land inconsistently with the grant; but, he argues, such an obligation does not touch or concern the land; it is the company which is burdened, not the land; and therefore the land is not burdened with onerous covenants within the meaning of s. 323 of the Companies Act, 1948.

Against this it was argued by counsel for the liquidator and counsel for Mr. Bright, a shareholder, that the restrictions are not personal, but bind or touch and concern the land. The form of grant confers an exclusive right to burial in a specified part of the cemetery, a right which is evidenced by registration in the book kept for the purpose. It therefore necessarily follows that the land cannot be used for any purpose conflicting with that right. To adopt the test suggested by counsel for Mr. Bright, let it be visualised that the land is sold. In such an event the purchaser must take with notice of the restrictions: and I cannot see that this would be any defence to an action for specific performance by the grantee against the purchaser. Nor is it any objection that the company's obligations are negative in character: *Re Mercer & Moore* (1). I therefore hold that the land the subject of this summons is land burdened with onerous covenants within the meaning of s. 323 of the Companies Act, 1948.

The second submission by counsel for Miss Clarke on the matter of jurisdiction can be put shortly thus: the special Act incorporating the company implies the positive obligation on it to continue to carry on its undertaking indefinitely and the further obligation not to alienate that undertaking and therefore not to alienate its land without which the undertaking could not be carried on: it therefore follows that the company could alienate its land only under the authority of a further special Act of Parliament: the act of disclaimer involves alienation; and therefore there is no jurisdiction in the court to authorise this to be done. For this proposition counsel relied on *Re Woking Urban Council (Basingstoke Canal) Act, 1911* (2). The facts in that case were ([1914] 1 Ch. 300):

“ In 1777 an Act of Parliament was passed for making a canal. It incorporated a company by name of the Company of Proprietors of the Basingstoke Canal Navigation, authorised them to construct the canal, to make by-laws, demand tolls, and acquire land. All persons were to have the right to use the canal on payment of tolls. The company were to make and maintain bridges. Throughout the Act in conferring rights or imposing obligations on the company the words ‘ their successors and assigns ’ were added. The canal was made and navigation carried on till 1866, when a winding-up order was made. In 1874 the liquidator with the sanction of the

A judge sold the canal to S.A. The word 'undertaking' was not used in the conveyance, but possession was taken, and tolls levied and received. In 1878 the company was dissolved by an order of the court. S.A. sold various portions of the land, and the last purchaser of the canal and undertaking was the L. and S.W. Canal, Ltd., which executed a mortgage thereof to W. Carter. The canal bridges fell into disrepair, and the Woking Urban District Council obtained an Act of Parliament in 1911 which authorized them to do the repairs and recover the costs from 'the company'."

B The Court of Appeal held as part of their decision that the company had no power to assign their undertaking and that nothing passed to Mr. St. Aubyn by the conveyance of 1878. COZENS-HARDY, M.R., having reviewed two earlier authorities, said (*ibid.*, at p. 309):

C "I think nothing passed by the conveyance, for it purported to pass that without which this statutory undertaking could not be carried on, and was, therefore, ultra vires the company. In saying this, I do not refer to any surplus lands, or to property which might be parted with without damage to the undertaking. The proper course for the liquidator to have taken was to have applied for a private Act of Parliament authorising the transfer of the undertaking to the purchaser. This course has actually been followed in several cases. In my opinion the purchaser acquired only a possessory title which might ripen into a fee simple by virtue of the Statute of Limitations."

D SWINFEN EADY, L.J., said (*ibid.*, at p. 313):

E "Where a company is incorporated by statute for a public purpose, with compulsory powers of acquiring land and other statutory privileges, and with statutory obligations, it cannot, without the intervention and authority of Parliament, transfer its undertaking, or its powers or privileges, to other persons. Neither can it mortgage its undertaking, except in the manner and to the extent permitted by Parliament. It has generally been with reference to railway companies that questions of this nature have arisen; but the rule is not limited to these companies; it extends also to water companies, canal companies, and the like."

F Finally PHILLIMORE, L.J., in his judgment, said (*ibid.*, at p. 317):

G "The canal fell, as many other canals have fallen, on evil days; and in 1866 an order was made to wind it up. Such an order could, according to the decisions, be made under the provisions of s. 199 of the Companies Act, 1862; and similar orders have been made in other cases. Under such an order there would be an official liquidator who would have power to use the rents and profits to pay debts, and who might sell any real or personal property not required for the purpose of the undertaking. He had, however, in my opinion, no power to proceed further and sell the canal with its locks and towpaths, or any other property real or personal required for the use of the undertaking. JAMES, L.J., it is true, in *Re Bradford Navigation Co.* (3), seems to have thought that a liquidator could so sell; but it was an obiter dictum, and he said that the liquidator could not, by selling, free the lands from their liability to discharge the public uses and burdens of the undertaking; and he intimated that in all probability recourse would have to be had to an Act of Parliament—a recourse which was, in fact, had in the case of the Wey and Arun Canal Company. Unless and until the property of a corporation or company in course of liquidation is sold, the corporation or company ought not to be finally wound up and dissolved. In fact, however, the liquidator purported to sell the land, not the undertaking, to one St. Aubyn in 1874; and the company was dissolved by order of the court in 1878."

On the authority of that case, counsel contends that as disclaimer will involve an alienation of the company's land I have no jurisdiction to allow such disclaimer. That case is clearly authority for the proposition that a company incorporated by special Act of Parliament to establish and maintain an undertaking for some public purpose (and I do not doubt that the company falls within that class) has no power to dispose of that undertaking or of any land necessary for its carrying on, and that, although there is jurisdiction in the court to order such a company to be wound-up under the Companies Act, 1948, as an unregistered company, the fact of liquidation does not put the liquidator in a better position than that in which the company was prior thereto so that he can do what was ultra vires the company. Just as such a company, during its active existence, would have had to seek the authority of Parliament to sell its undertaking, so its liquidator must seek such authority on its behalf.

In this regard it is material to remember, as counsel for the liquidator pointed out, that on a liquidation nothing vests in the liquidator, and if he designs to convey the company's land to a purchaser he must convey in the name of the company and affix its seal to the conveyance. It is also, I think, material to point out that the rule underlying *Re Woking Urban Council (Basingstoke Canal) Act, 1911* (2), is somewhat special in that it cuts down by implication the effect of the apparently unqualified words of s. 404 of the Companies Act, 1948, and the corresponding sections in the earlier Companies Act. The case, however, clearly binds me, and I must apply it, if I conclude that it is applicable in the present case. I take the view, however, that that case has no application to the case before me. The act which was considered by the Court of Appeal was the act of selling land without which the undertaking could not be carried on, an act which was ultra vires the company. In the present case, the act for which authority is sought is the disposal of land because the undertaking has by force of circumstances come to an end, or is about to come to an end. There can be no reason for retaining land which was used for the purpose of carrying on the undertaking when the undertaking has come to an end. Further, unlike the case of a sale, the liquidator in making a disclaimer does not have to use the name of the company. The right to disclaim is a right conferred on the liquidator, as such, by s. 323 of the Companies Act, 1948, a right which did not exist prior to 1929. He exercises it by writing under his hand, and he can exercise it only in relation to property which in effect has ceased to be an asset and has become a liability. In those circumstances no question of ultra vires arises: the right is one which ex natura the company could not enjoy; it arises for the first time when the company goes into liquidation and a liquidator is appointed. In my judgment the second objection of counsel for Miss Clarke fails. I therefore hold that I have jurisdiction to make the order asked for.

The question then arises: ought I to exercise my discretion under the section in favour of the liquidator? Prima facie I think that I should do so. If I make the order as asked, the liquidation will proceed in an orderly manner to its close. On disclaimer, claims will no doubt be advanced by those injured by the disclaimer. In that case the funds in the hands of the liquidator, subject to provision for the costs of the liquidation, will be available to meet those claims pro tanto. On the other hand, if I refuse the order, the result must be that the liquidator will have to be given leave to continue to maintain the cemetery for the next two and a half years, at the end of which time the fund will be exhausted and dissolution must supervene.

Counsel for Miss Clarke, on behalf of the class which he represents, urged me to refuse to make the order asked for, in order that the cemetery should be carried on for this limited period, saying that those whom he represented would prefer that course even if it meant exhausting the funds in the hands of the liquidator. I do not favour that course. It cannot lead to anything constructive, and it must involve dissipation of the only fund which ought to be available for those who, whether I make the order asked for or not, are bound to suffer.

A Then I was urged by counsel for Nottingham Corporation to refuse the order, so that the liquidator might be put in a position to carry on for some longer period than the two and a half years to which I have referred; he did not specify the period. His plea was based on the submission that the liquidator could make calls under s. 86 of the special Act in the liquidation for the purpose of carrying on the undertaking. In dealing with the previous summons in this matter,

B which raised the question whether the liability of the members was limited or unlimited, I held as a matter of construction that s. 86 was not merely ancillary to s. 85, and that under s. 86 the directors had power from time to time to make calls on the proprietors in addition to the calls which they were directed to make in respect of the £10 per share by s. 85. The power to make calls under s. 86 is confined to the directors, and the object of the calls is to defray the expenses of

C or to carry on the undertaking. The effect of the winding-up order was in my view to bring to an end the power of the directors to make calls, and thereafter the only power is the statutory power contained in s. 260 of the Companies Act, 1948: see *Fowler v. Broad's Patent Night Light Co.* (4). The scope of that statutory power is to "make calls on all or any of the contributories . . . to the extent of their liability", and the object of making such calls is limited by the words

D "for payment of any money which the court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves . . ."

E The Companies Act, 1948, s. 401, is designed to fit unregistered companies into this scheme: sub-s. (1) provides:

F "In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding-up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid."

Having regard to my decision on the previous summons, the date for ascertaining the liability of the members to contribute to the assets is the date of liquidation, and the maximum amount of such liability in the case of any member is

G (i) the amount (if any) unpaid of the nominal amount (£10) of the shares held by him and (ii) the amount (if any) unpaid in respect of any call made by the directors under s. 86 of the special Act. The evidence shows that the nominal amount (£10) was paid up on all the shares, and there is no evidence of any call made under s. 86 of the special Act being in arrear. A further objection to counsel's suggestion is that under the Companies Act, 1948, s. 245 (1), the power

H to carry on business is limited by the words "so far as may be necessary for the beneficial winding-up thereof."

I It was further argued that in deciding whether or not to exercise my discretion I ought to take into account the effect which it would have on the interested parties, and that it would have such an adverse effect that I should refuse the order. In support of this submission *Re Katherine et Cie., Ltd.* (5), was cited. Undoubtedly the court can and should consider the rights of parties interested, but that case was very different from the present, and affords me no assistance in resolving the problem before me. The headnote in that case so far as material reads as follows ([1932] 1 Ch. 70):

"Where the liquidator of a company applies for leave to disclaim leasehold property of the company, the court, in exercising its discretion, may take into consideration the effect of the disclaimer on interested parties. The liquidator of a company holding a lease applied for liberty to disclaim the

lease. The lessors, who were relying on certain guarantors for the payment of the rent and performance of the covenants, opposed the application, on which the registrar made no order save as to payment of costs. On a motion before the court by way of appeal:—*Held*, that, as the lessors, who were entitled to appear, would suffer substantial injury if the disclaimer were allowed, the court, in the exercise of its discretion, would not allow it.”

In the course of his judgment MAUGHAM, J., stated that the refusal of the court to allow the disclaimer would not prejudice the liquidator in winding-up the affairs of the company and concluding the liquidation in due course. In the present case, to refuse to allow the disclaimer would clearly hamper the course of the liquidation, without giving any corresponding benefit to those who oppose it, regarding them as creditors, the only capacity in which I can regard them.

Further, I was pressed to refuse the relief asked for with a view to the liquidator presenting a Bill to Parliament for a further special Act. It was not suggested what the contents of the Bill might be. The short answer to this suggestion is, to my mind, that the function of the liquidator is to administer the affairs of the company with a view to concluding the liquidation in due course. To do this does not require an Act of Parliament. Further, he does not want to promote any such Bill, and I know of no jurisdiction by which in such circumstances the court could compel him to do so. It appears to me that if any Bill is to be promoted with a view to providing for the future maintenance of this cemetery, it must be promoted outside the liquidation by those whose interest or duty it may be to see that the cemetery is maintained. For those reasons I propose to make the order as asked.

Order accordingly.

Solicitors: *Slaughter & May* (for the applicant); *Lee, Ockerby, Johnson & Co.* (for Mr. Bright); *Sharpe, Pritchard & Co.*, agents for *Town Clerk*, Nottingham (for Nottingham Corporation); *Legal Adviser to the Imperial War Graves Commission*; *Solicitor to the Commissioners of Crown Lands*; *Theodore Goddard & Co.* (for Miss Clarke).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A OWEN OWEN ESTATE, LTD. v. LIVETT AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), May 11, 12, 1955.]

Landlord and Tenant—Improvements—Proposed installation of new lavatories—Subsequent contract by tenants with underlessee to make the improvement—Whether entitled to claim compensation—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 2 (1) (b).

B On Sept. 2, 1954, the plaintiffs, who were lessees of premises of which the defendants were the freeholders, served on the defendants a notice under the Landlord and Tenant Act, 1927, s. 3 (1), that the lessees intended to make an improvement on the premises, namely, the provision of additional lavatory accommodation. On Sept. 23, 1954, the plaintiffs granted an underlease of part of the premises to the B. Society, and the underlease provided that the plaintiffs would install the new lavatories which were the subject-matter of the notice of Sept. 2. On Nov. 12, 1954, the defendants gave notice of their objection to the proposed improvement on the ground that since by the underlease the plaintiffs were under a contractual obligation to make the improvement, they were excluded from compensation by the Landlord and Tenant Act, 1927, s. 2 (1) (b), as the improvement had become one which they were under an obligation to make in pursuance of a contract, within the terms of that paragraph.*

C Held: the words of s. 2 (1) (b) of the Landlord and Tenant Act, 1927, were of such a general nature that they were apt to include such a contract as had been entered into by the plaintiffs with the B. Society, and the plaintiffs were precluded from claiming compensation for the proposed improvement.

E [For the Landlord and Tenant Act, 1927, s. 2 (1) (b), see 13 HALSBURY'S STATUTES (2nd Edn.) 886.]

Cases referred to:

- F (1) *Simpson v. Charrington & Co.*, [1934] 1 K.B. 64; 103 L.J.K.B. 49; 150 L.T. 103; *on appeal*, sub nom. *Charrington & Co., Ltd. v. Simpson*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469; 31 Digest (Repl.) 630, 7401.
- (2) *Salmon v. Duncombe*, (1886), 11 App. Cas. 627; 55 L.J.P.C. 69; 55 L.T. 446; 42 Digest 676, 874.
- G (3) *Fowle v. Bell*, [1946] 2 All E.R. 668; [1947] K.B. 242; [1947] L.J.R. 115; 31 Digest (Repl.) 708, 7957.

Adjourned Summons.

The plaintiff company made application by originating summons for a certificate that the improvement proposed to be made by them to premises of which they were tenants, namely, 108, 109 and 110, High Holborn in the county of London, was a proper improvement.

H By a lease dated Oct. 7, 1901, and made between the trustees of the St. Clement Danes High Holborn Estate Charity as lessors and William Molt Harford, premises known as 108, 109 and 110, High Holborn, were let to William Harford for a term of seventy-two years from Dec. 25, 1900, at a rent of £600 per annum. The reversion in the premises expectant on the said term was vested, at the date of proceedings, in the defendants as the trustees for the time being of the charity, and the plaintiff company were the assignees of the lease. On Sept. 2, 1954, the plaintiffs served on the defendants a notice under the Landlord and Tenant Act, 1927, s. 3 (1), that it was proposed to make an improvement on the said premises which consisted in providing additional and more convenient lavatory accommodation, and further gave notice that they intended to proceed with the said improvement unless within three months after service of the notice they received notice of objection from the defendants. On Nov. 12, 1954, the

* The terms of s. 2 (1) are set out at p. 514, letter F, post.

defendants gave notice of their objection to the said improvement on the ground that by an underlease dated Sept. 23, 1954, the plaintiffs demised a shop and basement, being part of the premises comprised in the headlease, to the Burnley Building Society and that by cl. 3 (c) of the underlease the plaintiffs had covenanted to install the new lavatories which were the subject-matter of the notice dated Sept. 2, 1954. A

On an application by the plaintiffs for a certificate that the proposed improvement was a proper improvement, the defendants contended that since by the underlease the plaintiffs were under a contractual obligation to make the proposed improvement, the plaintiffs were not, having regard to the Landlord and Tenant Act, 1927, s. 2 (1) (b), entitled to compensation therefor. B

G. T. Hesketh for the plaintiffs.

C. F. Fletcher-Cooke for the defendants. C

UPJOHN, J. : This summons raises an interesting question of construction on s. 2 of the Landlord and Tenant Act, 1927. Briefly, s. 1 of that Act entitles the tenant in certain cases to make a claim for compensation for improvements made by him to his holding during the currency of his tenancy. Section 2 limits the tenant's right to compensation in certain cases and the question I have to consider is whether, having regard to s. 2 (1) (b) the tenant's claim is excluded in this case. Section 3 (1) provides that a tenant proposing to make an improvement must serve on his landlord notice of his intention to do so with plans and so forth. Within three months the landlord may serve a notice of objection, and if he does so then the matter goes before the tribunal. Where, as in this case, the rateable value of the premises exceeds £500 per annum, the tribunal is, by the operation of s. 63 of the Landlord and Tenant Act, 1954, the High Court. The tribunal has to consider the matter, and if satisfied that the improvement is a reasonable and suitable one, it may issue a certificate and thereupon the tenant may execute the improvement. D

[His LORDSHIP stated the facts and continued:] I must now consider in greater detail the provisions of the Landlord and Tenant Act, 1927. I do not think I need say more about s. 1. Section 2 (1) is in these terms: E

"A tenant shall not be entitled to compensation under this Part of this Act—(a) in respect of any improvement made before the commencement of this Act; or (b) in respect of any improvement made in pursuance of a statutory obligation, or of any improvement which the tenant or his predecessors in title were under an obligation to make in pursuance of a contract entered into, whether before or after the passing of this Act, for valuable consideration, including a building lease; or (c) in respect of any improvement made less than three years before the termination of the tenancy . . ." F

Sub-section (2) provides for the case where the landlord expressed his willingness to grant a new lease or a new tenancy in consideration of the improvement. Sub-section (3) is in these terms: G

"The tribunal in determining the compensation for an improvement shall in reduction of the tenant's claim take into consideration any benefits which the tenant or his predecessors in title may have received from the landlord or his predecessors in title in consideration expressly or impliedly of the improvement." H

Section 3 sets out the machinery where the tenant is proposing to make an improvement. Where a certificate is granted by the tribunal it is common ground that no immediate right to compensation arises. The compensation is assessable and payable in accordance with s. 1 of the Act only on the expiry of the lease, which in this case would be in 1972. There is only one other section to which I need refer, namely, s. 9. The marginal note reads thus: "Restriction on contracting out". The body of the section is this: I

"This Part of this Act shall apply notwithstanding any contract to the

- A** contrary, being a contract made at any time after Feb. 8, 1927: Provided that, if on the hearing of a claim or application under this Part of this Act it appears to the tribunal that a contract made after such date as aforesaid, so far as it deprives any person of any right under this Part of this Act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto."
- B** The real point I have to consider is whether the sub-lease to the Burnley Building Society is a contract for the purposes of s. 2 (1) (b) which renders it impossible for the tenant to make any claim to compensation. Prima facie, there is no doubt that the words are wide enough to include and cover such an underlease. The underlease plainly put the plaintiffs under an obligation to make an improvement and, therefore, videlicet it was an improvement which
- C** the tenant was under an obligation to make in pursuance of a contract entered into for valuable consideration. However, it is said by counsel for the plaintiffs that that is not the meaning to be put on the words in this case, because as he has rightly pointed out the object of the Landlord and Tenant Act, 1927, was primarily to benefit the tenant and not the landlord. It was so put by SCRUTTON, L.J., in *Simpson v. Charrington & Co.* (1) ([1934] 1 K.B. at p. 69):
- D** "Before its [the Act's] passing there was strong feeling among tenants that if during their tenancy they had made at their own expense improvements in the leased property, which rendered the premises more valuable, or had built up a business in the premises, which rendered them more valuable for a trade by reason of the probability that customers would continue to resort to the old premises, it was inequitable that those two elements of value should pass to the landlord at the end of the tenancy without compensation to the tenant who had created them. Parliament appears to have thought it desirable to remedy what it considered this lack of equity."
- E**
- Therefore, counsel submits that the Act should be construed in a manner favourable to the tenant and that, although the words are capable of the wide construction which I have mentioned, in the circumstances the contract should be limited to a contract entered into between the landlord and his successors on the one hand and the tenant and his successors on the other hand. It is submitted that if the words be read in the wider sense, the benefit which the Act intended to confer on the tenant will be largely defeated and therefore it was suggested that I ought to confine the meaning in the way which I have mentioned.
- F**
- G** In further support of giving a beneficial construction to the Act I was referred to two cases, *Salmon v. Duncombe* (2), and *Fowle v. Bell* (3). Every case, however, depends on the proper interpretation of the relevant Act, and I do not derive any great assistance from those authorities, though they plainly justify the court in approaching the construction of such a statute as this in a manner favourable to the tenant.
- H** Counsel also submitted that the word "contract" in s. 9 referred only to a contract between the tenant and the landlords including any superior landlords or sub-tenants. That may be so, but I think it undesirable that I should express any view on that. Assuming it to be so, nevertheless it does not, in my judgment, assist me in coming to a conclusion as to the meaning of the word "contract"
- I** in s. 2 (1) (b), for the context is entirely different. I return then to that section and I find myself unable to cut down the perfectly general words there to be found. It may be, in such a case as I have before me, that the effect of the section is to deprive the tenant of part of the benefit of the improvements, because, although he may be in a position to obtain from the under-tenant valuable consideration as recompense for the improvements, that will be only for the term of the sub-tenancy. It may be that the effect is to deprive the tenant of compensation for his improvement in so far as it will inure for the benefit of the reversioner, the landlord. But I find it impossible to give other than a

literal interpretation to the words of the section, and, in my judgment, they are apt to include such a contract as has been entered into with the Burnley Building Society, which will therefore preclude the tenant from making any claim to compensation on the conclusion of the lease in the year 1972. **A**

The matter came before me in the form of a summons which was to be dealt with by the High Court acting as the appointed tribunal and which asked for the issue of a certificate. I do not think that is the right way of dealing with this problem. No objection has been taken to it as the parties desire to have their rights ascertained at this hour. I think, however, that this is not really in form an application to the tribunal to consider the merits of the proposed improvement. It should really have taken the form of an originating summons under R.S.C., Ord. 54A, for the construction of the Act. Therefore, I will ask the plaintiffs to issue a pro forma summons under Ord. 54A asking for the construction of s. 2, and I shall answer the question in this sense, that the tenants are not, in the events which have happened, entitled to compensation for the proposed improvements, being the improvements set out in the notice of Sept. 2, 1954. **B**

Order accordingly. **C**

Solicitors: *Kimber, Bull & Co.* (for the plaintiffs); *Woolley, Tyler & Bury* (for the defendants). **D**

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

J. H. VANTOL, LTD. v. FAIRCLOUGH DODD & JONES, LTD. [QUEEN'S BENCH DIVISION (McNair, J.), May 4, 5, 1955.] **E**

Sale of Goods—C.i.f. contract for sale of Egyptian cottonseed oil—London Oil and Tallow Trades Association form of contract—Force majeure clause—Time of shipment to be extended by two months “should the shipment be delayed by . . . prohibition of export”—Construction. **F**

On Nov. 10, 1950, the sellers purchased from shippers in Egypt two hundred tons of Egyptian cottonseed oil, one hundred tons to be delivered in December, 1950, and the other hundred in December, 1950/January, 1951. On the same day the sellers agreed to sell one hundred tons of Egyptian cottonseed oil to an Irish company, the goods to be ready for shipment during the first half of December, 1950. By a contract dated Nov. 27, 1950, the sellers sold to J. H. V., Ltd. (referred to hereinafter as “the buyers”) one hundred tons of Egyptian cottonseed oil, c.i.f. Rotterdam, to be shipped during December, 1950/January, 1951. The contract, which was made on a form issued by the London Oil and Tallow Trades Association, contained a force majeure clause, cl. 11, which provided: “A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled . . . B. Should the shipment be delayed by . . . prohibition of export . . . or any other cause comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible, but should the shipment not be possible within eight months from the date of shipment originally stipulated, contract to be void. The option to be declared as soon as shippers announce their inability to ship within the extended period of two months . . . If required sellers must produce proof to justify their claim for cancellation or extension”. The shippers had arranged to ship the two hundred tons of cottonseed oil which they had sold to the sellers on a ship which was due to load on Dec. 20, 1950, but on Dec. 12, 1950, the Egyptian government imposed a ban on the export of cottonseed oil. On **G** **H** **I**

- A** Jan. 3, 1951, the ban was lifted, and between Jan. 4 and Jan. 31 goods of the contract description and quantity were available for shipment. Towards the end of January, 1951, the shippers, in part performance of their contract with the sellers, shipped one hundred tons of oil, which the sellers appropriated to their contract with the Irish company. On Feb. 17, before a further shipment was made, the ban on export was re-imposed and was still in force at the end of April, 1951. The buyers claimed that the sellers were in default under the contract. The sellers claimed that shipment had been delayed by force majeure within cl. 11B of the contract.
- B**

Held: the sellers were not in default because (i) the shipment was delayed within the meaning of cl. 11B of the contract although the prohibition on export did not continue throughout the whole of the period remaining after its inception within which the contract might be performed, and (ii) it was not necessary for the sellers to prove that they were unable to purchase goods afloat.

- C**
- [As to shipment of the goods in c.i.f. contracts, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.]

D **Special Case.**

This was a Special Case stated, at the request of J. H. Vantol, Ltd., by the Board of Appeal of the London Oil and Tallow Trades Association under the Arbitration Act, 1950, s. 21 (1). The dispute arose out of a contract, dated Nov. 27, 1950, whereby J. H. Vantol, Ltd. purchased a quantity of Egyptian cottonseed oil from Fairclough Dodd & Jones, Ltd.

- E** At all material times a licence from the Egyptian government was required for the export of cottonseed oil. On Sept. 27, 1950, the Egyptian Salt & Soda Co., Ltd. of Alexandria (referred to hereinafter as "the shippers") obtained a licence to export at least two hundred tons. The licence was valid until Dec. 26, 1950, but was subject to a term that it might be withdrawn at any time. By a contract dated Nov. 10, 1950, Fairclough Dodd & Jones, Ltd. bought two hundred tons of Egyptian washed cottonseed oil from the shippers, at £138 per ton f.o.b. Alexandria. One hundred tons was to be delivered in December, 1950, and one hundred tons in December, 1950/January, 1951, and freight was to be provided by Fairclough Dodds & Jones, Ltd. for shipment to Rotterdam. The contract contained (a) a clause that, in the event of the shippers' export licence being rescinded, the contract was to be cancelled for any unshipped quantity, and (b) a "force majeure" clause. On the same day (Nov. 10, 1950), Fairclough Dodd & Jones, Ltd. (referred to hereinafter as "the sellers") entered into a contract with Irish Oil & Cake Mills, Ltd. of Drogheda (referred to hereinafter as "the Irish company"), to sell one hundred tons of the oil to the Irish company, at £145 10s. a ton c.i.f. Rotterdam, to be ready for shipment during the first half of December, 1950, and to be shipped on the first available steamer.
- G**
- H** By a contract in writing dated Nov. 27, 1950, the sellers sold to J. H. Vantol, Ltd. (referred to hereinafter as "the buyers") one hundred tons Egyptian washed cottonseed oil, to be shipped during the months of December, 1950/January, 1951, from Alexandria, at a price of £146 10s. a ton c.i.f. Rotterdam. The contract was on form 5a, issued by the London Oil and Tallow Trades Association, and headed "Contract for Oriental Oils. C.i.f. Terms Continental".
- I** Clause 2 provided:

"Particulars of shipment, with date of bill or bills of lading . . . to be duly declared by the original seller in writing with due dispatch, but not later than forty-two days from the date of the bill of lading . . ."

By cl. 11:

"A. In the event of war, hostilities or blockade preventing shipment this contract or any unfulfilled part thereof shall be cancelled. If required

sellers must produce proof to justify cancellation. B. Should the shipment be delayed by fire, strikes, lock-outs, prohibition of export, riots, or revolution, or any other cause comprehended in the term *force majeure* other than war, hostilities, blockade, the time of shipment shall be extended by two months. Should the delay exceed two months, buyers shall have the option of cancelling the contract forthwith or accepting the goods for shipment as soon as possible, but should the shipment not be possible within eight months from the date of shipment originally stipulated, contract to be void. The option to be declared as soon as shippers announce their inability to ship within the extended period of two months, a reasonable time being allowed for passing on such announcements. Should buyers fail to exercise their option in due time, contract to be void. If required sellers must produce proof to justify their claim for cancellation or extension.'

This contract, unlike that of Nov. 10, 1950, between the sellers and the shippers, did not contain an export licence clause.

Space was booked by the shippers for two hundred tons of cottonseed oil on board s.s. *Mentor* due to load on or about Dec. 20, 1950, but on Dec. 12 the Egyptian government imposed a ban on the export of cottonseed oil. On Dec. 13 the sellers received a cable from the shippers advising them of the shippers' inability to fulfil their contract by reason of the ban, and on the same day the sellers sent a copy of the shippers' cable to the buyers. On Jan. 3, 1951, as a result of negotiations between the shippers and the Egyptian authorities, the shippers' licence was renewed for a period of three months. Goods of the contract description and quantity were available for shipment between Jan. 4 and Jan. 31, 1951. The shippers, with the consent of the sellers, intended to ship one hundred tons by the end of January and the remaining hundred tons during February. Towards the end of January, 1951, the shippers shipped one hundred tons to the sellers, and the sellers appropriated that shipment to their contract with the Irish company. On Feb. 17, before any further shipment had been made, the ban on export was re-imposed by the Egyptian authorities and was still in force at the end of April, 1951. On Feb. 22 the sellers notified the buyers of the re-imposition of the ban, and the buyers replied, on the same day, alleging that shipment under the contract was then overdue, and claiming that the sellers were in default. The sellers denied that they were in default, and the matter went to arbitration. The arbitrators appointed by the parties having failed to agree, an umpire was appointed. On Feb. 4, 1953, the umpire awarded that the buyers had no claim against the sellers. The buyers thereupon appealed to the Board of Appeal of the London Oil and Tallow Trades Association.

The buyers contended, among other things, (a) that the imposition of the ban on the export of cottonseed oil did not, of itself, bring into operation the provisions of cl. 11 of the contract of Nov. 27, 1950, namely, the "*force majeure*" clause, entitling the sellers to an extension of two months; that, to bring cl. 11 into operation, the ban must cause such delay as to prevent shipment at any time during the contract period; that the sellers could have shipped the goods between Jan. 4 and Jan. 31; and that the decision of the sellers to allocate to the Irish company, instead of to the buyers, the goods which were in fact shipped during that period was arbitrary; and (b) that, if the sellers were prevented from shipping the contract goods, they were under an obligation to buy goods afloat, if able to do so; that the onus was on the sellers to prove that they were unable to buy goods afloat; and they had failed to discharge that onus. The sellers contended, among other things (a) that, since they had made all arrangements to ship the goods by s.s. *Mentor* due to load on Dec. 20, shipment was delayed, within the meaning of cl. 11B of the contract, by the prohibition on export imposed by the Egyptian government on Dec. 12, 1950; that, consequently, the sellers obtained by virtue of that clause, an extension of two months, i.e., the shipping period was extended until the end of March, 1951; and that,

A therefore, the sellers were not in default because their time for shipment had not expired when the second ban on export came into operation on Feb. 17, 1951; and (b) that, since the time for shipment had been extended, there was no obligation on the sellers to buy goods afloat. The buyers failed to establish that contract goods of the required quantity were available to be bought afloat, and no evidence was given by the sellers that the goods could not have been
B obtained afloat.

The board of appeal held, subject to the decision of the court, that the imposition of the ban on Dec. 12, 1950, operated to give the sellers an extension of two months in which to ship, and, in the event of the court deciding that the sellers were not in default, confirmed the award of the umpire.

C *A. A. Mocatta, Q.C.*, and *J. F. Donaldson* for the buyers.
T. G. Roche, Q.C., and *A. J. Bateson* for the sellers.

McNAIR, J., stated the facts, and said: It is well settled law that, normally, a c.i.f. contract can be performed by the seller in one of two ways: either (i) by shipping, on his own behalf or by his agents, contract goods during the period stipulated for shipment by the contract and tendering the appropriate bills of
D lading, or (ii) he can purchase goods afloat which have been shipped during the contract period. Generally, a seller cannot claim the protection of the clause which provides that the contract shall be cancelled if shipment is prevented by certain specific causes unless he proves both (a) that he was himself so prevented from shipping, and (b) that it was impossible for him to fulfil the contract by
E buying goods afloat which had been shipped during the contract period. Accordingly, in the argument before me, counsel for the buyers, in substance, took the following two points: (i) that, as a matter of construction, the expression "should the shipment be delayed" in cl. 11B of the contract means "should
F shipment be delayed during the whole of that part of the contract period which remains after the cause of delay has come into force", while conceding that, in a case of delay caused by prohibition of export, the delay might continue for some time after the prohibition had been removed; (ii) that, in any event, the sellers, in order to obtain the protection of that clause, must prove that there was no possibility of purchasing goods afloat which had been shipped before the prohibition came into effect.

In support of the first contention it was contended that the contrary construction would lead to the result that, if, for example, the prohibition of export
G operated only for the first week of December, that being the period contemplated for shipment by the sellers, the sellers would have been entitled to an extension of two months, i.e., on the conditions of this contract, an extension down to the end of March, which, it was said, was wholly unreasonable. I am by no means satisfied that such a result would be unreasonable as I can well imagine that the parties familiar with the trade who drew up this contract—which, it is to be
H remembered, is to provide for a period of shipment extending over many months—may have taken the view that such an extension would afford a reasonable time to make alternative arrangements. In any event, even on the buyers' construction, a prohibition operating only for the final week of the contract period would produce very much the same anomaly. Furthermore, it has always to be borne in mind that cl. 11B works both ways. It does not always
I work in favour of the seller because it imposes on the seller the obligation to effect delivery during the two months which follow the contract period, which may be very onerous on him if the market has risen substantially during that time. The second point taken on the construction of the clause was that the second sentence of cl. 11B, which starts with the words "Should the delay exceed two months", points clearly to the conclusion that the clause contemplates a delay which initially continues throughout the remaining part of the contract period. I am unable to accept that submission since it is clear that,

on either of the suggested constructions, the particular phrase "Should the delay exceed two months" cannot be given effect to according to its literal and grammatical meaning, but it must be regarded as an expression meaning "If the cause of delay continues to operate during the two months by which the period of shipment has been extended". In my judgment, as a matter of construction, there is no justification for reading into the first sentence of cl. 11B the words "during the whole of that part of the contract period which remains after the cause of delay has come into force". So to read it would, in my opinion, be, in effect, to read the word "delayed" as if it were "prevented" and thus to disregard the marked contrast between the use of the phrase "preventing shipment" in cl. 11A of the contract and the phrase "shipment be delayed" in cl. 11B.

In regard to the suggestion that the sellers have to show that they could not buy goods afloat, it seems to me that the use of the phrase "the shipment" coupled with the later phrase "as soon as shippers announce their inability to ship", in the third sentence of cl. 11B, points clearly to the conclusion that, in this particular contract, the parties are, in terms and designedly, providing protection for the sellers in a case where the first method of performing their obligation under the c.i.f. contract, namely, shipping by themselves or by their agents, is delayed. In my judgment, this clause will not work in any business sense if it were held that the sellers, in addition to proving that the contemplated shipment was delayed, had further to prove that they were unable to purchase goods afloat which were unaffected by the prohibition.

I have reached the same conclusion as to the effect of the clause as was reached by the two trade bodies of arbitration by whom this matter was considered, and the result is that in my judgment, on the facts found and on the true construction of the contract, the sellers were not in default.

Award upheld.

Solicitors: *Stephenson, Harwood & Tatham* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

GODFREY AND ANOTHER v. SMITH AND ANOTHER.

[QUEEN'S BENCH DIVISION (Donovan, J.), May 18, 19, 1955.]

Legal Aid—Costs—Assisted person unsuccessful defendant—Running-down action—Motor Insurers Bureau supporting defendant—Circumstance relevant on question of costs.

Insurance—Motor insurance—Motor Insurers Bureau supporting unsuccessful legally aided defendant—Circumstance relevant on question of costs.

Where a legally assisted person is the unsuccessful defendant in a running-down action the fact that the Motor Insurers Bureau is standing behind the defendant is a circumstance relevant on the question of costs and whether or not a full order for costs should be made.

[**Editorial Note.** The Motor Insurers Bureau on June 17, 1946, entered into an agreement with the Minister of Transport under which the bureau undertook to satisfy any judgment not satisfied within seven days in respect of "any liability which is required to be covered by a policy of insurance or a security . . . under Part 2 of the Road Traffic Act, 1930".

A The general principle with regard to an insurance policy and such a contract of indemnity is that it is, in relation to litigation against the assured, *res inter alios acta*, see 11 HALSBURY'S LAWS (3rd Edn.) 240. The present case forms an exception in that the consequence of the undertaking given by the bureau to the Minister of Transport becomes relevant on the question of costs.]

B **Action.**

This action arose out of a collision between a motor cycle ridden by the first defendant and another motor cycle ridden by the first plaintiff on which the second plaintiff was a pillion passenger. The first defendant had borrowed the motor cycle in question from his father who had in turn borrowed it from its actual owner. The insurance company who insured the owner at first refused to accept any responsibility on behalf of the first defendant but later the Motor Insurers Bureau agreed to stand behind the first defendant and meet any damages awarded against him. After giving judgment for the plaintiffs against the first defendant HIS LORDSHIP gave the following judgment on the question of costs.

J. D. Stocker and R. Geraint Rees for the plaintiffs.

Stephen Chapman, Q.C., for the defendants.

D **DONOVAN, J.:** In the ordinary way I should have made an order here for the sum of £50 by way of costs to be paid by the unsuccessful defendant, to be paid by instalments of £1 a month, if he so wished, because, apart from one circumstance, there is nothing in the circumstances and, certainly nothing in the conduct of the proceedings which would justify a full order.

E Then it appeared that the first defendant was driving his motor cycle uninsured at the time, with the result that these proceedings, so far as he is concerned, are—to use a neutral term—supported by the Motor Insurers Bureau. It is wrong to say that they indemnify the defendant against damages and costs. The position is, as I have been told, that there is an agreement between that bureau, which was set up by the leading insurance companies, and the Minister of Transport, under which the bureau undertook to pay such damages and costs as were awarded in an action against an unsuccessful defendant and not paid by him within a specified time.

F I am also told that the judgment which is obtained by the plaintiff in such a case has to be assigned to the Motor Insurers Bureau, and that they, thereafter, of course, are in a position to execute it against the defendant. Whether they do or not, I do not know, but I should imagine that if the defendant's means increased, they would. It is said that that is a circumstance which I ought to take into account in determining what order as to costs ought to be made.

G Whether you call it indemnity or whether you call it by some other name, in fact the unsuccessful defendant will not, in the first instance at least, pay. It will be paid by the Motor Insurers Bureau, pursuant to their agreement with the Minister of Transport.

H Whether I take that into account or not seems to me to be largely a matter of discretion, and I look at it in this way: here is an individual plaintiff who is not legally aided, who has suffered a wrong, who has been awarded damages here in consequence, and I think it would be wholly unjust if he had to be out of pocket of a considerable sum because the first defendant himself was legally aided and could not, in the ordinary way, pay the full costs, which I should imagine are more than £50.

I I think justice really requires that I should take into account the circumstance of the Motor Insurers Bureau being behind the defendant in the sense I have indicated, as something which is relevant when it comes to the question of making a full order or not. I think it is relevant. I think I ought to take it into account and I do so.

Therefore, I leave the order as I made it yesterday, namely, the order that the first defendant shall pay the two plaintiffs' costs, as taxed in the ordinary way. **A**

Order accordingly.

Solicitors: *G. Howard & Co.* (for the plaintiffs); *Ponsford & Devenish* (for the defendants).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*] **B**

J. H. TUCKER & CO., LTD. v. BOARD OF TRADE.

[CHANCERY DIVISION (Vaisey, J.), May 19, 1955.]

War Damage—War risk insurance—Business scheme—Working drawings used in the process of manufacture—Loss through enemy action—“Documents owned for the purposes of a business”—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 84 (1) (a), s. 104. **C**

A company were manufacturers of a wide range of electrical accessories and appliances. Working drawings were made of new designs, showing the complete article and the relation of the several parts. Phototypes were made from the drawings, which were an essential part of the process of manufacture and were not mere records of work done. In 1940 the company's premises were bombed, and among the contents destroyed were fifteen thousand working drawings, of which the agreed value was £14,600. The company claimed compensation for their loss under the War Damage Act, 1943. **D**

Held: the company were not entitled to compensation because the working drawings were “documents owned for the purposes of a business” within the proviso to s. 104 of the Act of 1943 and, therefore, were not insurable goods within s. 84 (1) of that Act. **E**

Hill v. Regem ([1945] 1 All E.R. 414) applied.

[For the War Damage Act, 1943, s. 84 (1) (a) and s. 104, see 26 HALSBURY'S STATUTES (2nd Edn.) 568, 585.] **F**

Case referred to:

(1) *Hill v. Regem*, [1945] 1 All E.R. 414; [1945] K.B. 329; 114 L.J.K.B. 438; 172 L.T. 255; 2nd Digest Supp.

Adjourned Summons under R.S.C., Ord. 54A, r. 1A, for a declaration that on the true construction of the War Damage Act, 1941, and the War Damage Act, 1943, s. 84 and s. 104, the expression “goods” included working drawings in respect of the loss of which a claim for compensation of £14,600 had been made by the plaintiffs, being the agreed value of the drawings, the property of the plaintiffs, destroyed by enemy action. **G**

Neville Gray, Q.C., and *E. H. Blain* for the plaintiffs.

Denys B. Buckley for the Board of Trade. **H**

VAISEY, J.: This summons raises a question of construction arising under the War Damage Act, 1943. In my view, the question is not an easy one to answer, but it lies within a very small compass and depends on the combined effect of s. 84 (1) and s. 104 of the Act. It involves the consideration of the problem of what are “documents” within the meaning of the last mentioned section. **I**

It is unnecessary for me to dwell at length on the width of the significance of the word “document”. Etymologically, it means something which shows or teaches and is evidential or informative in its character. Having said that, the context in which the word appears is naturally of the first and most cogent importance in determining what the word means for the purposes for which its meaning has to be considered.

The plaintiffs, J. H. Tucker & Company, Ltd., are manufacturers of electrical accessories and components. On the night of Nov. 21/22, 1940, their business

- A** premises in the city of Birmingham were destroyed by enemy action. Among the contents of the destroyed premises were some fifty thousand drawings, including some fifteen thousand working drawings which are the subject of the present claim. The assessment of the plaintiffs' total loss has been fixed at £133,687, which included £14,600 in respect of the working drawings. The position is that that sum is now being claimed by the plaintiffs, but their claim has not been
- B** admitted and is now resisted by the defendants, the Board of Trade. These working drawings included (a) tool design drawings required for the making or repairing of tools, (b) manufacturing drawings required for the process of manufacture of components, (c) inspection limit drawings required for gauging and viewing components, (d) assembly drawings required for assembling components and (e) outside suppliers drawings. I am told that all such drawings were essential
- C** parts of the process of manufacture, and, further, that the manufacturing processes could not even be initiated and still less carried through without them. There is no doubt, therefore, that these working drawings were of very great value and great importance. If the plaintiffs had wanted to sell their business undertaking the purchaser could hardly have been dealt with except on the footing that these working drawings would be handed over with the rest of the apparatus
- D** which would go to the making of the products which the plaintiffs supply. I do not doubt that these working drawings I am particularising are "documents". The question is whether these working drawings are property in respect of which a claim can validly be made under the statutory provisions which are applicable to the case.

Section 84 (1) provides so far as relevant:

- E** "Subject to the provisions of sub-s. (4) of this section, the goods insurable under the business scheme in relation to any person carrying on business are all goods situated in the United Kingdom—(a) which are in his possession (whether he owns them or not) and are held or used by him wholly or mainly for the purposes of that business . . .";
- F** If that were all that one had to consider, the answer would have been simple enough. These documents, these working drawings, were undoubtedly goods "situated in the United Kingdom" in the possession of the plaintiffs and held by them for the purposes of their business. But we have to look at s. 104, which is a definition section. The marginal heading of the section is, "Definition of 'goods'". I will read the section, omitting some words which are obviously
- G** irrelevant to the present purpose:

"In this Act, unless the context otherwise requires, the expression 'goods' includes all corporeal property neither falling . . . within the meaning assigned to the expression 'land' . . . nor deemed for the purposes of s. 71 of this Act to form part of a highway: Provided that the said expression does not include money, negotiable instruments, securities for money, evidences of title to any property or right or of the discharge of any obligation, or any documents owned for the purposes of a business."

- H** It is to be observed that those words are different from the words which are used in s. 84, "goods . . . held or used . . . for the purposes of that business", but whether they are different in meaning is another question altogether.

- I** The argument put forward on behalf of the plaintiffs is that these documents are not owned for business purposes in the same sense as account books or ledgers or anything of that kind are owned, but that they are documents which form an integral part of the process of manufacturing and without the possession of them the company could not carry out their manufacturing business.

At this stage I must refer to the only judicial decision which has been made on this point, *Hill v. Regem* (1), a decision of HUMPHREYS, J. The headnote is this ([1945] K.B. 329):

"Account books, such as journals and ledgers, used by an insurance broker

in his business, are 'documents owned for the purposes of a business,' within the meaning of the proviso to s. 104 of the War Damage Act, 1943, and so excluded from insurance under the 'business scheme' operated by the Board of Trade by virtue of s. 83 of the Act."

I do not think it is necessary for me to read the judgment of HUMPHREYS, J., which is to be found in [1945] 1 All E.R. at p. 415, with a final paragraph (*ibid.*, at p. 420, letter F) which does not appear in the report in the Law Reports.

I am attracted by the argument which counsel has advanced on behalf of the plaintiffs. I think "documents owned for the purposes of a business" clearly include account books, which are mentioned in *Hill v. Regem* (1), but the documents now under consideration are of a very different character from such documents as account books. The difference is that they are not at all of the same character as the other items mentioned in the proviso, but form a substantial and necessary part of the manufacturing activities of the company and are not merely what might be called business documents. All the other items mentioned in the proviso to s. 104 seem to me to be very far removed from a manufacturing process or the activities of a manufacturing business. I think the argument which can be drawn from that is that "any documents owned for the purposes of a business" would naturally mean something of the same character as those other items and that is the justification, as explained by HUMPHREYS, J., for the decision in *Hill v. Regem* (1).

The War Damage Act, 1943, which came into existence at a time of great disturbance, was, if I may venture to say so with respect, a very remarkable piece of draftsmanship and has, on the whole, produced very few problems. I am inclined to think that to limit the meaning of the word "documents" on any of the considerations which I have mentioned is really not permissible according to any proper principle of construction. The relevant words in s. 104 are "any documents owned for the purposes of a business". These working drawings seem to me to be clearly "documents": I think they were "owned" by the plaintiffs and I think that they were owned for the purposes of their business, not in the same sense that account books and ledgers may be owned, but for the purpose of carrying on their business.

Although there is a good deal to be said for the contentions which have been put forward by the plaintiffs, I think the safer course is to say that "documents" means, according to its ordinary significance, written documents. One may say that "documents" includes tombstones, but "documents", in the ordinary sense in which the ordinary business man uses it means written documents, documents which either record something or contain directions for the making of something or are used for reference in the course of business. The plaintiffs' argument is rather too subtle on a fair reading of the statute.

It is pointed out on behalf of the Board of Trade that there are many reasons why documents should be excluded from the purview of the Act. They could without any very great difficulty be duplicated, and indeed I am told that in this case the plaintiffs were in process of duplicating their documents when this unfortunate catastrophe befell them in the early days of the war. The argument as to the difficulty of valuing documents of this nature rather loses its weight when I know that a value has been attached to these particular documents and agreed at £14,600, but it would be in many cases very difficult to value a chemist's book of prescriptions, an advertising agent's mail list, an architect's drawings, and so forth.

The words are perfectly general. The proviso says that there are to be excluded from the category of goods "any documents owned for the purposes of a business". I think, on the whole, that "any documents owned for the purposes of a business" means written documents of any kind used or held or owned for any of the purposes of a business—it may be for the purposes of keeping the accounts of a business or in the way of making up bills for estimating quantities,

A and so on. In my judgment, those documents are clearly within the proviso and outside the Act under the decision in *Hill v. Regem* (1). It seems to me that the phrase must include, according to the ordinary use of language, these working drawings. I do not see where a line can be drawn between documents which are owned for the purposes of a business and documents which are owned for the purpose of carrying on a business or documents which are owned for both of such purposes and used for both of such purposes. I find myself on safer ground when I hold that "any documents owned for the purposes of a business" includes these particular working drawings. Accordingly, I shall declare that on the true construction of s. 84 and s. 104 of the Act the expression "goods" does not include the working drawings in respect of which a claim for £14,600 has been made by the plaintiffs and not accepted by the Board of Trade.

C Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Shakespeare & Vernon*, Birmingham (for the plaintiffs); *Solicitor, Board of Trade*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

D CHARLTON v. CHARLTON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.JJ.), May 16, 18, 1955.]

Divorce—Insanity—Incurable unsoundness of mind—Persons under care and treatment—Detention as temporary patient—Discharge—Absence of twelve days—Thereafter treatment as voluntary patient for a period of over five years—Whether treatment followed detention "without any interval"—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (d), s. 1 (2) (d).

From Feb. 15, 1947, the wife was detained by virtue of the provisions of the Mental Treatment Act, 1930, s. 5, in an institution, as a temporary patient. On Aug. 14, 1947, at the expiry of the period of six months the wife was discharged in accordance with s. 5 (1) of the Mental Treatment Act, 1930, and went home to the husband. On Aug. 26, 1947, she returned to the institution as a voluntary patient and had since been continuously under care and treatment there. On Apr. 15, 1953, the husband presented a petition for divorce under the Matrimonial Causes Act, 1950, s. 1 (1) (d), on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years. The question for the court was whether the wife received treatment as a voluntary patient which followed "without any interval" the period of detention within the meaning of s. 1 (2) (d) of the Act of 1950.

Held: without doing violence to the plain words of the statute it was not possible to say that the treatment of the wife as a voluntary patient followed the termination of the period of detention "without any interval", and, therefore, the petition failed.

Dictum of LORD GREENE, M.R., in *Safford v. Safford* ([1944] 1 All E.R. at p. 707) applied.

Appeal dismissed.

I [For cases on the effect of temporary absences from hospital, see 27 DIGEST (Repl.) 369, 3057-3059.

For the Matrimonial Causes Act, 1950, s. 1 (1), (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 389, 390.

For the Mental Treatment Act, 1930, s. 5 (1), (10), see 17 HALSBURY'S STATUTES (2nd Edn.) 1234, 1235.]

Cases referred to:

(1) *Frank v. Frank*, [1951] 2 All E.R. 503; [1951] P. 430; 27 Digest (Repl.) 371, 3068.

- (2) *Safford v. Safford*, [1944] 1 All E.R. 704; [1944] P. 61; 113 L.J.P. 54; 171 L.T. 29; 27 Digest (Repl.) 369, 3059. A
- (3) *Swymer v. Swymer*, [1954] 3 All E.R. 502.

Appeal.

Appeal by the husband against an order of Mr. Commissioner REWCASTLE, Q.C., at Leeds, dated Jan. 20, 1955.

On Feb. 15, 1947, the wife was received as a private temporary patient at the Holloway sanatorium in accordance with the provisions of the Mental Treatment Act, 1930, s. 5 (1). B

On Feb. 28, 1947, the visitors signed a statement under s. 5 (10) that they were of opinion that the wife should continue to be detained as a temporary patient. On Aug. 14, 1947, the wife was discharged from the sanatorium and returned to live with the husband. On Aug. 26, 1947, the wife was re-admitted to the same sanatorium as a private voluntary patient, and she had since remained there continuously under care and treatment. On Apr. 15, 1953, the husband presented a petition for divorce on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, namely, since Feb. 28, 1947. The learned commissioner dismissed the petition on the ground that the continuity of the necessary period of detention had been interrupted between Aug. 14 and 26, 1947. C

L. A. Pratt for the husband.

H. G. Bennett for the wife.

SIR RAYMOND EVERSHED, M.R. : By the Matrimonial Causes Act, 1950, s. 1 (1) (d), it is provided that a petition for divorce may be presented on the ground that the respondent D

“is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.” E

The date of the petition, Apr. 15, 1953, was a date considerably more than five years after both the first admission on Feb. 15, 1947, and also the second admission on Aug. 26, 1947. But the language of para. (d) is further expounded in sub-s. (2): F

“For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under [a number of Acts then mentioned] . . . (d) while he is receiving treatment as a voluntary patient . . . being treatment which follows without any interval a period during which he was detained as mentioned in para. (a) . . .” G

During the period from Feb. 15, 1947, until the expiration of six months (namely, Aug. 14, 1947), the detention in the Holloway sanatorium was a detention within para. (a), being a detention in pursuance of an order under one of the Acts mentioned. From Aug. 26, 1947, the wife has been receiving treatment as a voluntary patient continuously up to the present time; but there is the gap from Aug. 14 to Aug. 26, 1947, during which the wife was at home living with the husband. The question on this appeal is whether that interval of time, in all the circumstances of the present case, constitutes an “interval” within the meaning of sub-s. (2) (d). H

At the hearing before the learned commissioner a point was made on the husband's behalf that her sojourn with her husband should be regarded really as being a sojourn with someone who was taking care of her and treating her, in the same way as she would have been cared for had she been in the sanatorium. That suggestion was based, among other things, on the fact that the husband was given certain sedatives with which to quieten her impulses during the time she I

A was with him; but counsel for the husband has not felt able in this court (and, if I may say so, he is plainly right) to suggest that during the fortnight that she was with her husband she could sensibly be regarded as under care and treatment as a voluntary patient within the meaning of the Act. In those circumstances, counsel for the husband was constrained, in effect, to contend that the interval (having regard once more to the facts which I will mention briefly in a moment) is or should be regarded as being negligible, to the extent that the court may properly disregard it and may say that the wife was under treatment as a voluntary patient "without any interval", to use the language of s. 1 (2) (d), from the moment the order ceased to have effect on Aug. 14.

The doctor who had attended the wife at the sanatorium gave evidence. He said, in answer to a question put to him in examination in chief, that she was capable of expressing herself as willing or unwilling to receive treatment* when she first left the sanatorium. I will read one or two more questions which follow the answer I have just given:

"Q.—What did you do? A.—The temporary order was running out, and we decided to make her a voluntary patient. Q.—How do you make a person a voluntary patient? A.—The only way is if the person himself or herself is perfectly willing to become a voluntary patient. Q.—Was she? A.—Mrs. Charlton was perfectly willing to be a voluntary patient, although at the same time she was certain we were detaining her against her will. She was perfectly willing, and was on parole most of the time, except for the occasional interludes."

Then, leaving out a question or two:

"Q.—Was that [her leaving the sanatorium on Aug. 14] pursuant to any arrangement that she should go on trial? A.—Yes, it was a kind of trial. It was for a fortnight."

Then he said that the electrical treatment which she received just before leaving was in fact not the sort of treatment that you would give to a person who was being discharged unconditionally and without any arrangement for a return. In cross-examination by counsel for the wife, the following questions and answers appear:

"Q.—The fact is that for the period from Aug. 15 to the date of her re-admission on the 26th, this woman was the subject of no order at all? A.—That is so, other than the fact that we knew she was returning. (The commissioner): There was nothing legal? A.—No. Q.—Had she not desired to return on Aug. 26, she need not have done so? A.—She would have had to have been certified; that would have been inevitable. Q.—You will know from your experience that there can be trial periods given to patients who remain the subject of an order? A.—That is so, yes. Q.—That was not so in this case, was it, because there was no order in force against her? A.—There was no order in force against her."

Then, in re-examination, there are two questions and answers which I will read:

"Q.—If the patient had not returned at the end of the period, what action would you have taken? A.—Mr. Charlton would have had to have taken the action and called in doctors to certify Mrs. Charlton. (The commissioner): Supposing he had not taken any action? A.—Mrs. Charlton's conduct was such that, if Mr. Charlton had not, someone would have had to have done, because when she became impulsive, she really was dangerous and suicidal. It would have been quite inevitable."

Those facts disclose a tragic state of affairs in which one cannot help feeling great sympathy not only for the wife herself, but also for the husband. I have found it impossible, however, to conclude that, within the fair interpretation of

* See the Mental Treatment Act, 1930 (20 & 21 Geo. 5 c. 23), s. 5 (1).

this sub-section, the wife underwent treatment after the termination of the order "without any interval". Counsel for the husband very properly referred us to one or two cases in which this court said that, in construing this Act, you must depart from so strict an interpretation of its language as would deprive it of sense and obvious intention. Thus, in *Frank v. Frank* (1), the court came to the conclusion that where a patient who is being detained in an institution (say) in Scotland is then moved to an institution in England, the inevitable gap that occurs from the termination of the effectiveness of the Scottish order and the beginning of the effectiveness of the English order, the gap which is occupied in her being transported from one institution to the other, cannot have been intended to constitute a break in continuity. Without taking time to cite from the judgments of this court in that case, it was demonstrated that unless such inevitable gaps as were occupied with necessary transit were to be excluded from consideration, you would get from the language of the Act a result which could not possibly have been within the intention of its terms. Although such a very strict construction of the language must be rejected if it is necessary to do so to make the terms of the section effective, that (as it seems to me) cannot justify giving to the section a construction not only so liberal but, as I think, so loose as to amount to the substitution for the language Parliament has used of some different language. Parliament has said "without any interval"; and I think that the argument of counsel for the husband would compel us to interpret s. 1 (2) (d) as though Parliament had said "without any substantial interval". We are concerned with the language Parliament has used and not with some other language which one might think, if it had been used, would have enabled us in the present case to avoid a possible hardship.

Counsel for the husband put his case also on the basis that, in all the circumstances, this twelve days' interval might be disregarded by application of the principle *de minimis non curat lex*. I doubt whether it is legitimate to apply that principle in the construction of this sub-section. In expressing that doubt I am indeed doing no more than echoing the language which LORD GREENE, M.R., used in this court in *Safford v. Safford* (2). In that case, LORD GREENE, M.R., said, in terms, that he doubted whether the principle could be properly applied. His words were ([1944] 1 All E.R. at p. 707):

"I am very doubtful whether the principle of *de minimis* ought to be applied. If detention means detention in a physical sense, it is interrupted by four days' absence just as much (though not for so long) as by forty."

In that case, the question was whether the detention had been "continuous". There had been in fact during certain periods actual physical absences from the place where the detention had occurred, although the orders for detention had still remained in operation; and it was pointed out by this court that detention was to be regarded rather as a status than by reference to the physical fact of being kept under lock and key at a particular place. No question of that kind arises in the present case. The facts are that during a period which cannot be regarded as wholly negligible the wife was living with the husband. The order for her previous detention had ceased to operate, and she had not taken the steps necessary to become a voluntary patient and she did not become a voluntary patient until twelve days had elapsed.

In my judgment, it is not possible, without doing violence to the plain words of this statute, to say in those circumstances that the treatment which followed the termination of the order's operation followed "without any interval"; and, though I repeat my sympathy for both the parties, I fear that no other conclusion is possible than that at which the learned commissioner arrived. I think, therefore, that the appeal must be dismissed.

HODSON, L.J. : I agree. The commissioner was bound to arrive at the conclusion at which he did. The order in the present case lapsed on Aug. 14,

A 1947, and from that date until her re-admission on Aug. 26 of the same year there was no order in existence at all. On the latter date the wife became a voluntary patient, which she has remained ever since. It is not possible, therefore, for the reasons given by SIR RAYMOND EVERSHERD, M.R., to say that her treatment as a voluntary patient followed "without any interval" a period during which she was detained under an order. I agree, therefore, that the
B appeal must fail.

PARKER, L.J. : I have come to the same conclusion. From Aug. 26, 1947, up to the date of the petition, more than five years had elapsed during which the wife was incurably of unsound mind and was continuously under care and treatment. So far, therefore, the provisions of s. 1 (1) (d) of the Matrimonial Causes Act, 1950, apply; but, in the case of a person receiving voluntary treatment under the Mental Treatment Act, 1930, as the wife was, the petitioner must show that the treatment as a voluntary patient followed "without any interval" a period during which she was detained. There appears to be no authority as to the meaning of those words "without any interval", but we were referred to a number of cases dealing with the meaning of the word "continuously" in connection with the phrase "continuously under care and treatment". Those cases appear to show that, once a person has acquired a status or quasi-status of a person detained or a person undergoing treatment as a voluntary patient, a break in the actual treatment may not prevent a continuation of that status: compare *Safford v. Safford* (2), and *Swymer v. Swymer* (3), and in particular the judgment of LORD GODDARD, C.J. ([1954] 3 All E.R. at p. 504). They also show that treatment may be said to be continuous even if there is a slight break in it, provided that that break is necessary (for example, for the transference of the patient from one institution to another) and, for this reason, that to hold otherwise would defeat the whole intention of the Act: compare *Frank v. Frank* (1). Further than this the cases do not go. So far as the present case is concerned, there is clearly no question of status that can arise, because the original order of detention had lapsed and the wife did not become a voluntary patient until twelve days later. Further, it seems to me quite impossible to say that the twelve days' interval in question in the present case was an interval which was necessary for the purpose of her becoming a voluntary patient.

Counsel for the husband finally suggested that the principle of *de minimis* should be applied in the present case. Like SIR RAYMOND EVERSHERD, M.R., in the present case and LORD GREENE, M.R., in *Safford v. Safford* (2), I share the doubts whether this principle can be applied in a case such as the present; but, even if it could, I am satisfied that the interval of twelve days could not be brought within that principle. Sympathising, as I do, with the husband in the present case, I feel nevertheless that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ridsdale & Son*, agents for *Heningham, Armstrong & Ambler*, York (for the husband); *Official Solicitor* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

RIALTO CINEMAS, LTD. v. WOLFE.

[QUEEN'S BENCH DIVISION (Ashworth, J.), May 19, 1955.]

Landlord and Tenant—New lease—Claim by tenant for compensation or new lease—Landlord's notice of willingness to grant new lease—What term and rent appropriate for new lease—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 4 (1) (b), (3), s. 5 (5).

The applicants were tenants of cinema premises in central London, which had for many years been used as a news theatre, under a lease for twenty-one years from Nov. 21, 1932. In August, 1952, they gave notice to the landlord claiming a new lease or compensation for goodwill under s. 4 or s. 5 of the Landlord and Tenant Act, 1927. The landlord served notice under s. 4 (1) (b) that he was willing to grant a renewal of tenancy, which by the statute could not exceed a term of fourteen years, but the questions what the length of the term and what the rent should be were referred to an official referee. The premises had been damaged during the war and after the war were re-opened with a reduced seating capacity, attributable also in part to alterations. The landlord agreed to restore the original seating capacity as soon as the necessary licences could be obtained. The referee recommended that the term should be a term of fourteen years subject to a condition (following s. 5 (5) of the Act of 1927) for determination by the landlord after seven years by twelve months' notice for the purpose of re-development and on paying compensation.

Held: (i) the goodwill which had attached to the premises during the tenancy was not of sufficient value to entitle the tenants to a full term of fourteen years and a term of ten years would be appropriate in the circumstances of the particular case, the landlord covenanting to restore the capacity of the cinema when licence for the work could be obtained; but the tribunal had no jurisdiction, when determining the appropriate rent and term for the purposes of s. 4 (1) (b) of the Landlord and Tenant Act, 1927, to impose a condition on the tenancy to the effect of s. 5 (5) of that Act.

(ii) the appropriate principle on which to assess the rent was to determine the goodwill rent, viz., the rent if the premises were let for the same business as that which the tenants had carried on, and to determine a deduction therefrom appropriate to eliminate the factor of net adherent goodwill,* which deduction in the present case might be of an appropriate percentage (viz., ten per cent.), so as to compute, by making the deduction, the normal rent, which would be the proper rent to be reserved by the lease; further, in determining the goodwill rent it was proper to have regard to trading profits of past years.

Principle stated by MAUGHAM, L.J., in *Whiteman Smith Motor Co., Ltd. v. Chaplin* ([1934] 2 K.B. at p. 48) applied.

Per CURIAM: by giving notice of willingness to grant a new tenancy a landlord does not commit himself to an admission of the existence of net adherent goodwill (see p. 535, letter G, post).

[**Editorial Note.** Although the tenants had claimed in the present case a new lease under s. 5 of the Landlord and Tenant Act, 1927, their right to the new lease arose under s. 4, because they had claimed compensation also and the landlord had countered that claim by giving notice of willingness to grant a new lease under s. 4. Under s. 5 the tribunal has a discretion over the terms of the lease, but under s. 4 (1) (b) the tribunal has no discretion over items other than

* The meaning of this phrase was thus defined: "I shall use the phrase 'net adherent goodwill' as meaning the goodwill, if any, which will remain attached to the premises, not including the 'site goodwill', that is, irrespective of customers who would come to a new tenant, starting a new business, simply because of their convenient situation" (per MAUGHAM, L.J., in *Whiteman Smith Motor Co., Ltd. v. Chaplin*, [1934] 2 K.B. at p. 48).

- A** rent and duration. The method of assessment of the rent adopted in the present case followed a principle stated by MAUGHAM, L.J. ([1934] 2 K.B. at p. 49) for computing compensation payable to a tenant for goodwill value acquired by a landlord at the end of a tenancy, and was based on a consideration of trading profits for previous years. The practical consequence in such a case as the present one seems to be that, in a normal trading year, the trading profits other than a proportion allowed by the court as a suitable return on the business capital, and other than a proportion (in this instance ten per cent.) attributable to adherent goodwill, would be absorbed in paying rent to the landlord.
- B** proportion allowed by the court as a suitable return on the business capital, and other than a proportion (in this instance ten per cent.) attributable to adherent goodwill, would be absorbed in paying rent to the landlord.

As to the offer of renewal of a tenancy after a tenant has claimed compensation for goodwill, see 20 HALSBURY'S LAWS (2nd Edn.) 296, para. 337; and for cases on the subject of compensation payable for goodwill, see 31 DIGEST (Repl.) 629, 7393 et seq., and on the subject of a right to a new lease, see 31 DIGEST (Repl.) 631, 7405 et seq.

C For the Landlord and Tenant Act, 1927, s. 4, s. 5, see 13 HALSBURY'S STATUTES (2nd Edn.) 889, 892.]

Cases referred to:

- D** (1) *Whiteman Smith Motor Co., Ltd. v. Chaplin*, [1934] 2 K.B. 35; 103 L.J.K.B. 328; 150 L.T. 354; 31 Digest (Repl.) 629, 7394.
- (2) *Simpson v. Charrington & Co., Ltd.*, [1934] 1 K.B. 64; 103 L.J.K.B. 49; 150 L.T. 103; on appeal, sub nom. *Charrington & Co., Ltd. v. Simpson*, [1935] A.C. 325; 104 L.J.K.B. 226; 152 L.T. 469; 31 Digest (Repl.) 630, 7401.
- E** (3) *British & Argentine Meat Co., Ltd. v. Randall*, [1939] 4 All E.R. 293; 162 L.T. 91; 31 Digest (Repl.) 633, 7421.

Originating Summons.

By originating summons dated July 16, 1953, the tenants of premises known as the Cameo Cinema, Charing Cross Road, London, applied to the High Court for the determination of what was a reasonable rent and term for the renewal of the applicant's tenancy of the said premises under the provisions of s. 4 of the Landlord and Tenant Act, 1927.

F The premises had been let by a lease dated Nov. 21, 1932, for a term of twenty-one years from Nov. 21, 1932, at a weekly rent of £50 for the premises and £10 for the furniture and equipment, and the lease contained repairing and painting covenants. The lease was assigned to the applicants on Dec. 15, 1932, and the respondent to the originating summons was the freeholder, who was a successor in title of the original lessor. In April, 1941, the premises sustained bomb damage and ceased to be open as a cinema; and between October, 1942, and some date in 1944 they were used as a fun fair. On Aug. 6, 1945, the premises were re-opened as a cinema and news theatre and, as the furniture and equipment had been damaged or removed, the applicants had to re-furnish the cinema. Accordingly the weekly rent of £10 ceased. The seating was reduced in three stages: the capacity had originally been 489 seats and licensed standing room for eighty, which was reduced shortly after the beginning of the applicants' term to a seating capacity of 464; on re-opening in 1945 the capacity was 414 seats and licensed standing room for thirty-five, and subsequently the seats were reduced to 403 owing to the installation of a new screen.

G On Aug. 12, 1952, the applicants served on the respondent a notice under the Act of 1927 claiming a new lease under s. 5 or £20,000 compensation for goodwill under s. 4. On Oct. 10, 1952, the respondent served on the applicants a notice offering a renewal of their tenancy at such rent and for such term as, failing agreement, the tribunal should consider reasonable, and by notice dated Oct. 24, 1952, the applicants accepted this offer.

H By order dated July 30, 1953, the matter was referred to one of the panel of referees under the Landlord and Tenant Act, 1927, for the London District for consideration and report, and by order dated Oct. 6, 1953, Mr. Mark Goodman

was nominated to consider and report on the matter. The referee reported that if the tribunal considered the proper basis to be one year's rent, viz., the last year of trading, he would assess the rent at £3,900 per annum for an unfurnished and unequipped cinema in the present condition of this cinema. This figure was reached after allowing for some adherent goodwill and for the benefit of a central buying organisation. If the tribunal considered that the proper basis of assessment was on the average of the last three years, the referee assessed the rent at £5,000 per annum. The referee recommended a grant of a lease (containing the same terms as the former lease, so far as applicable) for fourteen years subject to the condition in s. 5 (5) of the Landlord and Tenant Act, 1927*, the landlord having to satisfy the tribunal that he required the premises for re-development if he determined the lease after seven years and to pay such compensation as the tribunal might determine to be the value of the unexpired residue of the term. The case was restored to the list.

G. Avgherinos for the applicants.

Neville Faulks for the respondent.

Cur. adv. vult.

May 19. **ASHWORTH, J.**, read the following judgment wherein, after stating certain facts, he continued: It is common ground between the parties that the issues which I have to decide are (a) for what term not exceeding fourteen years the new lease should be granted, and (b) what rent should be fixed.

An outline of the history of the cinema is to be found on p. 3 of the report, from which I extract the following passages:

"The premises have been a cinema for many years prior to 1932, one witness said prior to 1910, and are situated in a central position with frontages to Charing Cross Road (Nos. 35 and 37), Bear Street, which leads into Leicester Square and Hunt's Court. Prior to the applicants' tenancy, the cinema showed feature films and was conducted on the lines of an ordinary suburban cinema by the respondent's father. The applicants leased the premises with the intention of converting it into a news theatre, as soon as the existing advance bookings of films, which bookings they had to take over, ceased. Originally there were 489 seats with licensed standing room for eighty persons. Shortly after the applicants' tenancy began, the seating was slightly rearranged and the number of seats reduced to 464. The main entrance was in Charing Cross Road, but there was another entrance in Bear Street. On Apr. 17, 1941, the premises sustained bomb damage and ceased to be open as a cinema. Various notices under the War Damage Acts were served by the parties and from October, 1942, to some date in 1944 the premises were used as a fun fair. In 1944 a licence was obtained by the applicants to carry out temporary repairs, and on Aug. 6, 1945, the premises were re-opened by the applicants as a news theatre. As the furniture, etc., had been damaged or removed, the applicants had to repair, refurnish and re-equip the premises, and by agreement the £10 a week rent for furniture etc., ceased and the applicants paid £50 a week only. As a result of the bomb damage, the seating on re-opening was reduced to 414 and the licensed standing room from eighty to thirty-five. Subsequently the seating was reduced to 403 seats through the applicants installing a big screen. The auditorium had to be shortened because the projection room which had been in a gallery had to be rebuilt on the ground floor and the Bear Street entrance was demolished and no longer exists."

It is convenient to mention here three matters which were the subject of agreement before the referee and are referred to on p. 5 of his report:

"After some discussion the parties agreed further (1) that the rent was to

* The terms of the sub-section are printed at p. 533, letter E.

- A be assessed for an unfurnished and unequipped cinema with its present seating capacity of 403 seats. (2) that if at any time during the currency of the lease to be granted the landlord obtains a licence to restore the cinema to its former condition with a seating capacity of 464 or thereabouts, the rent was to be reassessed. Counsel for the landlord stated the latter was willing and anxious to restore the cinema when the necessary licences can be obtained. (3) that in the absence of agreement between the parties on the rent after restoration, the matter was to be referred to me again."
- B

As a rider to para. (2) of these three points, I should point out that in the course of the hearing before me it was stated without dissent on the part of the landlord that not only was he willing and anxious to restore the cinema, but that the new lease would contain a positive obligation on his part to do so when the licences were obtained.

C

Although the two issues now before me, namely, the issues as to the term of the new lease and as to the rent payable under it, are distinct, they cannot in my view be treated in isolation. The question what is a reasonable rent for the applicants to pay must be considered in relation to the period during which they are to be tenants, and I think it preferable to deal with the question of the term first.

D

Proviso (b) contained in s. 4 (1) of the Act of 1927 enacts in effect that the tenancy is to be "for such term not exceeding fourteen years as, failing agreement, the tribunal may consider reasonable". In the present case agreement as to the term was not reached, the applicants seeking the full period of fourteen years and the respondent contending that a seven years' term is enough. The referee did not adopt either view, but recommended a term of fourteen years subject to a condition in the terms provided by s. 5 (5) of the Act, which reads as follows:

E

"Every lease granted under this section shall, if the landlord so requires, be subject to a condition that if at any time after the expiration of seven years from the commencement of the term thereof the premises are required for the purpose of carrying out a scheme of re-development, the landlord, on satisfying the tribunal that the premises are so required, and on giving not less than twelve months' notice in writing to the tenant, may determine the lease and resume possession of the premises upon payment of such compensation as the tribunal may determine to be the value of the unexpired residue of the term of the lease."

F

It was argued for the applicants that in the present case, which arises under s. 4, there was no justification for introducing a condition applicable to a case arising under s. 5. In support of this argument reference was made to s. 5 (2), by which the tribunal is expressly empowered to order the grant of a new tenancy for such period not exceeding fourteen years and on such terms as the tribunal may determine to be proper. No power is conferred on the tribunal by s. 4 to deal with the terms of the new tenancy other than those relating to period and rent, and for my part I do not think that it is open to the court to adopt the course recommended by the referee. Counsel for the respondent did not seriously challenge the argument put forward on behalf of the applicants on this point, but did not in any way concede that a term of fourteen years was reasonable.

G

It is to be noted that a term of fourteen years is the maximum which in default of agreement can be imposed on a lessor, and in my view it is reasonable to suppose that a term of that length was considered by Parliament to be appropriate for a case in which the goodwill attached to the premises by reason of the tenant's trade or business was substantial, or at least not open to doubt. In other words, the length of the new term should have some relation to the nature and value of such goodwill, and if a lessor offers a new tenancy in lieu of compensation under s. 4, he does not commit himself to the grant of a tenancy for the maximum period of fourteen years.

H

I

In the present case the original lease was for a term of twenty-one years. As hereinafter appears, I have come to the conclusion that during that period goodwill did become attached to the premises which, but for the offer of a new tenancy, would have entitled the applicants to compensation, but I do not consider that such goodwill was of sufficient value to entitle them to the full term of fourteen years by way of renewal. In deciding what term is reasonable I have considered all the circumstances of the case, and I shall deal with some of them in more detail in relation to the question of rent. My conclusion is that a reasonable term is one of ten years.

So far as rent is concerned, it is convenient to start with a citation from s. 4 (3) of the Act:

"... the rent fixed by the tribunal shall be the rent which in the opinion of the tribunal a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises having regard to the terms of the lease, but irrespective of the value of any goodwill which may have become attached to the premises by reason of the tenant or his predecessors in title having carried on thereat a particular trade or business."

Although that sub-section was not considered by the Court of Appeal in the leading case of *Whiteman Smith Motor Co., Ltd. v. Chaplin* (1), the judgments, in particular that of MAUGHAM, L.J., contain statements of principle which are clearly applicable. As appears from the report ([1934] 2 K.B. at p. 48), certain matters which may favourably affect a business are none the less to be excluded from the valuation of the goodwill contemplated in s. 4. For example, any value attributable exclusively to the situation of the premises must be excluded, subject, however, to the observations of SCRUTTON, L.J., in *Simpson v. Charrington & Co., Ltd.* (2) ([1934] 1 K.B. at p. 79). Further, an addition to the value due to an increase in the population, or a change in trading conditions, or a shortage of suitable premises, or other like conditions, must also be excluded. Further, profits due to the reputation of the proprietor, or to the personal skill or ability of the persons or the assistants employed in the business, must be excluded. Lastly, value which is largely or wholly due to the custom of persons who come to the premises simply because of their proximity, or because they lie on a line of route which the customers frequent, must be excluded.

MAUGHAM, L.J. ([1934] 2 K.B. at p. 48), defined net adherent goodwill as meaning

"... the goodwill, if any, which will remain attached to the premises, not including the 'site goodwill', that is, irrespective of customers who would come to a new tenant, starting a new business, simply because of their convenient situation."

On p. 49, in para. 5, he stated the problem in the following terms:

"It follows that the real question to be answered is: What is the addition to the value of the premises in the hands of the landlord by reason of the 'net adherent goodwill'? This is in effect the same thing as saying that the compensation to which the tenant would be entitled is the difference, if any, between: (a) the value of the reversion if the landlord were to let the premises at the goodwill rent, i.e., for the purpose of the same business as that which the tenant has carried on, and (b) the value of the reversion if he let the premises at the normal rent."

In my judgment the problem in the present case is to fix what MAUGHAM, L.J., termed the normal rent, and the answer can best be ascertained by deciding first what is the goodwill rent, and then by deducting from it such figure as will reduce it to the normal rent. This appears to have been the method adopted by the referee and I agree with it, although I am unable to agree with the result as found by him.

- A Part of the argument before me centred on the question of the material which the court is to take into consideration in fixing the rent. The respective expert witnesses adopted widely differing approaches. On the one hand, Mr. Levy on behalf of the applicants relied on his own experience and put forward estimates of his own which were in no way based on the past trading results. On the other hand, Mr. Daly based his evidence on the past results, subject to their being
- B adjusted in the light of his criticisms. Originally he relied on the relevant accounts for the three years ended respectively on Mar. 25, 1951, Mar. 30, 1952, and Mar. 29, 1953, but in the course of the hearing before the referee, his attention was called to the draft accounts which had been prepared for the year ended Mar. 28, 1954, and which were subject to audit. As the original lease terminated in November, 1953, these last-mentioned draft accounts covered a period during
- C a considerable part of which the lease was still in being.

Warnings as to the risk of drawing wrong conclusions from figures of profit have been given on more than one occasion: see the judgment of MAUGHAM, L.J., in the case already cited ([1934] 2 K.B. at pp. 50 and 51), and see also *British & Argentine Meat Co., Ltd. v. Randall* (3). So long as those warnings are kept well in mind, I am of opinion that trading results, especially trading results for

D periods reasonably close to the end of the tenancy, do afford assistance in considering the problem of rent for the future. I agree with counsel for the respondent that a witness, however experienced, who has not taken into account any of the trading figures, carries less weight than one who has at least considered them, and I am not surprised to find that the referee preferred Mr. Daly to Mr. Levy.

- E It is hardly necessary to state that apart from the trading figures there are other relevant factors. In the present case one of the most obvious is the site of the premises. The Cameo Cinema is in Charing Cross Road, close to Leicester Square, and is therefore in a position to attract a considerable volume of casual trade. Another factor (on which the evidence was conflicting) relates to the nature of the entertainment and its capacity to create goodwill. The Cameo Cinema has, since the year 1935 and subject to war-time interruption, been run as a
- F news theatre, with programmes made up of short films, the whole performance lasting approximately one hour. It is therefore an entertainment which is well adapted to suit the requirements of persons who have time on their hands and are prepared to spend it in a cinema without minding much which particular cinema it is. As against this there was evidence to show that persons do tend to go to a particular cinema, even a news theatre, for its own sake and the substantial sums spent annually in advertisement must, I think, have had some effect in fostering and maintaining goodwill.
- G

- It was contended for the applicants that the respondent's counter-offer of a renewed tenancy in reply to the claim for compensation under s. 4 constituted an implied admission that net adherent goodwill had been created by the applicants. In my view this contention, which appears to have been accepted by the referee,
- H goes too far. Just as a counter-offer does not commit a lessor to an admission that the maximum term of fourteen years is reasonable, so also it does not commit him to an admission that there is a "goodwill" rent as distinct from a "normal" rent. The most that can be said of a counter-offer is the comment that a lessor, who has premises to let for which there are would-be tenants in competition, is hardly likely to make a counter-offer if he is confident that no net adherent
- I goodwill has been created.

One of the matters relied on by the respondent in support of his claim for a much higher rent than that fixed by the lease took the form of evidence as to negotiations with one Davis, which began in October, 1952, for a lease of the Cameo Cinema on the termination of the applicants' tenancy. Nothing came of those negotiations and for my part I do not consider that they are of much assistance. Mr. Davis is and was interested in a rival concern and was no doubt willing to consider a lease of the Cameo as a means of displacing the applicants,

But apart from that, the terms under discussion in the negotiations differed considerably from those affecting the applicants, and in my view the relevant documents do not lend any greater support to the respondent's case than they do to the applicants'. Mr. Davis was not called as a witness, and I do not consider it necessary to lengthen this judgment by reference to the details of the abortive negotiations. A

Proof of the creation of net adherent goodwill must frequently be a matter of difficulty for a lessee and the difficulty no doubt varies in degree according to the nature of the trade or business. In the case of a cinema carried on as a news theatre in the heart of London the difficulty is pronounced. On behalf of the respondent Mr. Daly expressed the view that no such goodwill had been created, but the referee did not accept this view. Nor do I. Having considered all the available evidence, I have reached the conclusion that the applicants have established that by their efforts, especially in the post-war period, some goodwill was created of which the respondent would receive the benefit, but (as will appear) I do not think that such goodwill calls for any substantial reduction in what MAUGHAM, L.J., described as the normal rent ([1934] 2 K.B. at p. 47). B C

On the assumption that the past trading results are relevant to the question of future rent, the problem arises of how such figures are to be applied. Various suggestions were canvassed, namely, that one should look only to the figures of the financial year in the course of which the lease terminated; alternatively, that one should take an average of the results of recent years. The last completed accounts seen by Mr. Daly were those for the year ended Mar. 29, 1953 (some eight months before the termination of the lease) and his evidence regarding future rent was therefore open to the criticism that he had not taken into account the change in circumstances revealed by the draft accounts for the year ended Mar. 28, 1954. It appears from the shorthand note that a good deal of somewhat hasty arithmetic was carried out in the course of his evidence, and it is by no means easy to follow all the calculations recorded in the note as having been made by Mr. Daly and by counsel and by the referee. D E

The referee was favourably impressed by Mr. Daly as a witness, and I see no reason to take a different view. I have therefore thought it right to adopt in principle his method of arriving at a figure for future rent, but I have adopted somewhat different figures in the process and, as already stated, I have also decided that some allowance ought to be made for net adherent goodwill. I accept the referee's finding that the year 1954 was exceptional throughout the cinema trade and that the decline in takings then experienced generally might fairly be regarded as over. I have not overlooked the fact that the seating accommodation is now 403 instead of 464, but it was agreed on behalf of the respondent that the new lease should incorporate an obligation on him to restore the original seating capacity as soon as the necessary licences can be obtained. F G

I have considered the trading figures contained in the accounts for the years ended March, 1951, 1952 and 1953, and also the figures in the draft accounts for the year ended March, 1954. From the comprehensive picture presented by all those figures, the following conclusions may, in my judgment, reasonably be drawn: (a) that annual takings would amount to £38,000 or thereabouts; (b) that annual expenditure, excluding rent and also excluding a sum of £2,000 in respect of management expenses, would amount to £27,900. This figure is arrived at by deducting from a sum of £32,500 the aforementioned sum of £2,000 and a sum of £2,600 in respect of rent which was payable under the original lease and was included in the sum of £32,500. The question whether any and, if so, what deduction should be made in respect of management expenses was the subject of much evidence and argument, to the details of which I do not propose to refer. I consider that the management expenses actually included in the accounts were higher than a potential lessee would reasonably expect to incur, and the deduction of £2,000 is based on Mr. Daly's evidence. On the other hand, H I

- A in estimating expenditure at £32,500, I have kept in mind a point made on behalf of the applicants that any increase in rent would entail an increase in rates; (c) that a reasonable sum to attribute to the lessee in respect of interest on capital and in respect of profit would be £3,000 per annum, namely, twenty-five per cent. on an estimated capital of £12,000; (d) that a sum of £770 per annum would be a reasonable allowance in respect of repairs, being £500 in excess of the allowance
- B laid down by statute, so as to take account of increased building costs.

These conclusions result in a balance of £6,330, made up as follows:

	Takings (para. a)		£38,000
	<i>Less</i> Expenditure (para. b)	27,900	
	Interest and profit (para. c)	3,000	
C	Repairs (para. d)	770	
			31,670
			£6,330

- D This sum of £6,330 represents my view of what MAUGHAM, L.J., described as the goodwill rent and there remains for consideration the deduction necessary for the purpose of assessing what he defined as the normal rent. I am conscious that the result must on any view appear arbitrary, and that (as MAUGHAM, L.J., said) it cannot be more than an intelligent guess, although I hope that at least it qualifies for that description. In my judgment a reasonable method of making the
- E deduction is by way of a percentage, and I hold that ten per cent., namely, £630, should be deducted.

The result is that I fix the rent at £5,700 per annum.

Order accordingly.

Solicitors: *Joynson-Hicks & Co.* (for the applicants); *Eland, Nettleship & Butt* (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

LAKE v. LAKE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.JJ.), May 2, 18, 19, 1955.]

Divorce—Appeal—Order dismissing husband's petition—Wife found guilty of adultery but condoned by husband—Appeal by wife against finding of adultery—Finding not stated in the order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 27 (1)—R.S.C., Ord. 58, r. 1.

The husband petitioned for divorce on the ground of the wife's adultery and cruelty. By her answer the wife denied that she had been guilty of adultery or cruelty, pleaded that if she had committed adultery it had been condoned, and cross-prayed for a decree of judicial separation on the ground of the husband's cruelty. The divorce commissioner found (so it is to be assumed for the present purposes, see p. 541, letter H, post) that the wife had committed adultery, but that it had been condoned by the husband; he also rejected the charge of cruelty. In the order thereupon drawn up it was stated that the commissioner "pronounced that the [wife] had not sufficiently proved the contents of the answer, that the [husband] had not sufficiently proved the contents of the petition, dismissed the said petition". The wife now sought to appeal against the finding that she had committed adultery.

Held: the wife's right of appeal, pursuant to R.S.C., Ord. 58, r. 1 and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1), was against the formal judgment or order not against the reasons for the decision; and as there was nothing of which the wife could complain in the order she had nothing against which she could appeal.

Observations as to the application of the doctrine of *res judicata* in the event of subsequent proceedings between the parties (see p. 542, letters C to E, and p. 543, letters E to H, post).

Per SIR RAYMOND EVERSLED, M.R.: where a finding of adultery will not lead to any effective result because any adultery has been condoned, it may well be the wiser course for the judge to refrain from expressing any concluded view on the issue of adultery, because any finding will in effect be unappealable and because of its possible consequences in subsequent proceedings (see p. 541, letter I, post).

Appeal dismissed.

[As to appeal from the grant or refusal of decree nisi, see 10 HALSBURY'S LAWS (2nd Edn.) 775, para. 1226; and for cases on the subject, see 27 DIGEST (Repl.) 592, 5535-5542.]

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 27 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 355.]

Cases referred to:

- (1) *Bright v. Bright*, [1953] 2 All E.R. 939; [1954] P. 270; 117 J.P. 529; 3rd Digest Supp.
- (2) *Onslow v. Inland Revenue Comrs.*, (1890), 25 Q.B.D. 465; 59 L.J.Q.B. 556; 63 L.T. 513; 39 Digest 264, 478.
- (3) *Hudson v. Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 27 Digest (Repl.) 517, 4603.

Appeal.

The wife applied for leave to appeal out of time against an order of Commissioner SIR HARRY TRUSTED, Q.C., dated Nov. 29, 1954, whereby he dismissed the husband's petition for divorce on the ground of the wife's adultery and cruelty and rejected the cross-prayer of the wife's answer for a decree of judicial separation on the ground of the husband's cruelty. On May 2, 1955, the Court of Appeal, on the wife's application and in the absence of the husband, ordered that the wife should

A have leave to file a notice of appeal by May 16, 1955, and that the issue whether a right of appeal did lie should stand adjourned. The wife gave notice of appeal to set aside that part of the judgment and finding of the commissioner whereby it was pronounced that since the celebration of the marriage she had committed adultery with a person unknown.

E. H. Laughton-Scott for the wife.

B *T. Dewar* for the husband.

SIR RAYMOND EVERSHED, M.R.: The point which the wife desires to agitate in the Court of Appeal is the conclusion to which she says Commissioner SIR HARRY TRUSTED, Q.C., came, that she had committed adultery. The husband sought a dissolution of the marriage on two grounds, adultery and cruelty. The wife denied the charges. As regards the adultery, she not only denied the charge, but she also alleged by way of answer that if, contrary to her contention, there had been adultery on her part, it had been condoned. She went on by a cross-prayer to seek herself a decree of judicial separation on the ground of the husband's cruelty. The formal judgment or order which was drawn up referred to the fact that leave had been given to the wife to amend her answer, to the fact that oral evidence had been taken of the parties and witnesses on their behalf, and to the fact that counsel had been heard on each side, and stated that the commissioner

"pronounced that the [wife] had not sufficiently proved the contents of the answer, that the [husband] had not sufficiently proved the contents of the petition, dismissed the said petition"

E and ordered that the costs be taxed as provided under the Legal Aid and Advice Act, 1949. That form of order, and particularly the formula "the [husband] had not sufficiently proved", reflects the language of s. 4 (2) (a) of the Matrimonial Causes Act, 1950. On the face of it, it appears to indicate that the husband generally had failed to satisfy the court of the truth of the charges that he had brought. Counsel for the wife complained that that form of order really is imperfect, because it disguises the circumstance (which is apparent, as he says, when you look at the reasons which the commissioner gave) that, to the limited extent that adultery was charged, the husband succeeded. He failed to establish that adultery as a ground for divorce, because the alternative defence of condonation was established. Counsel for the wife, therefore, suggested that the order could, and should, be amended as containing a slip. That argument, I must say, G I reject without any hesitation. This form of order, to my mind, does correctly reflect the conclusion at which the commissioner arrived, namely, that the two parties (husband and wife) had failed sufficiently to prove their cases and so failed to obtain the relief which they respectively sought.

The next and most formidable point made by counsel for the wife was that, although the order, on the face of it, did not appear to do other than negative the charges which the husband had made, yet, when you looked at the pleadings, and more particularly the recorded reasons given by the commissioner, it did become plain that there was a finding of fact, namely, that the wife had committed adultery, and that, unless she could in some way challenge that finding in this court, she was in the unhappy position of having such a conclusion unappealable on her part and possibly leading to her disadvantage hereafter, either on some subsequent petition because the alleged adultery had been revived or perhaps I in some proceedings for maintenance which she might bring against her husband. What admittedly occurred was that at a certain date the wife was delivered of a foetus, proved to be of approximately three months' age, and it was said by the husband that she must have conceived that foetus at a date when he had in fact no access to her. She, on the other side, said that she had been taken by the husband for drives in a motor van and that on one or more occasions sexual intercourse took place between them. The commissioner said:

"The landlady of the place where she [the wife] was living said that there

was some discussion between the [husband] and the [wife] afterwards, in which it was not altogether clear that the husband knew of his wife's condition. So on the whole, although it is a difficult matter about which to make up one's mind, I do not think that the [husband] was responsible for the state of affairs which resulted in this miscarriage . . . I do not know exactly the facts which led to that [an alleged scene of violence]. It was never fully gone into, but proceedings took place between September and Dec. 17, when she had the miscarriage. As I say, I am not satisfied that the husband was responsible for that condition. Be that as it may, the parties came together in the following January, and lived together again as man and wife. So that anything which may have occurred before then, whether or not it caused this miscarriage, was undoubtedly condoned by both parties."

Then he passed on to see what had happened thereafter which related to the allegations of cruelty.

If the matter had rested there, it might well be said that there was no concluded expression of opinion on this issue of adultery; but at the end of the judgment there followed, as there commonly does, a discussion with counsel, and counsel for the husband said:

"It may be clear from your Lordship's judgment that you find adultery in case it is revived hereafter. The commissioner: Yes, I think so. Counsel: There may be a possibility of revival hereafter. The commissioner: Yes."

Now, for reasons which I will later state, I think (being wise after the event) it is perhaps a pity that counsel for the husband sought to rub his triumph home in that way. At any rate, the consequence to him is that he is now here in the Court of Appeal. In face of those last two questions and answers, there is obviously a formidable case for saying that the commissioner did find, and did intend to find, adultery committed by the wife. It is for that reason, as I have said more than once, that counsel for the wife feels a certain anxiety as to the consequences that may flow therefrom for his client in the future. The next question that we must decide is whether, in the circumstances as I have stated them, there is, properly speaking, any subject-matter on which we could properly entertain an appeal. I have come to the conclusion that there is not. It is clear from the form of order or judgment which I have read that it does record accurately the conclusions which, in the end, the commissioner reached. On the question whether its form is satisfactory, we took the opportunity of consulting with LORD MERRIMAN, P., and he has indeed been kind enough to supplement what he told us by also bringing the matter, as I understand, to the attention of his brother judges. There seems to be no doubt whatever that this form of judgment or order, where the petitioner fails in the end of all (although he may base himself on a number of charges, in respect of some of which he may succeed in proving some of the alleged facts) is hallowed by very long usage. It certainly has been consistently used for twenty years, and I should think very probably more. I think also that to suggest (except, at any rate, in wholly exceptional circumstances) that an order of this kind should condescend to a detailed statement of every single issue which was raised in the case and of the court's conclusions on those issues seriatim would be to make the form of order altogether too complicated, and, indeed, that it would be an impracticable and wholly undesirable result.

Therefore, I start by assuming and accepting that this is an appropriate and correct form of order. From that it seems to me to follow inevitably that we could not now entertain an appeal on this matter of fact: Aye or no, was the wife guilty of adultery? For, even if we came to the conclusion that the commissioner formed a wrong view on the facts, we could not make any alteration at all in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. As I indicated

A to counsel for the wife, let it be supposed that he were free to raise this matter in the court and that the court came to the conclusion, as sometimes does happen, that the manner of the trial of this issue was not satisfactory, the right course for the court to take, presumably, would then be to order a new trial. A new trial of what? That again, as I think, shows the impossibility of our acceding to counsel for the wife's request, for I cannot see how we could possibly order the
B issue of adultery as such to be re-tried, seeing that it could not possibly lead, in the circumstances, to any effective result whatever. I should say that, except on this one point, there has been no appeal or notice of appeal on either side from the findings of the commissioner either by the wife against the rejection of her answer, or by the husband against the rejection of his petition.

A party's right of appeal (which is, of course, a statutory right) is now regulated
C by the terms of R.S.C., Ord. 58, r. 1. That states that the appellant may, pursuant to s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, appeal from "the whole or any part of any judgment or order". Counsel for the wife strongly argued that the judgment, for the purposes of the present matter, is not the formal document which I have already read, drawn up and signed by the district registrar, but is the statement of his reasons given by the
D commissioner at the end of the trial and from the transcript of which I have read certain short extracts. I will assume that the statement should be construed and read in the light of the questions and answers, which I also read, following the delivery of the so-called judgment, though I must not be taken to be saying that such a dialogue should necessarily be treated as part of the judgment itself. In my view, however, the argument cannot be sustained. Nothing from the
E cases brought to our attention by counsel for the wife persuades me that by the words "judgment or order" in the rule or in the sub-section is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute. In other words, I think that there is no warrant for the view that there has by statute been conferred any right on an unsuccessful party,
F even if the wife can be so described, to appeal from some finding or statement—I suppose it would include some expression of view about the law—which you may find in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding. If that is right, I come back again to the formal judgment or order; and, for the reasons which I have already made plain, there is no part of that document against which any appeal or, indeed,
G any complaint, could be made on the part of the wife. As counsel for the husband observed, the wife raised as a substantive defence, that, if she had committed adultery (though she denied it), then that adultery had been condoned, and in that matter she was successful. Indeed, on her husband's petition she was the successful party at the trial; and it may be said in mitigation of her apparent embarrassment now because of the finding of adultery, that, after all, she did
H succeed in one of the defences she deliberately put forward and it ill becomes her now to complain of that fact in this or any other court.

As I have said, plainly the wife's anxiety is lest the finding which, I will assume without deciding, the judge made and intended to make about the adultery should be used against her in subsequent matrimonial proceedings. Of course, in nine cases out of ten, perhaps in ninety-nine cases out of a hundred, the present
I problem is not in the least likely to arise, because one party or the other or both will appeal against the whole of the trial judge's conclusion and the whole matter will then be open for re-hearing. This is the tenth, or the hundredth, case and (I assume) the facts as to the relevant matter of condonation are too clear to be challenged. In a case of this kind, where it is apparent that a finding of adultery will not lead to any effective result because any adultery has been quite plainly and incontrovertibly condoned, it may well be the wiser course for the judge trying such case to refrain from expressing any concluded view on the issue of

adultery, because it would be in effect unappealable and because of its possible consequences. He may well think it proper to express his inclination to prefer one witness rather than another, but, without seeking to lay down any hard and fast rule, I think it a wiser course in such circumstances as have arisen in the present case, even when provoked by questions put to him by the learned counsel for one or other of the parties, for the judge to refrain from expressing a final view on the matter of adultery, for the reasons I have indicated. After all, adultery is, whatever the later consequences may be, a very serious thing. A

There remains the question: What is the result, what is the effect for the future, of this finding? It was suggested by counsel for the wife that, if hereafter a petition was presented, founded on the same adultery revived, or if in proceedings which she took for maintenance this question was raised against her by the husband, she might find herself in the position that the other party claimed that the adultery was now *res judicata* and that she was therefore estopped from denying the charge. I do not think it necessary or desirable that I should express any final view one way or the other whether such a plea of *res judicata* would be successful, if raised, in all or any of the possible proceedings that might ultimately be brought. A plea of *res judicata* may depend for its success on particular circumstances in particular cases. I will, however, say that if the view expressed by WILLMER, J., in *Bright v. Bright* (1), to which counsel for the wife referred us, is correct, it supports the view that the wife would not be estopped from defending herself if this alleged adultery were charged against her again. I do not think that it would be right on this application, which originated as an application for leave to appeal, for the court to say any more; but that authority, if it be well founded, lends support for the view that the wife would not be so embarrassed hereafter as she has, perhaps not unnaturally in view of the dialogue to which I have already referred, been led to fear. I come to the conclusion that this appeal ought not to proceed. B

HODSON, L.J.: I agree. This is an attempt by a successful wife to appeal against an order which she has obtained in her favour. In my judgment, this court cannot entertain such an appeal. The proceedings were proceedings for divorce, in which each side accused the other of cruelty. The husband, who was the petitioner, not only alleged cruelty, but also alleged adultery; and the form of the order which was drawn up after the commissioner had given his judgment recited that the evidence had been given and counsel had been heard and pronounced C

“that the [wife] had not sufficiently proved the contents of the answer [alleging cruelty], that the [husband] had not sufficiently proved the contents of the petition [alleging cruelty and adultery]”, D

that he dismissed the petition and the order then dealt with the costs. E

The wife's complaint in the present case is that, notwithstanding her success in the action, in giving his oral judgment before the order was drawn up, the commissioner said that he disbelieved her when she denied the charge of adultery which was made against her by her husband and found that she had committed adultery, although it had been condoned. In the pleadings she had not only denied the adultery, but she had said as an alternative defence, as she was quite entitled to do, that if adultery was committed it was condoned; and, on the alternative defence, she succeeded. The position, therefore, is that, although she failed in part of her defence to the charge of adultery, she succeeded in the other part; and the result was, in my view, correctly contained in the order to which I have referred. That order is in the form which has been used for many years, probably longer than the twenty years over which it has been possible to trace an order in that form. In effect, it follows the form of order which is made in making a decree in converse form. When a decree is pronounced, the court declares that the petitioner has sufficiently proved the contents of the petition, and when a F

- A decree is refused, as in the present case, that the petitioner or respondent (as the case may be) has not sufficiently proved the contents of the petition or the answer. If that order is correct, there is nothing in the order against which the wife can appeal. Appeals under s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, lie against judgments or orders of the High Court, and there is no doubt that that sub-section is dealing with the formal judgment or order. The distinction between "judgment" and "order" has been dealt with in this court by LORD ESHER, M.R., in *Onslow v. Inland Revenue Comrs.* (2), where he said (25 Q.B.D. at p. 466):

"A 'judgment', therefore, is a decision obtained in an action, and every other decision is an order."

- C That is drawing a distinction between judgments obtained in an action and other orders, but it is only dealing with the formal order and not dealing with the reasons for the decision, which may, in many cases (especially where, as in the present case, alternative defences are put forward), lead to a successful defendant finding himself or herself in the position of having won a case and having had matters decided against him or her about which some feeling of dissatisfaction may remain. Nevertheless, it does not follow that because the judge, in arriving at his conclusion, has determined those matters in that way, there is an appealable issue. That, I think, is the present case. There was no slip in the order, and there is no appeal against the reasons given by the judge before making the order.

- D The anxiety felt by the wife in the present case was due to the fact, I suppose, that this was a divorce case and that the effect of her having been told by a judge that she was guilty of adultery in litigation between herself and her husband might, she feared, be used against her in case there was any subsequent litigation between the same parties. The way in which that statement by the learned commissioner might be used against her has not been examined by this court, and it would not be right, where the issue does not arise, for this court to give its view whether or not there could possibly be any application of the res judicata doctrine. This matter has been considered by WILLMER, J., in *Bright v. Bright* (1). He referred to a decision of LORD MERRIMAN, P., in *Hudson v. Hudson* (3), which he cited ([1953] 2 All E.R. at p. 946), the headnote of which reads:

"In support of a petition for divorce based upon the same facts, it is not sufficient merely to rely upon a previous conviction of a particular offence in a court of summary jurisdiction even though that conviction may have been upheld on an appeal to the Divisional Court. In the Divorce Court the matter is not concluded per rem judicatum; and no doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before it."

- H That is a reference to what is now s. 4 (1) of the Matrimonial Causes Act, 1950, which imposes the duty on the court to inquire into the truth of matters before it and which prima facie is not affected by the doctrine of estoppel per rem judicatum.

PARKER, L.J.: I entirely agree with both judgments.

Appeal dismissed.

- I Solicitors: *Smith & Hudson*, agents for *Harold Michelmores & Co.*, Newton Abbott (for the wife); *Keene, Marsland & Co.*, agents for *McLusky & Braddell*, Exeter (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LAW SOCIETY *v.* RUSHMAN.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), May 20, 1955.]

Legal Aid—Costs—Charge for costs on damages recovered—Infant plaintiff—Money paid into court—Balance remitted to county court for plaintiff's benefit—Whether charge enforceable by payment out to Law Society—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), s. 3 (4)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 19 (1), (2)—County Court Rules, 1936, Ord. 16, r. 13 (4).

An infant suing by her next friend issued a writ claiming damages for personal injuries. The defendants paid £125 into court. Subsequently the next friend applied for legal aid, and a civil aid certificate was granted to the infant plaintiff herself, her contribution being assessed at £4 10s. On the day when the action was to be heard the plaintiff accepted the £125 with the leave of the judge. The attention of the court was not drawn to s. 3 (4) of the Legal Aid and Advice Act, 1949,* whereby a first charge on property recovered is conferred for the benefit of the legal aid fund in respect of a deficiency of the costs of an assisted plaintiff; and, in those circumstances, an order was made that the plaintiff should pay £20 towards the defendants' costs from the date of the payment of the £125 into court and that the balance of £105 should be transferred to the county court to be dealt with for the benefit of the plaintiff. The £105 having been so transferred became subject to the provisions of C.C.R., Ord. 16, r. 13 (4) for application for the benefit of the plaintiff. The plaintiff's costs were taxed pursuant to the Legal Aid and Advice Act, 1949, Sch. 3, and, after the plaintiff's contribution of £4 10s. had been paid, there remained a sum of £167 10s. for costs due to the legal aid fund. The Law Society, in whom the charge for the benefit of the legal aid fund was vested pursuant to the Legal Aid (General) Regulations, 1950, reg. 19 (1),† applied to the county court for the £105 to be paid out to them. The county court judge refused the application. On appeal,

Held: since under the Legal Aid and Advice Act, 1949, s. 3 (4), the Law Society were entitled to a first charge for the benefit of the legal aid fund on the £105 recovered by the plaintiff in the action, they were entitled to an order for the £105 in court to be paid out to them, notwithstanding, in the circumstances, that the sum had been transferred to the county court for the benefit of the plaintiff.

R. v. Judge Fraser Harrison, Ex p. Law Society ([1955] 1 All E.R. 270) followed.

Appeal allowed.

[**Editorial Note.** Section 3 (4) of the Legal Aid and Advice Act, 1949, confers a first charge for the benefit of the legal aid fund on property recovered or preserved for an assisted person in the proceedings in which he is assisted. SINGLETON, L.J., indicates the desirability of the attention of the trial judge being drawn to this provision and to reg. 19 of the Legal Aid (General) Regulations, 1950, when a compromise is made and approved on behalf of an assisted infant. It was because the attention of the trial judge had not been drawn to these provisions, that an order had been made which, by directing money to be transferred to the county court for the benefit of the infant plaintiff, had created difficulty (see p. 547, letter I, post). Attention is also drawn to reg. 16 (see p. 549, letter G, post), and by reg. 16 (1), as amended by S.I. 1954 No. 166, moneys payable to an assisted person by virtue of an order or agreement in connection with an action or paid into court on his behalf are to be paid to his solicitor.

* The terms of s. 3 (4) are printed at p. 546, letter G, post.

† The terms of reg. 19 (1) are printed at p. 547, letter E, post.

- A For the Legal Aid and Advice Act, 1949, s. 3 (4), see 18 HALSBURY'S STATUTES (2nd Edn.) 537.

For the Legal Aid (General) Regulations, 1950, reg. 19, see 5 HALSBURY'S STATUTORY INSTRUMENTS 218.]

Case referred to:

- B (1) *R. v. Judge Fraser Harrison, Ex p. Law Society*, [1955] 1 All E.R. 270; [1955] 1 Q.B. 287.

Appeal.

- C The Law Society appealed from an order of His Honour JUDGE DUTTON BRIANT, at Brighton County Court, dated Mar. 2, 1955, whereby he refused their application for payment out of court of a sum of £105 in right of a charge for the benefit of the legal aid fund, that sum being the balance of an amount recovered by the respondent, an assisted person, in an action brought by her, as an infant suing by her next friend, for damages for personal injuries, and having been transferred to the county court for her benefit.*

The facts appear in the judgment of SINGLETON, L.J.

- D *J. R. Macgregor* for the appellants.
J. K. Wood for the respondent.

- E SINGLETON, L.J. : This is an appeal by the Law Society, which arises out of an order made by His Honour JUDGE DUTTON BRIANT at the Brighton County Court dated Mar. 2 of this year. The case arises in this way: the respondent on this appeal, Miss Eileen Joyce Rushman, was injured whilst working for her employers some years ago. On Jan. 25, 1952, a writ was issued on her behalf; she was then an infant and sued by her father as her next friend. In the action damages were claimed against her employers for negligence and breach of statutory duty. On May 21, 1952, the defendants in that action paid the sum of £125 into court. Subsequently the next friend applied for legal aid; on Oct. 29, 1952, a civil aid certificate was granted to Miss Rushman and her contribution was assessed at the sum of £4 10s. I emphasise that according to the words on the certificate Miss Rushman was herself granted

"legal aid to continue proceedings by my next friend for damages in respect of personal injuries."

- G When the conditions under which it would be granted were communicated to the solicitor, the acceptance of those terms was given both by the next friend and by Miss Rushman herself. On July 16, 1953, the case was in the list at Lewes Assizes to be heard and determined by HAVERS, J. It was decided at that stage that Miss Rushman would accept the £125 which had been paid into court. She was still an infant, and the judge's consent to, or approval of, that course of action was necessary. The judge approved, and he made an order which is before this court. It recites that the plaintiff had during the course of the trial asked for leave to take out of court, in satisfaction of her claim, the sum of £125 paid into court and that course was allowed. It was obvious, as the money had not been taken out of court earlier, that the defendants in the action would in the ordinary course be entitled to their costs after the date of payment in unless there was good reason for some order to the contrary. The judge, after consideration, assessed the amount which Miss Rushman should pay towards the defendants' costs at the sum of £20. I have no doubt that he made that assessment after having taken into consideration her means in accordance with the terms of the Legal Aid and Advice Act, 1949. So that of the money in court there was left

* The power for this purpose is conferred by s. 164 of the County Courts Act, 1934, 5 HALSBURY'S STATUTES (2nd Edn.) 118; by s. 164 (2) of the Act the money is, subject to any special order or direction of the High Court or a judge thereof, and to the county court rules, to be dealt with for the benefit of the person to whom the order relates.

the sum of £105 after the £20 had been paid out to the defendants. In regard A
to that the judge's order provided:

" And it is further ordered that the sum of £125 aforementioned do remain
in court to abide the taxation of costs, the sum of £20 or such smaller sum
as shall be certified by the district registrar as payable hereunder by the
plaintiff to the defendants shall be paid out to the defendants in settlement B
of their claim to costs herein and that the balance of the said sum thereafter
remaining in court be transferred to the Brighton County Court there to be
invested applied or otherwise dealt with for the benefit of the plaintiff
Eileen Joyce Rushman in such manner as the county court in its discretion
shall think fit ";

and, accordingly, the sum of £105, with a small sum in respect of interest, was C
transferred to the Brighton County Court for Miss Rushman's benefit.

There followed an order for the taxation of the plaintiff's costs under the
Legal Aid and Advice Act, and those costs were taxed as between solicitor and
client at the sum of £213. Some of the amount included in that taxation was
reduced by fifteen per cent. under the terms of the Act, and the amount paid out of
the legal aid fund was in fact £172 odd. Miss Rushman had contributed the sum D
of £4 10s. in accordance with the terms on which legal aid had been granted, and
thus the sum of £167 10s. was due to the legal aid fund. Some time after the
order of HAVERS, J., two applications were made to his Honour JUDGE ARCHER,
who was then the judge at Brighton County Court. One application was made by
the Law Society that the £105 should be paid out to them, and the other was an
application by Miss Rushman that it should be paid out to her. The county court E
judge thought that there were difficulties because of the wording of the order
of HAVERS, J., and he adjourned the matter so that it might be mentioned to
the judge. In the meantime there came a decision of the Divisional Court in
R. v. Judge Fraser Harrison, Ex p. Law Society (1). When the Law Society's
advisers saw that decision they thought their proper course was to go back to
the county court and make application for the money to be paid out to them; F
and so they returned, and the application was heard by His Honour JUDGE
DUTTON BRIANT, who had been appointed in place of JUDGE ARCHER. He heard
their application and the application of Miss Rushman, she appearing in person.
He gave a reserved judgment on Mar. 2, 1955, in favour of Miss Rushman,
ordering that the money should be paid out to her. Against that decision
the Law Society appeals to this court. G

Section 3 (4) of the Legal Aid and Advice Act, 1949, reads:

" Except so far as regulations otherwise provide, any sums remaining
unpaid on account of a person's contribution to the legal aid fund in respect
of any proceedings and, if the total contribution is less than the net liability
of that fund on his account, a sum equal to the deficiency shall be a first
charge for the benefit of the legal aid fund on any property (wherever situate) H
which is recovered or preserved for him in the proceedings."

Property for this purpose includes money; the contrary has not been argued in
this court. Thus the effect of the sub-section is that if the legal aid fund is
out of pocket, any money recovered on behalf of a plaintiff is subject to a first
charge for the benefit of the fund if there is a deficiency. Again I emphasise the
words " a first charge ". It ought to be understood that the legal aid fund is I
not wholly charitable. It has served for some years now a good purpose for
persons whose financial position is such that they are unable to undertake litigation
unless they have financial help. Help is provided out of public funds, and
the framers of the Act of Parliament thought it right to say that, if there were a
deficiency arising, the property recovered in such an action should be subject to
a first charge for the benefit of the legal aid fund. If a person, with the help
of the legal aid fund, obtains £5,000 damages, it is surely only right and

- A proper that some part of those damages should be made available, if there be a deficiency, rather than that the public should bear the cost. There are many cases, no doubt, in which there is no fund available, and the cost to the public of the administration of the Legal Aid and Advice Act must be considerable. In a case such as this, if the damages recovered amount only to a sum of £105, while the deficiency is £167 10s., it appears to me to be open to the Law Society, who administer the legal aid fund, to claim their first charge on the £105. It is unfortunate for Miss Rushman that she did not recover more damages than the deficiency which arose in costs, but that is not the fault of the Law Society or of those who administer the legal aid fund. The £125 might have been taken out of court before there was an application made for legal aid, or it might have been taken out of court at a later stage before the case went to trial. Why it was not I do not know; nor do I know anything about the circumstances of the action or the injury, but at the trial Miss Rushman was advised to take the £125 out of court. It is most important in the administration of the service given by this Act that a plaintiff should be advised what the position is in a case such as this before a settlement is arrived at. It is disappointing for a plaintiff if she is advised to take £125 out of court and is not told she will not receive a penny by reason of the fact that someone else has a charge over the whole amount, and it may lead some people to think that there is not so much good in the Legal Aid and Advice Act as there is.

Section 3 (4) of the Act clearly gives a first charge to the legal aid fund in respect of any deficiency that there may be. The later sub-sections of s. 3 also make it clear that this case is covered; and in particular sub-s. (5) which covers the case of a compromise, as this may be described, although it was a compromise arrived at with the approval of the court. Regulation 19 of the Legal Aid (General) Regulations, 1950, provides:

- "(1) Any charge on property recovered or preserved for an assisted person arising under s. 3 (4) of the Act shall vest in the Law Society. (2) The Law Society may enforce any such charge in any manner which would be available if the charge had been given inter partes. (3) Any such charge affecting land shall be a land charge of class B within the meaning of s. 10 of the Land Charges Act, 1925. (4) Subject to the provisions of the Land Charges Act, 1925, all conveyances and acts done to defeat, or operating to defeat, such charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the Law Society."

In the regulations, as in the Act, care is taken to provide for the protection of public moneys and to provide a means of enforcing the first charge which is given under s. 3 (4). Furthermore, there is no doubt that when circumstances such as these arise the Law Society is a person interested under Ord. 16, r. 2, of the County Court Rules.

- When this matter was before the county court judge he had the help of counsel for the defendants, but there was no counsel representing Miss Rushman, who appeared in person. The judge pointed out that he would be very glad if the case were considered elsewhere, but he hoped, in such an event, that she would have some help in putting her case before the court, as he had been without assistance on her side. Accordingly it was arranged that she should have legal aid for the purposes of this appeal, and I am very glad that that was done. The judge, as I have said, decided that he ought to make an order that the money in court be paid out to Miss Rushman. There were several reasons which led him to that conclusion, and I must deal with them. In the first place he was in some difficulty in view of the order made by *HAVERS, J.* The difficulty was created by the fact that s. 3 (4) of the Legal Aid and Advice Act was not drawn to the attention of *HAVERS, J.*, when he made his order. I have no doubt that no one had thought about it, but if it had been present to the mind of counsel, I think it ought to have been mentioned, as it would have saved trouble.

I am inclined to think that there might have been a later application made to HAVERS, J., to re-consider the terms of the order under the slip rule. His Honour JUDGE DUTTON BRIANT, in the course of his judgment, referred to *R. v. Judge Fraser Harrison, Ex p. Law Society* (1), where the point raised was almost precisely the same as this. Damages had been awarded by GLYN-JONES, J., who approved a settlement; the money had been paid into the Liverpool County Court, and an application of this kind was made. The learned county court judge said that GLYN-JONES, J., had said to the plaintiff ([1955] 1 All E.R. 270):

“ ‘ I gather that the defendants have not offered to pay any costs. We must leave the legal aid fund to deal with the next friend.’ ”

JUDGE FRASER HARRISON thought it right not to order that the Law Society's application be granted in that case, because of that statement of GLYN-JONES, J. On an application in the Divisional Court for an order of mandamus LORD GODDARD, C.J., in the course of his judgment made it clear that s. 3 (4) gave a first charge to the Law Society, and that the learned county court judge had no option but to make the order which the Law Society sought. To my mind, that case is on the same footing as this. It is true that there was no representation on behalf of the plaintiff in that case, and some of the questions which have been mentioned before us were not argued there, but I see no distinction between the two cases. Having dealt with that case His Honour JUDGE DUTTON BRIANT gave his reasons for making the order he made, and said:

“ This case can be distinguished from *R. v. Judge Fraser Harrison* (1) in that HAVERS, J., dealt with the question of defendants' costs and ordered the plaintiff to pay a sum not exceeding £20 towards the defendants' costs, clearly with the intention that the plaintiff should receive the balance of the money. If he had been informed that the effect of his order was that the defendants would be deprived of the balance of their costs over £20 and that the rest of the money would go to the legal aid fund and not the plaintiff, I do not think he would have limited the plaintiff's liability to £20. Unfortunately, the defendants have had no opportunity of arguing this point.”

It may be that if the judge had realised the result of this, he would have thought it right to let the defendants in the action have more than £20. That would not have any effect on the plaintiff, nor would it have benefited her, and I do not think that on that ground a distinction can be drawn between this case and the case to which I have referred. The next reason given by the county court judge is this:

“ Although the civil aid certificate was granted nominally to the plaintiff, as she was an infant she was under no personal liability for costs and the next friend was joined for the purpose of meeting any liability for costs and it is he if anyone who is liable for the deficiency.”

In the ordinary way where an action by an infant suing through his or her next friend fails, the order for costs will often be “ costs against the next friend ”. That has no bearing on this case. Legal aid was granted to the infant; the infant recovered in the action a sum of damages; those damages are subject to a first charge as a sum recovered in the proceedings. It matters not for this purpose whether the plaintiff is an infant or not in view of the fact that the certificate was granted to the infant, and the first charge is given in respect of the deficiency in those proceedings, which were the proceedings in which the infant had been granted legal aid. The judge's third reason is this:

“ Section 3 (4) of the Act provides for a first charge on property recovered ‘ except so far as regulations otherwise provide ’ and reg. 19 (2) provides that the Law Society ‘ may ’ enforce such charge. In my opinion this

- A gives the Law Society a discretion as to whether or to what extent they should seek to enforce the charge."

That is a matter for them. I suppose they have a discretion as to how far they will go in these matters, but it is right to say that when they are administering the legal aid fund they are dealing with public money, and they owe a duty to the public which is at least as high as their duty to anyone else; it is sufficient to say they seek to enforce the first charge which they are given by the Act of Parliament.

- B

The fourth reason given by the judge is:

- C "That I am bound by the order of HAVERS, J., and by Ord. 16, r. 13 (4) of the County Court Rules to administer the fund for the benefit of the plaintiff within my discretion."

It is the form of the order which caused some difficulty; none the less, if the judge was satisfied that the order was made without the attention of HAVERS, J., having been called to the section in question, and if the section is clear, I think he ought to have followed it. The fifth reason:

- D "There being conflicting claims to the fund, I must exercise my discretion, having regard to the benefit of the plaintiff, and in spite of the contention of the Law Society that the charge would still attach to the money in the hands of the plaintiff. I reject the argument that this is a good reason for refusing payment out to the plaintiff. For these reasons I order payment out of the whole sum in court to the plaintiff."

- E I am not quite sure what that means. If the judge has a discretion, he must exercise the discretion according to law. His duty was to regard the terms of the statute. He must have realised that the order of HAVERS, J., would not have been in that form if his attention had been drawn to the words of s. 3 (4) of the Legal Aid and Advice Act. I should think that if the money is still in the county court it would be open to the Law Society to apply now for an injunction to prevent the plaintiff in the action dealing with it pending the determination of the question. However if this court is satisfied that the Law Society's claim to a first charge is right, it would be idle that there should be further proceedings.

- F It appears to me for these reasons that the proper course is for this court to allow the appeal and to say that the order which the Law Society seeks should be made. I wish to add one further observation. Consideration should be given to the framing of an order which will meet the position when a situation of this kind arises; it would save trouble if associates, both on circuit and in London, had this kind of question always present to their minds, for they are able to remind a judge if the position is not brought to his attention by counsel. There are provisions as to moneys recovered by infants in R.S.C., Ord. 22, r. 14, and under reg. 16 of the Legal Aid (General) Regulations which may be described as overlapping to some extent. There is no difficulty in the working of them, I think, provided that some form of order is devised which will cover both sets of circumstances.

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- H

JENKINS, L.J. : I agree.

MORRIS, L.J. : I also agree.

- I

Appeal allowed.

Solicitors: *Hempsons*, agents for *Gates & Co.*, Brighton (for the appellants); *Charles Webb & Sons*, Brighton (for the respondent).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

Re COX (H.C.) (*deceased*). A

BAKER v. NATIONAL TRUST CO., LTD. AND OTHERS.
PUBLIC TRUSTEE FOR THE PROVINCE OF ONTARIO v.
NATIONAL TRUST CO., LTD. AND OTHERS.

Re COX (L.B.) (*deceased*). B

BAKER v. NATIONAL TRUST CO., LTD. AND OTHERS.
PUBLIC TRUSTEE FOR THE PROVINCE OF ONTARIO v.
NATIONAL TRUST CO., LTD. AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, L.C.,* Lord Oaksey, Lord Reid, Lord Tucker and Lord Somervell of Harrow), October 4, 5, 6, 7, 1954, May 19, 1955.] C

Charity—Benefit to community—Public element—Trust for “charitable purposes” —Beneficiaries limited to employees and ex-employees of a company and their dependants.

A testator directed his trustees by his will to hold the balance of his residuary estate on trust: “To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the board of directors of the said The Canada Life Assurance Company, as they . . . in their absolute discretion shall from time to time decide . . .” The circumstances of employees or former employees of the company were not likely to be such that they would often be in need of financial assistance. The balance of the estate which the testator left when he died was large. On the question whether there was a valid charitable trust, D

Held: the trust was not a valid charitable trust because, having regard particularly to the fact that the employees of the company would not be likely to be in poverty, the words “for charitable purposes only” must be read as comprehending all the four purposes laid down as charitable by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* ([1891] A.C. at p. 583) and could not be confined to the purpose of relieving poverty; accordingly, the trust was for the purpose, among others, of the education of a limited class of beneficiaries, which was not a good charitable purpose. E

Oppenheim v. Tobacco Securities Trust Co., Ltd. ([1951] 1 All E.R. 31) followed. F

Appeal dismissed. G

[As to the requirement that a purpose should be for the benefit of an appreciably important class of the community if it is to be a charitable purpose, see 4 HALSBURY’S LAWS (3rd Edn.) 209, para. 488; and for cases on the subject, see 8 DIGEST (Repl.) 320, 321, 49-57.] H

Cases referred to: I

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, 1.
- (2) *Verge v. Somerville*, [1924] A.C. 496; 131 L.T. 107; sub nom. *Verge v. Somerville, A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173; 8 Digest (Repl.) 347, 282.

* VISCOUNT SIMONDS ceased to be Lord Chancellor on Oct. 19, 1954.

- A (3) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 8 Digest (Repl.) 321, 55.
- (4) *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985; [1950] Ch. 177; 8 Digest (Repl.) 320, 51.

Appeals.

- B Consolidated appeals by special leave from two orders of the Supreme Court of Canada dated Dec. 22, 1952, dismissing appeals by the appellants, Edwin G. Baker and the Public Trustee for the Province of Ontario, from two orders of the Court of Appeal for the Province of Ontario dated Feb. 16, 1951, which reversed two orders of the Supreme Court of Ontario (WELLS, J.), dated Jan. 27, 1950.
- C By his will dated June 23, 1938, the testator, Herbert Coplin Cox, who died on Sept. 17, 1947, provided, among other things:

D "Subject as hereinbefore provided and with respect to the balance of my residuary estate which may remain in my trustees' possession, my said trustees shall hold same upon trust as follows: To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the board of directors of the said The Canada Life Assurance Company, as they, the said board of directors, in their absolute discretion shall from time to time decide. The trust fund is to be known as 'The Cox Foundation' in memory of the family whose name has been so long associated with the said company."

E

- His widow, Louise Bogart Cox, who died on Nov. 18, 1948, made a similar
- F provision in her will, dated Nov. 2, 1948. The executors of both wills were the respondent, the National Trust Co., Ltd. and Alfred Herbert Cox (since deceased). By order dated Jan. 27, 1950, Edwin G. Baker, a director of The Canada Life Assurance Company, was appointed to represent the employees of The Canada Life Assurance Company; the respondent, Margaret Jane Ardagh, one of the next of kin of the testator, was appointed to represent all the next of kin of the
- G testator not individually represented; the respondent, the Official Guardian for the Province of Ontario, was appointed to represent any unascertained persons interested in the event of an intestacy and not represented by Margaret Jane Ardagh, and the Public Trustee for the Province of Ontario was appointed to represent other persons who might benefit under the bequests in question. The respondents, William Burt Shepard and Lida Louise Shepard, were next of kin
- H of the testatrix.

By originating motion issued in the Supreme Court of Ontario in March, 1949, the executors of the two wills applied to the court for the determination of the question whether or not the bequests were valid charitable bequests and for consequential relief and directions.

- I *John F. Robinette, Q.C.* (of the Canadian Bar), and *Denys B. Buckley* for Edwin G. Baker.

Geoffrey Cross, Q.C., *A. Racine, Q.C.* (of the Canadian Bar), and *R. O. Wilberforce, Q.C.*, for the Public Trustee for the Province of Ontario.

Denys B. Buckley for the National Trust Co., Ltd., and the board of directors of The Canada Life Assurance Company.

Milner Holland, Q.C., *J. D. Arnup, Q.C.* (of the Canadian Bar), and *T. A. C. Burgess* for Margaret Jane Ardagh, William Burt Shepard, the Official Guardian for the Province of Ontario and Lida Louise Shepard.

LORD SOMERVELL OF HARROW: This is an appeal by special leave from a decision of the Supreme Court of Canada dismissing (by a majority) an appeal from the Court of Appeal of Ontario which allowed an appeal from **WELLS, J.** The question is whether there was, by the will of the late Herbert Coplin Cox, a valid charitable bequest of the residue of his estate which he directed his trustees to hold on trust as follows:

" . . . To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the board of directors of the said The Canada Life Assurance Company, as they, the said board of directors, in their absolute discretion shall from time to time decide. The trust fund is to be known as 'The Cox Foundation' in memory of the family whose name has been so long associated with the said company."

An originating motion was issued by the National Trust Co., Ltd., and Mr. A. H. Cox as administrators and trustees of the will. Edwin G. Baker is president of The Canada Life Assurance Company and represents the interests of the employees and ex-employees. The other parties are the next of kin and the Public Trustee for Ontario, who represents the interests of charities generally. There is a similar provision in the will of Mr. H. C. Cox's widow.

It must first be determined what is the true construction of this bequest. In the event of a certain determination a question of much difficulty arises, whether a gift in perpetuity for the relief of poverty confined to employees of a particular employer and their dependants is a good charitable trust. In the view which their Lordships take, that question does not fall for decision. To explain how the question arises and the issues raised on construction, it is necessary first to recall **LORD MACNAGHTEN's** definition of charity in *Income Tax Special Purposes Comrs. v. Pemsel* (1) ([1891] A.C. at p. 583):

" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

Secondly, there should be borne in mind the familiar proposition that, in order to qualify as a charity a gift must, to use the words of **LORD WRENBURY** in *Verge v. Somerville* (2) ([1924] A.C. at p. 499) be

"for the benefit of the community or of an appreciably important class of the community."

In connection with this general proposition, it is to be remembered that a gift for the education of a group of employees of a particular employer is not a charity (*Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3)). There is ancient authority for supporting a gift for the relief of poor relations, and the Court of Appeal has recently held good a gift to relieve the poverty of employees of a particular employer (*Gibson v. South American Stores (Gath & Chaves), Ltd.* (4)). The correctness of this decision was expressly reserved in *Oppenheim's* case (3).

The first question of construction arises on a submission made by counsel on behalf of the Public Trustee for the Province of Ontario. It was argued that there was a general charitable trust for "indirect" benefits which was not restricted to the class who were to receive "direct" benefits. On this view, a *cy-près* scheme should be established. This construction was based mainly on the words "in perpetuity" and "directly" in the bequest. It commended itself to a minority in the Supreme Court, but their Lordships cannot accept it. The words "in perpetuity" mark the distinction between charitable and ordinary trusts.

- A The word "directly" is not inapt, though it may be surplusage. The employees are to be his direct beneficiaries, and it will be immaterial that others might benefit indirectly. It would need very plain words to restrict a trust to "indirect" benefits, nor is it clear what the words would mean. Their Lordships are satisfied that the only beneficiaries within the bequest are the employees and ex-employees of the company and their dependants.
- B The second question turns on the meaning in their context of the words "for charitable purposes only." It appears to their Lordships that these words look back to the preamble of the Statute of Elizabeth [43 Eliz. 1 c. 4] and the exposition of its scope and meaning which has been familiar to generations of lawyers by the passage cited from LORD MACNAGHTEN's judgment. The relevant bequest must, then, be read as if LORD MACNAGHTEN's classification was set out in full after, or instead of, the words "for charitable purposes only". If it is so read, it follows that the trustees are given a discretion to apply the income of the fund in perpetuity for the benefit of the employees in question for any of the purposes enumerated in LORD MACNAGHTEN's classification and, if this is so, it is not in doubt that the gift as a whole is not a good charitable gift. If it is open to doubt whether a gift in relief of poverty of such a group is valid, it is clear that a gift for their education is not. This construction was put forward on behalf of the next of kin.
- C
- D

The alternative construction which is submitted on behalf of the employees, involves, as it appears to their Lordships, the introduction of words after the words "for charitable purposes only", which are designed not to explain those words but to avert the invalidity which ensues from reading them in their natural

- E sense. The court is, in effect, asked to read the phrase as if the testator had directed his trustees to apply the income not for all or any of the purposes which the law recognizes as charitable but only for such (if any) of those purposes as, having regard to the prescribed beneficiaries, could be regarded as charitable. While that is not, perhaps, an impossible construction, the circumstances of this case are such that their Lordships cannot adopt it. The construction
- F requires that the testator must be supposed to have had some doubt whether all the purposes or divisions set out by LORD MACNAGHTEN could be held to be charitable purposes with regard to the class of persons whom he intended to benefit. The only reasonable doubt would have been whether, if the other purposes were invalid, the purpose of relieving poverty among these beneficiaries would be held valid. But the testator cannot have supposed that persons in the
- G employment of the company would be in poverty save in the most exceptional circumstances, nor can he have supposed that former servants of the company would often require financial assistance for this reason. Yet the sum which he directed to be held for charitable purposes is large, and it appears to their Lordships to be impossible in the circumstances to hold that he intended it to be held solely for the purpose of relieving poverty among his beneficiaries if it should
- H prove that no other purpose could be sustained as valid.

Although WELLS, J., found a good charitable trust for the relief of poverty, it seems clear that he accepted the construction which commends itself to their Lordships. He said ([1950] O.R. at p. 139):

- I "I think there can be no question that this gift must be deemed to be for any of the four purposes which the authorities have laid down as compendiously describing charitable trusts,"

an opinion on the question of construction which he forcibly reiterated later in his judgment. In spite of this, he felt able to declare a valid trust limited to the relief of poverty only. This, with respect, is wrong, as has been stated above. On the construction adopted by WELLS, J., the whole trust must fail.

The Court of Appeal refused to follow or apply *Gibson's* case (4), and the trust was, therefore, invalid on either construction. It is, however, clear that the court took the same view as that taken by WELLS, J. ROACH, J.A., in

whose judgment the other members of the court concurred, said ([1951] O.R. at p. 223): A

"The trusts with which we are here concerned are 'for charitable purposes only'. That phrase necessarily includes all legal charities."

In the Supreme Court, the minority as well as the majority construed the bequest in the same way. KELLOCK, J. (with whom TASCHEREAU and FAUTEUX, JJ., concurred), said ([1953] 1 S.C.R. at p. 103): B

"I see no escape from reading the words used as though the testator had set out seriatim the said four heads"

—that is LORD MACNAGHTEN'S classification. ESTEY, J., said (*ibid.*, at p. 113):

"It would appear that the testator, in providing that the directors might expend the income for charitable purposes, included the relief of poverty, in the same sense that all other purposes and objects are included, and made it abundantly clear that the employees and their dependants should benefit, not only in case of financial need, but in any manner that might be included within the phrase 'charitable purposes'." C

CARTWRIGHT, J., who was in the minority, referred to the words in question (*ibid.*, at p. 123) as words D

"which in their ordinary and natural meaning in no way restrict the application of the income to the relief of poverty."

Finding this consensus of opinion on the question of construction, their Lordships would, in any case, be reluctant to take a different view, but it appears to them that the language of the will is unambiguous, and that the construction placed on them by the courts in Canada gives plain words their proper meaning. Their Lordships will, therefore, humbly advise Her Majesty that the appeals be dismissed. The costs of all parties of these appeals will be paid as between solicitor and client out of the estates of Herbert Coplin Cox and Louise Bogart Cox and the former estate will bear three-quarters of such costs and the latter estate one-quarter of such costs. E F

Appeals dismissed.

Solicitors: *Slaughter & May* (for Edwin G. Baker, the National Trust Co., Ltd., and the board of directors of The Canada Life Assurance Co.); *Charles Russell & Co.* (for Margaret Jane Ardagh, William Burt Shepard, the Official Guardian for the Province of Ontario and Lida Louise Shepard); *Lawrence Jones & Co.* (for the Public Trustee for the Province of Ontario).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A Re BONE (*deceased*). BONE *v.* MIDLAND BANK, LTD., AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), May 18, 19, 1955.]

Family Provision—Time for application—Extension—Question as to interest in the estate not having been determined—Inheritance (Family Provision) Act, 1938 (1 & 2 Geo. 6 c. 45), s. 2 (1A) (b) (added by Intestates' Estates Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 64), s. 7 and Sch. 3).

A testator died on Feb. 11, 1953, and his will was proved on May 8, 1953.

A question arose on the construction of the will whether or not the testator's widow was entitled to a life interest in part of the estate, and the widow's solicitors were informed that it was intended to take out an originating summons to decide the question. No such originating summons having been issued, on Nov. 10, 1953, the widow issued a summons under the Inheritance (Family Provision) Act, 1938, for provision to be made for her out of the estate. Her solicitors were aware of the requirement under s. 2 (1) of the Act that the summons should be issued within six months from the date when representation was first taken out (i.e., by Nov. 8, 1953). At all times until January, 1955, it was contemplated that an originating summons for the construction of the will would be issued, but in that month counsel advised against the issue of such a summons. The summons under the Act of 1938 being out of time, the widow now applied under s. 2 (1A) for the time for the issue of the summons to be extended.

Held: the court had jurisdiction to extend the time under s. 2 (1A) (b) of the Act, and, as otherwise hardship would be caused, it was proper to extend the time to Nov. 11, 1953.

Re Greaves (decd.) ([1954] 2 All E.R. 109) distinguished.

[For the Inheritance (Family Provision) Act, 1938, s. 2 (1A) (b), see 32 HALSBURY'S STATUTES (2nd Edn.) 142.]

F Case referred to:

(1) *Re Greaves (decd.)*, [1954] 2 All E.R. 109; [1954] Ch. 434.

Adjourned Summons.

Application by the widow of the testator as a dependant that the period limited by the Inheritance (Family Provision) Act, 1938, s. 2 (1), within which an application for reasonable provision for maintenance under the Act ought to have been made, should be extended pursuant to s. 2 (1A) of the Act of 1938 as amended by the Intestates' Estates Act, 1952, s. 7 and Sch. 3, to a date subsequent to Nov. 10, 1953.

Geoffrey Cross, Q.C., and *Raymond Walton* for the plaintiff, the widow.

H *N. S. S. Warren* for the first and second defendants, the executors of the testator.

B. S. Tatham for the third defendant, the residuary legatee.

DANCKWERTS, J.: This matter arises under the Inheritance (Family Provision) Act, 1938, s. 2, which, as amended by the Intestates' Estates Act, 1952, s. 7 and Sch. 3, provides as follows:

I “(1) Except as provided by the following provisions of this section or s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the deceased's estate is first taken out. (1A) If it is shown to the satisfaction of the court that the limitation to the said period of six months would operate unfairly,—(a) in consequence of the discovery of a will or codicil involving a substantial change in the disposition of the deceased's estate (whether or not involving a further grant of representation) or, (b) in consequence of a question whether a person had an interest in the

estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out, or (c) in consequence of some other circumstances affecting the administration or distribution of the estate, the court may extend that period. (1B) The provisions of this Act shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the said period of six months on the ground that they ought to have taken into account the possibility that the court might exercise its power to extend that period, but this sub-section shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under this Act."

The testator died on Feb. 11, 1953, and probate was granted on May 8, 1953. The period for taking out the summons expired on Nov. 8, 1953, but the summons was not taken out until Nov. 10, 1953.

There was a question whether the widow might not take a life interest in the part of the testator's estate representing the assets of his business. At any rate, there was a doubt on that point comparatively early on in the proceedings. The plaintiff's solicitors were informed that an originating summons would be taken out raising a question of construction of the will, and, thereafter, letters were exchanged between the solicitors for the parties concerned, but no such summons was taken out. That continued until the time was reached when the application had to be made under the Act. The plaintiff's solicitors were well aware of the six months' limitation, and began to get anxious as no construction summons was taken out before the long vacation. It was still anticipated, however, that a summons would be taken out by the executors and this view continued to be held until January, 1955, when counsel advised the executors, contrary to the opinion which had originally been given by other counsel, that there was no doubt about the effect of the will and it was unnecessary for the executors to go to the court. That advice put an end to any question of a construction summons. In the meantime, the plaintiff's solicitors had taken out a summons under the Inheritance (Family Provision) Act, 1938. It was issued on Nov. 10, 1953, and was, therefore, just too late. As Nov. 8, 1953, was a Sunday, it may be that the last possible date was Nov. 9, 1953, in which case it was only one day late. However that may be, it was clear it was only a little too late and just outside the time.

In these circumstances, the plaintiff asks for an extension of time within which the summons can lawfully be taken out for the purposes of the Act. This application is not opposed by the executors, but it is opposed by the last defendant, who is joined as a beneficiary because she appears in a representative way on behalf of a class and feels it her duty therefore to put forward such arguments as can be made against the granting of the application.

I have been referred to a decision of ROXBURGH, J., in *Re Greaves (decd.)* (1), in which case there was a mistake by the solicitors for the plaintiff in the sense that it appeared that they were ignorant of the time limit. There had been negotiations in that case which might have avoided the necessity for starting any proceedings at all, but they apparently fell through and when the application was made it was two months out of time. ROXBURGH, J., held that the error was due to the mistake of the solicitor, and as that was not a circumstance affecting the administration or distribution of the estate he felt bound to refuse the application.

In the present case, it is true there has also been a mistake by the solicitors. There is that common feature between the two cases. The solicitors were apparently well aware of the date on which the summons ought to have been taken out, as well as the provisions of the amendment in the Act of 1952. On the other hand, it seems to me that the circumstances are not the same. In the present case, the solicitors for the plaintiff were kept waiting by the executors'

A solicitors who had led them to suppose that some proceedings would be started by the executors for the construction of the will. In one sense, that is not a complete answer because it does not prevent the plaintiff starting her proceedings and getting them adjourned pending a decision on the originating summons taken out by the executors.

On the whole, it seems to me that this is a case in which it would be a hardship if the time were not extended. I think most of these cases must stand on the particular facts in each case, and it is difficult to see that there is any general principle except so far as it is laid down in the provisions of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952. It seems to me that this case comes directly within the words of s. 2 (1A) (b):

C "in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out."

It seems to me that there was a "question" in this case, and that it had "not been determined". Therefore, I have power to extend the time and it seems to me to be a case in which I should extend the time. Accordingly, I extend the time until the expiration of Nov. 11, 1953.

D *Application allowed.*

Solicitors: *Bell, Brodrick & Gray* (for the plaintiff); *Waterhouse & Co.*, agents for *Coleman & Co.*, Hove (for the first and second defendants); *Trotter, Leaf & Pitcairn* (for the third defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

E

UNITED DOMINIONS TRUST (COMMERCIAL), LTD. v. PARKWAY MOTORS, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), May 23, 1955.]

F *Hire-Purchase—Sale of goods by hirer—Sale prohibited by hire-purchase agreement—Assignment of agreement similarly prohibited—Detinue—Relief—Whether owners entitled to value of goods or limited to outstanding instalments.*

G By a hire-purchase agreement dated Oct. 8, 1952, the plaintiffs, the owners of a van, hired it to W. The agreement provided (i) for the payment by W. of a number of monthly instalments with an option to purchase the van for 10s. when the instalments were paid, (ii) that W. should not sell the van or assign the benefit of the agreement, and (iii) that the owners should have the right by notice to terminate the agreement and to retake possession of the van if W. committed a breach of the agreement. In December, 1953, W. sold the van to T., who sold it to the defendants, T. undertaking to see that the balance of the hire-purchase money and the option money was paid to the plaintiffs. In January, 1954, the plaintiffs served a notice on W. terminating the hire-purchase agreement. On the same day the defendants tendered to the plaintiffs the balance of the hire-purchase money and the option money, viz., £96 10s., which the plaintiffs refused to accept. The plaintiffs claimed in detinue for the return of the van or, in default, its value (£350) and damages for its detention.

I **Held:** the plaintiffs were entitled to an order for the return of the van or for its value (£350) and the defendants were not entitled to have the amount recoverable reduced to the amount of the instalments and option money outstanding (£96 10s.) because, although where a defendant had a contractual interest in goods the measure of damages for conversion of the goods was the value of the plaintiff's interest (not the value of the goods), yet the hire-purchase agreement prohibited the sale of the van and the assignment of the benefit of the agreement, and the defendants had, therefore,

no interest in the van and no right to the benefit of the hire-purchase agreement. A

Belsize Motor Supply Co. v. Cox ([1914] 1 K.B. 244) and *Whiteley v. Hilt* ([1918] 2 K.B. 808) distinguished.

[As to alienation by a hirer under a hire-purchase agreement, see 16 HALSBURY'S LAWS (2nd Edn.) 523, para. 772; and for cases on the subject, see 3 DIGEST 95-98, 251-268.] B

Cases referred to:

- (1) *Belsize Motor Supply Co. v. Cox*, [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151; 3 Digest 93, 247.
- (2) *Whiteley v. Hilt*, [1918] 2 K.B. 808; 87 L.J.K.B. 1058; 3 Digest 97, 262.
- (3) *Brierly v. Kendall*, (1852), 17 Q.B. 937; 21 L.J.Q.B. 161; 18 L.T.O.S. 254; 117 E.R. 1540; 7 Digest 133, 756. C
- (4) *Chinery v. Viall*, (1860), 5 H. & N. 288; 29 L.J.Ex. 180; 2 L.T. 466; 157 E.R. 1192; 3 Digest 113, 371.
- (5) *Johnson (Assignee of Cumming) v. Stear*, (1863), 15 C.B.N.S. 330; 33 L.J.C.P. 130; 9 L.T. 538; 143 E.R. 812; 37 Digest 12, 69.

Action. D

By a hire-purchase agreement dated Oct. 8, 1952, the plaintiffs, United Dominions Trust (Commercial), Ltd., a hire-purchase finance company, hired a Morris Cowley ten hundredweight van to John Theodore Williams. By cl. 1 of the agreement the hiring was to commence on Oct. 8, 1952, and, unless determined by either party, was to continue for a period of eighteen months, ending on Apr. 8, 1954. By cl. 2, the initial instalment of rent, £193 5s., was payable on the making of the agreement, and the balance of hire was to be eighteen monthly instalments of £24 1s. each, the first payable on Nov. 8, 1952, and the remainder on the same day of each succeeding month. By cl. 6: E

"During the continuance of this agreement the hirer shall keep the goods in his possession . . . and shall not sell, offer for sale, assign or charge the goods or the benefit of this agreement . . ."

Cl. 13 provided that if the hirer made default in payment of an instalment, or died, or had an order made against him, or committed F

"any breach of any term hereof or shall do or suffer anything whatsoever which in the [plaintiffs'] opinion bona fide formed upon reasonable grounds will or may have the effect of jeopardising the [plaintiffs'] rights of property in the goods the [plaintiffs] shall have the right by notice forthwith to terminate this agreement and retake possession of the goods . . ."

By cl. 17 it was further agreed that G

"if and when all instalments and other moneys payable by the hirer to the [plaintiffs] under this agreement shall have been duly paid and provided that the hirer shall not have committed any breach of the provisions of this agreement then the hirer shall have the option (but shall not be bound) to purchase the goods for the sum of 10s."

The initial payment was made and instalments paid as they fell due up to Dec. 8, 1953, when the instalment due on that date was not paid. On Dec. 23, 1953, Mr. Williams advertised the van for sale and on Dec. 24, 1953, sold the van to a Mr. Trotter for £410. On Dec. 26, 1953, Mr. Trotter sold the van to the defendants, Parkway Motors, Ltd., for £410 10s., Mr. Trotter undertaking to see that £96, the balance due to the plaintiffs under the agreement of Oct. 8, 1952, and 10s., the option money under cl. 17 of that agreement, was paid to the plaintiffs. Mr. Trotter's cheque to Mr. Williams not having been met, Mr. Williams reported the matter on Dec. 28, 1953, to the plaintiffs and paid the instalment due on Dec. 8, 1953. On Jan. 4, 1954, the plaintiffs served a notice on Mr. Williams terminating the agreement of Oct. 8, 1952, thereby purporting to exercise their I

- A right under cl. 13 thereof. On the same day, the defendants tendered to the plaintiffs by cheque, and on Jan. 12, 1954, in cash, £96 10s., being the amount of the unpaid balance of hire, plus 10s. due on the option under cl. 17 on the basis that they had become entitled to exercise Mr. Williams' rights under the agreement. The plaintiffs refused to accept either the cheque or the cash, and brought an action in detinue against the defendants for the return of the van or, in default, for its value (which was £350) and damages for its detention.

Maurice Lyell, Q.C., and J. M. Rankin for the plaintiffs.

John Thompson, Q.C., and J. W. Borders for the defendants.

- McNAIR, J., stated the facts and continued: The real dispute between the parties is whether the plaintiffs are entitled to recover the sum of £350, the value of the van at the date of conversion, or whether their claim for damages is limited to the sum of £96 10s. Normally, of course, a party who converts the property of another is bound to pay him the real value of the property so converted; but it is said on behalf of the defendants that, while accepting that as a general rule, there is, in these circumstances, to be applied an exception recognised by law as applicable in cases of this nature, namely, that in these circumstances the damages payable to the hire-purchase company are limited to the outstanding hire money and the money which it would be necessary to pay to exercise the option of purchase. Counsel for the defendants primarily relies, in support of that submission, on two cases: *Belsize Motor Supply Co. v. Cox* (1), and *Whiteley v. Hilt* (2), a decision of the Court of Appeal. In the former of those cases, CHANNELL, J., had to consider two points: one, whether the hirer under a hire-purchase agreement in similar, but not identical terms with the present, was a person who could part with property under s. 25 of the Sale of Goods Act, 1893, to a person taking it from him in good faith; and, secondly, he had to consider the question of damages. I am not concerned here with the first question, but with the question of damages. In *Belsize Motor Supply Co. v. Cox* (1), where the question was one of a pledge, it was held that, as the pledgee had an interest in the vehicle, the measure of damage was not the full value of the vehicle but was only the value of the owners' interest therein, that is, the amount of the hire and purchase money remaining unpaid. I take that from the headnote.

In the course of his judgment, CHANNELL, J., says this ([1914] 1 K.B. at p. 251):

- "The second point in the case is more doubtful. Does this case come within the exception to the general rule that in an action for conversion the measure of damages is the value of the goods and chattels converted? There is an exception to that rule where the defendant has an interest in the goods and chattels converted; then the measure of damages is the value of the plaintiff's interest as between himself and the defendant. This exception has often been recognised, for example, in *Brierly v. Kendall* (3), *Chinery v. Viall* (4) and *Johnson v. Stear* (5). I am not aware of any binding authority applying this exception to a case where the rights of the parties depend upon a hire and purchase agreement. The defendant is not himself the original bailee, but is a third person deriving title from the original bailee. In the present case he is a pledgee. A pledgee or purchaser takes such title as his pledgor or vendor has, and here, whether the pledge to the defendant was rightful or wrongful (in this case it was wrongful), yet the defendant thereby acquired such rights as the Burgess Company, the original hirers, had."

In my judgment, it is quite clear that CHANNELL, J., in that case took the view, as a matter of construction of that particular hire-purchase agreement, that the hire-purchase agreement itself was assignable. The clause in the *Belsize* case (1) dealing with re-letting and selling or parting with the possession was in these terms:

"The hirer shall not relet sell or part with the possession of the said motor taxi-cab . . . without the previous consent in writing of the owners or their said agents."

There is nothing in the *Belsize* case (1) in any way comparable with the words in cl. 6 in the present case, which prohibit the hirer from assigning the goods or the benefit of this agreement. That CHANNELL, J., took the view that an assignable interest in the contract passed to the defendant in the case which he was considering is clear from the language to which I have referred and from the cases on which he relied in his judgment. In each of those cases which have been examined before me the defendant had a contractual interest in the goods and, when sued by the respective plaintiffs for conversion, was able to say that as between him and the plaintiff he, the defendant, had an interest in the goods which had the effect of diminishing the value of the goods in his hands. In CHANNELL, J.'s case, also, the defendant Cox was in a position to say that he had an interest arising under this hire-purchase agreement which gave him a right to obtain the ownership of the motor vehicle on payment of the unpaid balance. That can only be on the footing that that contractual option was an assignable option and had, in fact, in the circumstances been assigned to the pledgee.

The other case referred to is *Whiteley v. Hilt* (2), which arose under a hire-purchase agreement under which a piano was let out on hire by Messrs. Whiteley, Ltd. to a Miss Nolan and passed into the possession of the defendant. The question in this case, too, was the same, inasmuch as the original hirer, Miss Nolan, had a right to acquire ownership by exercising an option. The question was whether the defendant, as her assignee, could exercise the same right and so limit the amount of damages recoverable. SIR CHARLES SWINFEN EADY, M.R., giving the leading judgment, sets the question for the court as follows ([1918] 2 K.B. at p. 817):

"The first question which arises is whether Mrs. Widlake [Mrs. Widlake was formerly Miss Nolan] had any interest under the hire-purchase agreement which she could lawfully assign."

WARRINGTON, L.J. (*ibid.*, at p. 819), and DUKE, L.J. (*ibid.*, at p. 822), posed the question in the same terms. It was only because, on the facts of that case, the lords justices came to the conclusion that the original hire-purchase agreement was assignable that they limited the plaintiffs' right to recover in the same way as it has been limited by CHANNELL, J., in the *Belsize* case (1). The *Belsize* case (1) is only referred to in the judgment by WARRINGTON, L.J. (*ibid.*, at p. 821). I think that it is clear from the way in which he refers to that case that he treats it as being a case parallel to the case then before the court.

In the particular contract in the present case the hirer is prohibited by the terms of the contract from assigning, or purporting to assign, or attempting to assign, either the goods themselves or the benefit of this agreement. Accordingly, as it seems to me, Mr. Williams, the hirer, was unable to pass any rights in the van or any rights under the agreement to Mr. Trotter; and, if he could not pass any rights to Mr. Trotter, then Mr. Trotter could not pass any rights to the defendants. Accordingly, the defendants are in the position of persons who have no interest in the goods and have no contractual rights or other rights against the plaintiffs which enable them to cut down the plaintiffs' *prima facie* right to recover the value of the goods. Accordingly, in my judgment, they are entitled to recover the sum of £350, the approved value of the motor van.

Judgment for the plaintiffs for return of the van or for its value (£350).

Solicitors: *H. Huband Harper* (for the plaintiffs); *Linsley-Thomas & Co.* (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

DENHAM v. MIDLAND EMPLOYERS' MUTUAL ASSURANCE, LTD.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), May 13, 16, 17, 18, 26, 1955.]

B

Master and Servant—Loan of servant—Whether servant under “contract of service” with new employer—Unskilled labourer—No consent to transfer—Duty to comply with new employers’ directions as to way of doing work—Old employers’ liability for wages and insurance and right of dismissal. Insurance—Employers’ liability—Construction of policy—Whether servant under “contract of service” with assured—Loan of servant to assured—Unskilled labourer.

C

Brick-makers employed contractors to bore holes on their property and agreed to provide an unskilled labourer to assist the contractors’ skilled drillers in carrying out the work. The brick-makers provided a labourer, of whom they were the normal employers, without obtaining his consent to any transfer of his contract of service. They alone had power to dismiss him, they paid his wages, kept his insurance cards and paid for his insurance stamps; but the labourer worked at unskilled tasks under the direction of the contractors’ foreman, with whose proper orders the labourer had to comply. In the course of the work he was killed through the negligence, so it was conceded for the purpose of the proceedings, of the contractors, and his widow and administratrix brought an action for damages against the contractors. They claimed indemnity from one of two insurers, viz., either from the one insurer under an employers’ liability policy covering personal injury by accident to “any person under a contract of service” or from the other insurer under a public liability policy covering the death of persons other than “any person under a contract of service”, the contract of service being in each case with the contractors. On the question which of the two insurers was liable to indemnify the contractors,

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E

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Held: the contractors were entitled to indemnity under the public liability policy and not under the employers’ liability policy because the labourer was not “under a contract of service” with them but was under a contract of service with the brick-makers; further (per DENNING and BIRKETT, L.JJ.) the original contract of service could not be transferred without the labourer’s consent (*Nokes v. Doncaster Amalgamated Collieries, Ltd.* ([1940] 3 All E.R. 549) followed); and any vesting of responsibility to the labourer in the contractors as his temporary employers since he was working under their direction (principle of *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* ([1946] 2 All E.R. 345), and *Garrard v. A. E. Southey & Co. & Standard Telephones & Cables, Ltd.* ([1952] 1 All E.R. 597) considered) did not amount to a contract of service within the meaning of that term in the insurance policies.

H

Appeal dismissed.

I

[**Editorial Note.** The labourer whose services were lent in the present case was unskilled, and it is pointed out (see at p. 564, letter E, post) that the legal doctrine whereby a labourer may become temporarily the servant of an employer to whom his services are lent is a device to fix that employer with the responsibility towards him for his safety, and but rarely applies if the labourer is skilled, so that, in effect, he determines himself how he does his job. Comparison on this aspect of the case may usefully be made with *O’Reilly v. Imperial Chemical Industries, Ltd.* (p. 567, post), where in the rather special circumstances of that case the quasi-employers were held responsible for negligence towards a lorry driver who was the servant of another employer.

In the court below LORD GODDARD, C.J., took the view that on the facts found by the arbitrator this aspect of the present case was covered by *Century*

Insurance Co., Ltd. v. Northern Ireland Transport Board ([1942] 1 All E.R. at p. 496, letter H), where LORD WRIGHT said that the presumption was against a transfer of a man's service, most cases being explicable on the basis of an understanding that the man is to obey the directions of another contractor (*Denham v. Midland Employers' Mutual Assurance, Ltd.*, [1955] 1 Lloyd's Rep. at p. 249).

As to the loan of a servant, see 22 HALSBURY'S LAWS (2nd Edn.) 242, para. 422; and for cases on the subject, see 34 DIGEST 22-27, 23-58.]

Cases referred to:

- (1) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.
- (2) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- (3) *Garrard v. A. E. Southey & Co. & Standard Telephones & Cables, Ltd.*, [1952] 1 All E.R. 597; [1952] 2 Q.B. 174; 3rd Digest Supp.
- (4) *Moore v. Palmer*, (1886), 2 T.L.R. 781; 51 J.P. 196; 34 Digest 26, 47.

Appeal.

The appellant was an underwriting member of Lloyd's who, with other underwriting members of Lloyd's, had issued to Le Grand Sutcliff & Gell, Ltd. ("Le Grand") a public liability policy of insurance. The respondents were an insurance company and had issued an employers' liability policy to the same company and also to Eastwoods, Ltd. Following an accident causing the death of an unskilled labourer lent by Eastwoods, Ltd., to Le Grand in connection with a contract between them, an action for damages for negligence was brought by the widow and administratrix of the estate of the labourer under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against Le Grand who claimed to be entitled to be indemnified against any liability they might be under in respect thereof under one or other of their two policies of insurance. The appellant and the respondents by agreement referred the question of whether Le Grand were so entitled to an arbitrator, it being agreed for the purposes of the arbitration that the liability of Le Grand to the wife and administratrix existed by reason of negligence on their part or on the part of some servant of theirs. The arbitrator made his award, dated Dec. 3, 1954, in the form of a Special Case for the decision of the High Court. He found that at the time of the accident the labourer was a servant of Le Grand who sustained personal injury by accident arising out of and in the course of his employment and that the respondents, and not the appellant, were liable to indemnify Le Grand in respect of any liability which they might have incurred to the widow and administratrix. In the High Court LORD GODDARD, C.J., in a judgment dated Feb. 24, 1955, held that the labourer had not been in the service of Le Grand and that, therefore, the appellant was liable, and not the respondents, to indemnify Le Grand. The appellant appealed to the Court of Appeal.

P. M. O'Connor and M. McLaren for the appellant.

Marven Everett, Q.C., and *Tudor Evans* for the respondents.

Cur. adv. vult.

May 26. The following judgments were read.

DENNING, L.J. : Eastwoods, Ltd. are brick-makers who own property at Woburn Sands. Le Grand Sutcliff & Gell, Ltd. are contractors who specialise in boring holes in the ground. In August, 1953, Eastwoods employed Le Grand to make test borings on their property at Woburn Sands. Le Grand agreed to provide two skilled drillers with plant and tackle to carry out the test borings at a stated price; and Eastwoods agreed to provide "one labourer to assist" the two skilled men free of charge to Le Grand. It was quite a usual arrangement between the two companies for Eastwoods to provide unskilled labour to assist the skilled drillers of Le Grand. If Eastwoods had not

A provided the unskilled labour, Le Grand would have got it from the local employment exchange.

In September, 1953, Eastwoods lent a man named Clegg to Le Grand to do the unskilled work. After a few days he was killed at his work; he was helping to get a wire rope on to a derrick when it came into contact with the cable of an electricity pylon and he was electrocuted. It is agreed for present purposes that

B Le Grand are liable to pay damages to his widow on the ground that his death was due to the negligence of Le Grand or their servants. Le Grand seek to be indemnified by their insurers against this liability; but the difficulty arises because they insured with two concerns. They insured with the Midland Employers' Mutual Assurance, Ltd., the respondents, in respect of their liability to their servants, and they insured with Lloyd's in respect of their liability to the public. One or other of these concerns is liable to indemnify Le Grand. The question is which of them is to do so. They have put the matter before an arbitrator, who has stated his award in the form of a Special Case for the decision of the court.

The employers' liability policy issued by the respondents states that:

D "If any person under a contract of service or apprenticeship with the insured shall sustain any personal injury by accident or disease caused during the period of insurance and arising out of and in the course of his employment by the insured in the business above mentioned and if the insured shall be liable to pay damage for such injury or disease the association shall indemnify the insured against all sums for which the insured shall be so liable."

E The public liability policy states that the Lloyd's underwriters will

"indemnify the assured for any sums which they may become legally liable to pay in respect of: (i) death of or accidental bodily injury to persons; (ii) loss of or damage to property; arising in or out of the business of boring and pump engineers carried on by Le Grand Sutcliffe & Gell, Ltd., anywhere in the United Kingdom and Ireland, including Eire. *Exclusions.* This policy does not cover: (i) liability for death of or bodily injury to any person under a contract of service or apprenticeship with Le Grand Sutcliffe & Gell, Ltd., where such death or injury arises out of and in the course of his employment by Le Grand Sutcliffe & Gell, Ltd."

G On reading those two policies, it is plain that the question is whether Mr. Clegg was employed "under a contract of service" with Le Grand. If he was so employed, the respondents are liable to indemnify Le Grand. If he was not so employed, Lloyd's underwriters are liable.

The arbitrator stated the relevant facts in paras. 5 and 6 of his award:

H "On the evidence called before me I find as facts that a few days prior to Sept. 30, 1953, Mr. Clegg was lent by Eastwoods to Le Grand for the said purpose; that it was the practice of Le Grand, if no labourer was lent to them, to employ one obtained from the local labour exchange; that the labourer's work was unskilled; that Mr. Clegg himself had no previous experience at that work, that the actual manual work which he was required to do consisted of all sorts of rough work and odd jobs and included handling a rope in connection with the erection of the rig for the purpose of putting it on a drum; that he did this under the specific direction of one Gale, a foreman employed by Le Grand, that he had to comply with any proper orders given him by such foreman; worked the same hours as those of Le Grand's general employees on the site including overtime. I also find as facts that he was paid his wages by Eastwoods; that they alone had the power to dismiss him; that they kept his national health insurance card, but apart from the occasional presence of one Crossby on the site of the work no other employee of Eastwoods was present on the site at any material time, nor

gave any directions to Mr. Clegg directly or indirectly . . . On the said facts I draw the inference that the only practical ways in which his services were or could have been employed at that site were such that whenever it was necessary to instruct him what to do or how to do what he was required to do he would have to obey the orders of the foreman Mr. Gale and that that was recognised by Le Grand, by Eastwoods and by Mr. Clegg himself."

The difficulty of the case is shown by the fact that the arbitrator—for whose opinion we all have the most sincere respect—found one way and the Lord Chief Justice has found the other way. I find myself in agreement with the decision of the Lord Chief Justice.

Much of the difficulty which surrounds this subject arises out of the nineteenth century conception that a servant of a general employer may be transferred to a temporary employer so as to become for the time being the servant of the temporary employer. That conception is a very useful device to put liability on the shoulders of the one who should properly bear it. But it does not affect the contract of service itself. No contract of service can be transferred from one employer to another without the servant's consent: and this consent is not to be raised by operation of law but only by the real consent in fact of the man, express or implied: see *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (1). In none of the transfer cases which have been cited to us has the consent of the man been sought or obtained. The general employer has simply told him to go and do some particular work for the temporary employer and he has gone. The supposed transfer when it takes place is nothing more than a very convenient and just device to put liability on to the temporary employer. In recent years this device has been very much restricted in its operation. It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only *what* the servant is to do, but also *how* he is to do it: see *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (2). Such a transfer rarely takes place when a man is lent with a machine, such as a crane or a lorry: or when a skilled man is lent so as to exercise his skill for the temporary employer. In such case the parties do not contemplate that the temporary employer shall tell the man how to manipulate his machine or to exercise his skill. A transfer does sometimes take place in the case when an unskilled man is lent to help with labouring work: see *Garrard v. A. E. Southey & Co. & Standard Telephones & Cables, Ltd.* (3). The temporary employer can then no doubt tell the labourer how he is to do the job. The labourer becomes so much part of the organisation to which he is seconded that the temporary employer is responsible for him and to him.

Applying these principles to the facts found by the arbitrator, I have myself no doubt that, if a third person had been injured by the negligence of Mr. Clegg in the course of his work, then Le Grand would be liable to the third person and not Eastwoods. So also, when Mr. Clegg himself was killed, Le Grand are liable to his widow on the same footing as if they were his masters and not merely as inviters. These results are achieved in law by holding that Mr. Clegg became for the time being the temporary servant of Le Grand. There is no harm in thus describing him, so long as it is remembered that it is a device designed to cast liability on the temporary employer. The real basis of the liability, however, is, simply this: If a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility. So, also, if a temporary employer sets a labourer to work alongside his own skilled men, he should take just as much care to see that the plant and material are safe for the labourer as for the skilled men. The labourer should not be defeated by knowledge of the danger any more than the skilled men.

- A I cannot regard the propositions about "temporary servant" and "temporary employer" as decisive of the questions now before us. We have to decide simply whether, on the wording of the employers' liability policy, Mr. Clegg was employed "under a contract of service" with Le Grand. I do not think he was. His contract of service was with Eastwoods and Eastwoods alone. They selected him. They paid him. They alone could suspend or dismiss him.
- B They kept his insurance cards and paid for his insurance stamps. He was never asked to consent to a transfer of the contract of service and he never did so. If he was not paid his wages, or if he was wrongfully dismissed from the work, he could sue Eastwoods for breach of contract and no one else. If he failed to turn up for work Eastwoods alone could sue him. I see no trace of a contract of service with Le Grand, except the artificial transfer raised by the law so as to
- C make Le Grand liable to others for his faults or liable to him for their own faults; and I do not think the artificial transfer so raised is "a contract of service" within this policy of assurance. There was no contract of service between Mr. Clegg and Le Grand. Le Grand are therefore not entitled to recover against the respondents under the employers' liability policy, but only against the applicant under the public liability policy.
- D This view is confirmed by the fact that the premium on the employers' liability policy is regulated by the "amount of wages and salaries and other earnings paid to employees by the insured" during the period of insurance. The premium is therefore paid to cover the risk of injury to men on the pay roll of Le Grand, and not to men on the pay roll of anyone else. It is also confirmed by the fact that Eastwoods would be the employer of Mr. Clegg for the purposes of the Workmen's Compensation Acts: see s. 5 (1) of the Act of 1925. I would dismiss this appeal.

BIRKETT, L.J. : I agree with the judgment which has just been delivered by my Lord. I have had the opportunity of reading in advance and considering the judgment of **ROMER, L.J.**, with which I agree and which I am about to read.

- F In those circumstances I do not propose to deliver a judgment of my own.

ROMER, L.J. (read by **BIRKETT, L.J.**): Notwithstanding the persuasive and able argument which Mr. O'Connor addressed to us on behalf of the appellant I am of opinion that the Lord Chief Justice came to a right conclusion in this case.

- The question, as it seems to me, is a short one and may be stated thus. At the time when the workman, Mr. Clegg, met with his accident, was he, on the facts as
- G found by the learned arbitrator, a person under a contract of service with Le Grand Sutcliffe & Gell, Ltd., within the contemplation of the policy which the respondents issued to Le Grand? If he was, then the respondents are liable under the policy; if he was not, then no liability attaches to them. Immediately prior to his going to work for Le Grand, Mr. Clegg was working under a contract of service with Eastwoods, and in my judgment he was still performing his obligations
- H under that contract at the time when he met his death. If it be said, as it is said, that, when he started to work for Le Grand, he entered into a new contract of service with that company, one is entitled and bound to inquire what the terms of that contract were. Among the common features of a service contract are an obligation by the employer to employ a man, and to pay him an agreed or proper wage, and a right to control his services, and the manner in which he performs
- I them, and to dismiss him if reasonable cause is shown; and, on the workman's side, he must obey all reasonable directions, present himself for work at an agreed hour, and continue to work for the agreed period, and he will be guilty of breach of contract if he refuses to perform these obligations. In my opinion the only one of the features which I have mentioned which was present in the association which existed between Mr. Clegg and Le Grand was that he had to perform the tasks which were allotted to him in whatever way Le Grand told him to perform them. None of the other features was present. Le Grand were under

no duty to him to give him employment or to pay him, nor could they dismiss him. On the other hand, Mr. Clegg was under no duty to Le Grand to work for them for any agreed hours or at all and could not have been sued by them for breach of contract if he stayed at home instead of reporting for work. Further, the inference which I draw from the arbitrator's findings is that the reason why he subjected himself to the control of Le Grand as to what he did and how he did it was that Eastwoods told him to do so.

It appears to me, accordingly, that not even the skeleton of a service contract has been established as between Mr. Clegg and Le Grand. Nor is there any evidence that either Le Grand or Mr. Clegg at any time agreed to enter into such a contract, and the relationship of master and servant cannot be established except by mutual consent. If Le Grand were intending to incur the obligations of an employer, they would presumably have reserved also the corresponding right to dismiss; whilst Mr. Clegg would hardly bind himself to work for Le Grand without securing the right to receive a wage. Yet the right to dismiss was at all times vested in Eastwoods, and it was to them alone that Mr. Clegg was entitled to look for his wages. When to this is added the fact that Eastwoods kept his national insurance card, it is difficult indeed to accept the view that Mr. Clegg entered into a service contract with Le Grand in substitution for, or (if such a thing were possible) concurrently with, that which already existed between himself and Eastwoods. There is a clearly marked distinction between the transfer of a servant on the one hand and the transfer only of his services on the other. BOWEN, L.J., said in *Moore v. Palmer* (4) (2 T.L.R. at p. 782):

"The great test was this—whether the servant was transferred or only the use and benefit of his work?"

The facts of the present case show clearly, in my judgment, that, as between Mr. Clegg and Eastwoods and Le Grand, all that was transferred to Le Grand was the use and benefit of Mr. Clegg's work; and the fact that Le Grand were to be entitled to control that work (which, it is to be observed, was work done on Eastwoods' premises and for their purposes) cannot in itself establish a new contract of service which was not within the contemplation of any of the parties concerned. It is true, as my Lord has pointed out, that for some purposes Le Grand undoubtedly assumed the obligations and liabilities of a master in relation to Mr. Clegg; for example, they would have been answerable to a third party who was injured as a result of Mr. Clegg's negligence while working for them. This consideration does not, however, in my opinion, affect the real issue in this case, which is: whether Mr. Clegg at the time of his death was a person under a contract of service with Le Grand, within the meaning of that phrase as used in the policy. In my judgment he was not, and I am fortified in this conclusion by the fact that, by para. 5 of the conditions attached to the policy, the annual premium payable to the insurers was measured by reference to the wages paid by Le Grand to their employees, which is some indication that the contracts of service envisaged by the policy were contracts of the ordinary kind which exist between master and servant and possessing the features to which I have earlier referred. I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hewitt, Woollacott & Chown* (for the appellant); *Machin & Co.* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A O'REILLY v. IMPERIAL CHEMICAL INDUSTRIES, LTD.

[MANCHESTER ASSIZES (Oliver, J.), May 4, 9, 1955.]

Master and Servant—Loan of servant—Long-standing arrangement—Hirer's duty to servant—Whether that of invitor or quasi-employer—Hire of lorry and driver—Driver working for hirer on full-time basis—Driver injured through dangerous method of unloading adopted by hirer.

The plaintiff was a lorry driver employed by British Road Services (referred to hereinafter as "B.R.S.") at their depot at Kearsley. Under an arrangement between B.R.S. and the defendants, a number of B.R.S. lorries and their drivers, including the plaintiff, were put at the disposal of the defendants on a whole-time basis. The defendants' name was on the lorries and there was nothing on the lorries to show that they belonged to B.R.S., but the drivers were still paid by B.R.S. and could be dismissed only by B.R.S. Over a period of many years the plaintiff, under this arrangement, had collected his lorry in the morning from the B.R.S. depot at Kearsley, driven to one of the defendants' depots, loaded the lorry under the defendants' instructions, and had then taken the goods to another depot belonging to the defendants, unloading under their directions. On Jan. 1, 1953, while the plaintiff was unloading drums of Terylene from his lorry at the defendants' Terylene plant, he fell from the mechanical platform provided by the defendants for the unloading and was seriously injured. In an action against the defendants for damages for negligence, the court found that the method of unloading adopted by the defendants was dangerous, that the danger was obvious, and that there was no contributory negligence on the part of the plaintiff in the actual performance of the task. On the question of the defendants' liability to the plaintiff,

Held: the plaintiff was, on the facts, a quasi-employee (not merely an invitee) of the defendants, and the defendants owed to him the same duty in regard to appliances and a safe system of work as if he had been their own employee; and, therefore, the defendants were liable to the plaintiff in damages for their negligence in adopting a dangerous method of unloading, notwithstanding that the danger was obvious to the plaintiff so that if he had been merely an invitee he could not have maintained the action.

London Graving Dock Co., Ltd. v. Horton ([1951] 2 All E.R. 1) distinguished.

[Editorial Note. This case may be compared with *Garrard v. A. E. Southey & Co. & Standard Telephones & Cables, Ltd.* ([1952] 1 All E.R. 597), where a workman whose services were lent by his general employers to the occupiers of a factory was injured by defective plant in the factory and the occupiers of the factory were held liable. In that case the court rejected the contention of the occupiers that the conclusive or sole test of liability in such a case was who had the power to dismiss the workman. It is rarely, however, that circumstances are such that a skilled worker who is the servant of an employer becomes temporarily in a position in which another master, to whom his services are lent, is fixed with responsibility towards him as a master, since a skilled worker will not usually be under directions how his work is to be done (cf. *Denham v. Midland Employers' Mutual Assurance, Ltd.*, at p. 564, letter E, ante).

As to duty to invitees, see 23 HALSBURY'S LAWS (2nd Edn.) 604, para. 853; and for cases on the subject, see 36 DIGEST (Repl.) 54-56, 291-304, and 62, 63, 335-344.

As to master's duty to servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187, para. 314; and for cases on the subject, see 34 DIGEST 194-198, 1583-1620.

As to the existence of the relation of master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 112, para. 191; and for cases on the subject, see 34 DIGEST 22-27, 24-55.]

Case referred to:

- (1) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; *revsq.* [1950] 1 All E.R. 180; [1950] 1 K.B. 421; 2nd Digest Supp.

Action.

The plaintiff was a lorry driver employed by British Road Services at their depot at Kearsley. For a period of twelve or fourteen years British Road Services and their predecessors at the depot had supplied to the defendants, Imperial Chemical Industries, Ltd., a number of lorries together with their drivers, on a whole-time basis, and the plaintiff was one of the drivers who had worked continuously for the defendants throughout that period. The lorries were kept at the British Road Services' depot at Kearsley, but they were marked "I.C.I.", and there was nothing on them to show that they belonged to British Road Services. The drivers, however, were paid by British Road Services and could be dismissed only by British Road Services. In the morning the plaintiff used to drive his lorry to one of the defendants' depots, in accordance with the defendants' instructions, pick up the load which he was required to carry, and take it to another depot belonging to the defendants, the loading and unloading being done under the supervision and direction of the defendants' employee in charge of the particular depot. On Jan. 1, 1953, the plaintiff took a load of some twenty-three drums of a chemical called Terylene, manufactured by the defendants, to the defendants' Terylene plant at Thornton-le-Fylde. The drums, which had no handles or lugs, were approximately three feet long and two feet wide and weighed about three hundred pounds each, and they were stowed upright in the lorry in three tiers. It had originally been the defendants' practice to have the drums delivered at the unloading bay at their Thornton depot where there were proper facilities for unloading. This depot was about a quarter of a mile from the Terylene plant, and, owing to the difficulty of re-conveying the drums to the plant, the defendants decided, at some date before 1953, to have the drums taken in the British Road Services' lorries direct to the plant. On Jan. 1, 1953, the unloading gear provided by the defendants for use at the plant was a mechanical apparatus having a platform which could be adjusted to a height of six feet two inches from the ground. As this height was only a few inches above the deck of the lorry, the plaintiff had to stand on the platform in order to lower the two top tiers of the load on to the platform, and, as the dimensions of the platform were only five feet by three feet, there was not sufficient room for a second person to stand on it so as to help at this difficult stage of the unloading. The plaintiff managed to get down one drum from the top tier by sliding it on to the second tier, controlling it against himself, and then placing it on the platform. While he was trying to unload a second drum he fell on to the floor with the drum on top of him and was seriously injured. He claimed damages against the defendants for personal injuries arising out of their negligence.

H. I. Nelson, Q.C., and *C. M. W. Elliott* for the plaintiff.

R. H. Forrest, Q.C., and *R. G. Clover* for the defendants.

Cur. adv. vult.

May 9. **OLIVER, J.**, stated the facts, and said: I have to decide whether Imperial Chemical Industries, Ltd., who are the only defendants, are liable for the accident. A number of questions arise. The first is: Was this a reasonably safe or a dangerous method of unloading the heavy drums, dangerous in the sense of involving anyone who was responsible for the method in negligence? Secondly, assuming that it was dangerous in this sense, are the defendants liable? What duty did they owe to the plaintiff in the circumstances? Is he, as was contended by the defendants, only an invitee, so as to come within the decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* (1), or, on the facts of the case, do the defendants owe him a larger duty than that owed to an invitee?

- A On the facts, do they owe him the duty of an employer? I do not think that it is necessary to enlarge on what *Horton's* case (1) decided. That case caused great doubt and difficulty in the various tribunals before which it came, and it was eventually decided that the only duty owed to the plaintiff, as an invitee, was that, if an unusual danger existed in and about the work, he was to be warned of it, unless it was obvious that he knew of it. Whatever danger there was in the
- B present case was obvious and the plaintiff knew of it.

The third question is: If the defendants did owe to the plaintiff the duty of employers in the circumstances, was the plaintiff guilty of contributory negligence? So far as contributory negligence in the actual performance of this task is concerned, I clearly find that he was not, and I do not think it was really suggested that he was. An attempt to handle, single-handed, and on a narrow

C platform, such a weight as three hundred pounds, without any appliances and without even handles or lugs by which to steady it, could obviously result in an accident to the workman engaged on the task, in spite of his using the very best endeavours. [His LORDSHIP then reviewed the evidence on the question whether or not the method adopted by the defendants in regard to unloading the drums was dangerous, and held that it clearly was. His LORDSHIP continued:]

- D The question which I now have to consider is the extent of the duty owed to the plaintiff by the defendants. The plaintiff was not in the employment of the defendants in that they did not pay him, they had not engaged him, and could not dismiss him. He was, in fact, the servant of British Road Services. It seems to me, however, that there is, in this case, a very special set of facts, and I have come to the conclusion that this special set of facts distinguishes this case from
- E *Horton's* case (1). Here was no casual employment of a British Road Services' lorry by the defendants. For twelve or fourteen years it had been the practice for a number of lorries at the Kearsley depot, including the plaintiff's lorry, to be hired, on a whole-time basis, to the defendants. In the morning the plaintiff and the other lorry drivers from the Kearsley depot who were on loan to the defendants would go from the Kearsley depot to a depot of the defendants where
- F they would load their lorries under the supervision and direction of whoever was in charge of that depot on behalf of the defendants. The defendants would decide what load was to be taken. The driver, of course, would decide how the load was to be stowed, and I suppose that he could have refused to load if he thought that the load was so big as to be dangerous. He could have done that even in the case of his ordinary employers: if they told him to do something
- G which he thought was dangerous, he could have refused to do it. Subject to that, however, the lorry driver was entirely under the direction of whoever was in charge of the defendants' depot.

- [His LORDSHIP described the different methods employed by the defendants for unloading the drums of Terylene, including the method which was in use at the time of the accident, namely, the mechanical platform. His LORDSHIP
- H continued:] It is hard to say how often the plaintiff had used that machine for unloading. A man working as he was doing would not remember; it is no part of his duty to make a note of his daily occasions. I should not think that the machine had been there very long. The plaintiff could not have used it much because on the morning of the accident, when the young man who was then in charge of the unloading at the Terylene plant brought this machine round to
- I the tail of the plaintiff's lorry, the plaintiff said: "Is that all you have got?" It does not look as if the plaintiff had a very thorough knowledge of the machine before that morning. However, as I have said, I cannot decide that.

As counsel for the plaintiff pointed out, each of the methods of unloading was inaugurated by the defendants: it was their method. Just as they were in control of the loading, so they were in control of the unloading, except that the plaintiff could have said: "I am not going to use that machine. I am going to take my load back home to Kearsley", which was about fifty miles away. Had

the plaintiff done so, he would have wasted the day, and would probably have been dismissed when he got there for not doing what the defendants had told him to do. A

Counsel for the plaintiff contended that the history and the circumstances of the present case distinguished it completely from *Horton's* case (1), and that, having regard to the fact that the state of affairs in the present case had continued over a long period, the plaintiff could not be regarded as a mere invitee, but could be described as a quasi-employee of the defendants. Counsel for the defendants, on the other hand, contended that *Horton's* case (1) completely covered the present case. He submitted that, where a man was engaged, paid, and was dismissible by some other employer, then, whatever the circumstances, whatever the history, he was a mere invitee. I use the phrase "mere invitee" because in this case it seems to me to be appropriate, an invitee being in a much worse position, so far as this sort of matter is concerned, than an employee. C
How difficult is this particular tract of legal country is illustrated by *Horton's* case (1) itself. In that case *LYNSKEY, J.*, who tried it, gave judgment for the defendants on the ground that the plaintiff knew of the danger and, being an invitee and not in the employment of the defendants, could not succeed. All three lords justices who heard the appeal reversed the decision of *LYNSKEY, J.* I have only to mention that the three included *TUCKER, L.J.*, now *LORD TUCKER*. In the House of Lords, by a majority of three to two, the judgment of *LYNSKEY, J.*, was restored. Thus it happened in that case, as, necessarily, in others, that the opinion of four judicial authorities prevailed over that of five. None the less, the decision in the House of Lords is the law, and, if I thought that it applied to these facts, I would, of course, be bound by it. With considerable hesitation E
I have come to the conclusion that the plaintiff is right and that in this case, by reason of all the circumstances, the defendants owed him the same duty as regards appliances and system of work as if he had, in fact, been their own employee. They were his employers in every respect except that they did not pay him and could not dismiss him. If that be the true relation, it would be entirely wrong to say that he was guilty of contributory negligence if all that he did was to try to work a negligent system devised by his employers or quasi-employers. Therefore, there must be judgment for him. F

[His LORDSHIP reviewed the evidence on the question of damage and assessed the damages to which the plaintiff was entitled at £2,341 10s. 4d., including the sum of £841 10s. 4d. as special damages.]

Judgment for the plaintiff. G

Solicitors: *Fielding & Fernihough*, Bolton (for the plaintiff); *J. W. Ridsdale* (for the defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

A BAKER v. BARCLAYS BANK, LTD.

[BIRMINGHAM ASSIZES (Devlin, J.), March 22, 23, April 6, 1955.]

Partnership—Conversion of partnership property by one of two partners—
 Cheques payable to partnership indorsed by one partner and paid into third
 person's banking account—Right of aggrieved partner to sue alone without
 joining guilty partner—R.S.C., Ord. 16, r. 11.

B Bank—Cheque—Conversion—Whether holder in due course—Duty to make
 inquiries—Negligence—Partnership cheques appropriated by one partner,
 handed over to a customer of bank, and paid into customer's account—Bills
 of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 29 (1) (b), s. 30 (2), s. 82.

C From October, 1950, the plaintiff carried on a confectionery business in
 partnership with B. under the name of "Modern Confections". The
 partnership's manufacturing process was carried on at premises at Hinckley
 and at Nuneaton, but all the office work was done at Hinckley where the
 plaintiff worked, while B. was in charge of the Nuneaton premises. Until
 about April, 1951, the invoices for all goods from both premises were made
 out at Hinckley, usually by the plaintiff, while the cheques in payment of
 D the goods were usually collected by B. The partnership had an account
 with the M. bank at Hinckley, and the usual practice was for both the plain-
 tiff and B. to indorse the cheques before paying them into the M. bank, but
 each had authority to indorse alone. From about April, 1951, B., without in-
 forming the plaintiff, began to run the business at Nuneaton separately from
 E Hinckley, sending out invoices on his own account. The cheques received
 in payment of these invoices were made out to B., and, after being indorsed
 by him, were handed over to J., a customer of the Nuneaton branch of the
 defendant bank, Barclays Bank, Ltd. At that time J. had three accounts with
 the defendant bank: (a) a current account, which was opened in 1938, was in
 credit, between 1946 and 1951, to the extent generally of about £150 to £200,
 and had an annual turnover of about £5,000; (b) a No. 2 account, opened
 F in 1946, on which J. was allowed to draw up to an agreed limit and which
 was overdrawn by 1951 to an amount exceeding £980; and (c) a No. 3
 account, opened in 1947 in connection with a particular business on which J.
 was then engaged. By the beginning of April, 1951, the No. 3 account
 showed a credit balance of 5s. 6d. and had become dormant. From the
 middle of April, J. indorsed and paid into this account the cheques handed
 G to him by B., and from then on, he also drew large sums out of the account. In
 and after May, 1951, B. appropriated nine cheques, amounting in value to
 £1,160 16s. 6d., which were made out to "Modern Confections" in respect of
 invoices sent out from the partnership's premises at Hinckley. These cheques,
 indorsed by B. "Modern Confections p.p. [G.B.]", and also indorsed by J.,
 were paid by J. into his No. 3 account. The manager of the defendant bank,
 H seeing that the cheques were made payable to "Modern Confections",
 asked J. for an explanation and was told that B. was the sole proprietor
 of that business, that J. was helping B. with the financial side of the business
 with a view to entering into partnership with B., and that B. owed J. £450.
 The manager made no inquiry of B. and in effect accepted this explanation.
 In an action by the plaintiff against the defendant bank for damages for
 conversion of the cheques,

I **Held:** (i) a co-owner of property, who does an act which can only be
 justified by exclusive possession of the property, converts it (*Morgan v.*
Marquis (1853) (9 Exch. 145), *Wilkinson v. Haygarth* (1847) (12 Q.B. 837),
 and *Farrar v. Beswick* (1836) (1 M. & W. 682) considered), and therefore, as
 B. had delivered partnership cheques to J. to be paid into J.'s No. 3 account
 which was not a partnership account, B. had converted the cheques, and the
 bank by collecting the proceeds of the cheques was prima facie guilty of
 conversion despite the fact that B., who indorsed the cheques, had authority

to do so (*A. L. Underwood, Ltd. v. Bank of Liverpool* ([1924] 1 K.B. 775) applied); further, the plaintiff could maintain an action for conversion without joining his partner, B., because the old rule that all co-owners should be parties had rested on the plea in abatement (statement of LORD ELLENBOROUGH, C.J., in *Bloxam v. Hubbard* (1804) (5 East, at p. 419) followed) and did not now hold good in view of the abolition of that plea (cf. R.S.C., Ord. 21, r. 20) and in view of R.S.C., Ord. 16, r. 11, and accordingly the bank, since the possible defences mentioned in (ii) and (iii) below failed, was liable to the plaintiff for his share of the proceeds of the cheques..

(ii) the bank was not a holder of the cheques in due course within s. 29 (1) of the Bills of Exchange Act, 1882, because B. was guilty of fraud in his dealings with the cheques so that the burden of proving that value was given was, under s. 30 (2) of the Act of 1882, on the bank, and because that burden was not discharged since (a) J.'s explanation that he was acting for B. was inconsistent with J.'s having given value, (b) the bank manager believed that the cheques represented B.'s money and they could not have been applied, therefore, to discharge J.'s indebtedness to the bank and (c) no agreement by the bank to honour cheques before receipt of the proceeds of the partnership cheques was proved (dictum of ATKIN, L.J., in *A. L. Underwood, Ltd. v. Barclays Bank* ([1924] 1 K.B. at p. 805) applied).

(iii) the bank was not protected by s. 82 of the Act of 1882 because the explanation given by J. to the bank manager regarding the cheques was not one which should have satisfied him, and, as it showed that B., who was not a customer of the bank, was having an account created for him, the bank manager should have made inquiries about B. as a prospective customer.

Dictum of LORD WRIGHT in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* ([1933] A.C. at p. 231) applied.

Per CURIAM: it is not necessary that I should hold that every failure to make proper inquiries, even though the bank can show affirmatively that the failure is immaterial, is fatal to a defence under s. 82 of the Act of 1882. In my judgment, however, if a bank manager fails to make inquiries which he should have made, there is at the very least a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner (see p. 584, letter F, post).

[As to the position of co-owners in relation to conversion of their joint property, see 33 HALSBURY'S LAWS (2nd Edn.) 60, para. 95; and for cases on the subject, see 43 DIGEST 503, 425 et seq.]

As to the effect of fraud on the onus of proving that value was given for a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 179, 180, paras. 297, 298.

On the question whether a collecting bank is a holder for value, see 2 HALSBURY'S LAWS (3rd Edn.) 178, para. 338.

As to the protection of a bank acting without negligence in relation to the collection of cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 180, para. 343; and for cases on the subject, see 3 DIGEST 240-243, 681-692.

A "per pro." indorsement may put a collecting bank on inquiry, see 2 HALSBURY'S LAWS (3rd Edn.) 181, para. 344.

As to non-joinder of parties, see 26 HALSBURY'S LAWS (2nd Edn.) 20, para. 17.

For the Bills of Exchange Act, 1882, s. 29, s. 30 and s. 82, see 2 HALSBURY'S STATUTES (2nd Edn.) 520, 521 and 547.]

Cases referred to:

- (1) *Wilkinson v. Haygarth*, (1847), 12 Q.B. 837; 16 L.J.Q.B. 103; 8 L.T.O.S. 465; 116 E.R. 1085; on appeal sub nom. *Haygarth v. Wilkinson*, (1848), 12 Q.B. 851; 116 E.R. 1090; 43 Digest 411, 339.
- (2) *Morgan v. Marquis*, (1853), 9 Exch. 145; 23 L.J.Ex. 21; 22 L.T.O.S. 91; 156 E.R. 62; 43 Digest 505, 454.

- A (3) *Farrar v. Beswick*, (1836), 1 M. & W. 682; 5 L.J.Ex. 225; 150 E.R. 608; 43 Digest 504, 449.
- (4) *Underwood (A. L.), Ltd. v. Bank of Liverpool, Underwood (A. L.), Ltd. v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.
- B (5) *Hollins v. Fowler*, (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53; 43 Digest 471, 102.
- (6) *Bryant Powis & Bryant v. La Banque du Peuple, Bryant Powis & Bryant v. Quebec Bank*, [1893] A.C. 170; 72 L.J.P.C. 68; 68 L.T. 546; 6 Digest 111, 755.
- (7) *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240; 70 L.J.K.B. 662; 84 L.T. 777; 1 Digest 400, 1009.
- C (8) *Bloxam v. Hubbard*, (1804), 5 East, 407; 102 E.R. 1126; 41 Digest 168, 89a.
- (9) *Addison v. Overend*, (1796), 6 Term Rep. 766; 101 E.R. 816; 41 Digest 813, 6746.
- (10) *Sedgworth v. Overend*, (1797), 7 Term Rep. 279; 101 E.R. 974; 41 Digest 813, 6747.
- (11) *Brewer v. Westminster Bank, Ltd.*, [1952] 2 All E.R. 650; 3rd Digest Supp.
- D (12) *Welch v. Bank of England*, [1955] 1 All E.R. 811.
- (13) *Tatam v. Haslar*, (1889), 23 Q.B.D. 345; 58 L.J.Q.B. 432; 6 Digest 175, 1096.
- (14) *Fitch v. Jones*, (1855), 5 E. & B. 238; 24 L.J.Q.B. 293; 25 L.T.O.S. 160; 119 E.R. 470; 6 Digest 179, 1123.
- (15) *M'Lean v. Clydesdale Banking Co.*, (1883), 9 App. Cas. 95; 50 L.T. 457; 6 Digest 115, 773.
- E (16) *Jones v. Williams*, (1857), 24 Beav. 47; 30 L.T.O.S. 110; 53 E.R. 274; 35 Digest 264, 232.
- (17) *Jones v. Smith*, (1841), 1 Hare, 43; 11 L.J.Ch. 83; 66 E.R. 943; *affd.* L.C., (1843), 1 Ph. 244; 41 E.R. 624; 35 Digest 528, 2605.
- (18) *Savory (E. B.) & Co. v. Lloyds Bank, Ltd.*, [1932] 2 K.B. 122; 101 L.J.K.B. 499; 146 L.T. 530; *affd.* H.L. sub nom. *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.*, [1933] A.C. 201; 102 L.J.K.B. 224; 148 L.T. 291; Digest Supp.
- F

Action.

G The plaintiff claimed against the defendant bank damages for conversion of nine cheques, amounting in value to £1,160 16s. 6d. The transactions took place at the Nuneaton branch of the defendant bank, of which branch Mr. Stanley Jones was the manager.

H Since about 1938 Mr. Jeffcott, an insurance agent, had a current account with the Nuneaton branch of the defendant bank (referred to hereinafter as "the bank"). In 1946 the bank allowed him to open a No. 2 account on which he was allowed to draw up to an agreed limit, the overdraft being secured by the deeds of his house. The initial overdraft was £150. Between 1946 and 1951 his current account was in credit to the extent generally of between £150 and £200, and had an annual turnover of between £5,000 and £6,000. On Mar. 15, 1947, Mr. Jeffcott opened a No. 3 account which was used from time to time and at other times lay dormant.

I In October, 1950, the plaintiff started a business in Hinckley in partnership with a Mr. Bainbridge and a Mr. Tattersall, under the name of Modern Confections, but the name was not registered under the Registration of Business Names Act, 1916. The partnership account was kept with the Midland Bank at Hinckley, and the three partners shared the profits equally. The business consisted of buying biscuits from biscuit manufacturers, including Valvona Biscuit Co., putting chocolate on the biscuits, and then selling them to wholesalers, and the manufacturing process was carried on at premises at Nuneaton as well as at Hinckley. The office work for both production centres was done at

the premises in Hinckley, where the plaintiff worked, and Mr. Bainbridge was in charge of the Nuneaton premises. Mr. Tattersall was not an active partner and retired from the partnership early in 1951. Until then all invoices, whether the goods came from Hinckley or Nuneaton, were made out at Hinckley, usually by the plaintiff. Payment was generally made by cheque which was collected usually by Mr. Bainbridge. The plaintiff and Mr. Bainbridge each had authority to indorse the cheques alone but the usual practice was for both of them to do so, and the cheques were then paid into the Midland Bank. After Mr. Tattersall left the partnership, Mr. Bainbridge began to carry on the business at the Nuneaton premises separately from that at the Hinckley premises, sending out invoices on his own account, without informing the plaintiff. Cheques in respect of these invoices were made out to Mr. Bainbridge, who indorsed them and handed them over to Mr. Jeffcott.

At the beginning of April, 1951, Mr. Jeffcott's No. 3 account showed a nominal credit of 5s. 6d., and his overdraft on his No. 2 account had increased to over £900. On Apr. 23 Mr. Jeffcott paid £249 6s. 2d., in cash, into the No. 3 account. On Apr. 25 he paid into the account a cheque for £118 19s. 6d., drawn by Thomas Hoyles & Son, Ltd., and made payable to "G. Bainbridge". This cheque was indorsed "G. Bainbridge" and also by Mr. Jeffcott. On the same day Mr. Jeffcott drew £75 in cash out of the account; on Apr. 26 he drew out £100 in cash; and on Apr. 27 he drew on the account a cheque for £124 5s. in favour of Valvona Biscuit Co. In May cheques amounting to £3,000 in value were paid into the account and substantial sums were drawn out of the account, both in cash and by cheque. Until the middle of May all the cheques which Mr. Jeffcott paid into his No. 3 account were made payable to Mr. Bainbridge and indorsed over to Mr. Jeffcott.

From May, 1951, Mr. Bainbridge began to appropriate cheques which he had collected in respect of invoices sent out from the Hinckley premises. These cheques, which were drawn by Thomas Hoyles and Son, Ltd., or by a firm called William Wine, were made payable to Modern Confections and were the cheques in respect of which the plaintiff brought his action against the defendant bank. The first was a cheque, dated May 19, for £131 14s., drawn by Thomas Hoyles & Son, Ltd. It was indorsed "Modern Confections, p.p. G. Bainbridge" and also by Mr. Jeffcott, who paid it into his No. 3 account. In all, nine cheques made payable to Modern Confections, and amounting in value to £1,160 16s. 6d., were indorsed by Mr. Bainbridge in this manner and were paid by Mr. Jeffcott into his No. 3 account.

Mr. Jones, the bank manager, knew, apparently, that Mr. Jeffcott's No. 3 account had become active again in April, but did not investigate the matter until a second cheque in favour of Modern Confections was paid into the account. Mr. Jones then interviewed Mr. Jeffcott whose explanation was that Mr. Bainbridge was the sole proprietor of Modern Confections; that, as Mr. Bainbridge was not good at running the financial side of his business, Mr. Jeffcott was helping him with a view to going into partnership at a later date; and that Mr. Bainbridge owed £450 to Mr. Jeffcott. There were subsequent interviews between Mr. Jones and Mr. Jeffcott, and when Mr. Jones raised the point that large sums in cash were being drawn out of the account, Mr. Jeffcott said that the money was going to Mr. Bainbridge. Mr. Jones felt that he had no reason to distrust Mr. Jeffcott, who was a good customer and had never, until then, given him cause for anxiety. Mr. Jones was, therefore, satisfied with Mr. Jeffcott's explanations and did not ask to see Mr. Bainbridge, but Mr. Jones told Mr. Jeffcott that the account should be "put on proper lines", and, in consequence, in July, 1951, an account with the defendant bank was opened in the name of Arbury Confections and both Mr. Jeffcott and Mr. Bainbridge had authority to draw on it. Mr. Jones did not know that anything was wrong until Oct. 9, 1951.

In the meanwhile, the plaintiff learnt that Modern Confections' account with

A the Midland Bank was overdrawn, as money had been paid out while no cheques were paid in. The plaintiff thereupon terminated the partnership, and brought this action against the bank.

R. K. Brown for the plaintiff.

N. N. McKinnon and A. C. Warshaw for the defendant bank.

B *Cur. adv. vult.*

Apr. 6. DEVLIN, J., stated the facts, and, after referring to the recrudescence of activity in the No. 3 account in April, 1951, Mr. Jones' interviews with Mr. Jeffcott, and his explanations in regard to the payments into and out of the No. 3 account, continued: If Mr. Jones had been less unsuspecting, I think that the possibility to which his mind might most naturally be expected to turn would be the possibility that Mr. Jeffcott might be defrauding Mr. Bainbridge. Of course, C cheques are indorsed over to third parties, but usually for small sums and only occasionally. When the bank manager sees it happening for large sums and quite regularly, I think that he is put on inquiry. It is not uncommon in the annals of fraud to find a clerk or servant or other associate, who has been given D an indorsed cheque with instructions to pay it into his principal's bank account, adding his own name on the back and paying it into his own. The explanation which Mr. Jones received when he asked for one was not, I think, one which should have satisfied a bank manager. I appreciate Mr. Jones' confidence in Mr. Jeffcott and I agree that allowance has to be made for what one might call the personal equation in these matters; but, all the same, people who appear to be completely honest do sometimes commit frauds, and I think it is necessary E for bank managers to consider the merits of the story which they are told on occasions such as these. I do not think that the explanation given to Mr. Jones was one which should have satisfied a bank manager and caused him to refrain from making further inquiries. I think perhaps the trouble was that Mr. Jones had not really made a study of the position. He had not observed, as I think he should have done in the circumstances, the number of cheques that were coming F in and the size of them, and he was not really concerning himself with anything more than to find out the nature of Mr. Jeffcott's association with Modern Confections. I do not think that he appreciated the significance of a number of indorsed cheques coming in one after the other, or also the significance that the payments out included substantial sums of cash. If he had, I think that he would have found Mr. Jeffcott's story less convincing, for within less than a month G Mr. Bainbridge had received from people who were presumably his customers cheques amounting to £2,000 or £3,000. Surely a man whose business was on that scale and was done in cheques might have been expected to have a bank account of his own? If he had, and if he wanted Mr. Jeffcott to run the financial side of the business for him, why did he not let Mr. Jeffcott operate the bank account in Hinckley, where the business was carried on? Why cause the H earnings of this business to be paid by this method of indorsement into Mr. Jeffcott's private account? The result of such an arrangement was that Mr. Jeffcott was handling large sums of money on behalf of Mr. Bainbridge, Mr. Jeffcott being either an agent or trustee, without Mr. Bainbridge being able to exercise any control, and that large sums in cash were being drawn out of what was, in effect, turned into an agency or trust account.

I [His LORDSHIP reviewed the evidence in regard to the partnership, and to the cheques indorsed by Mr. Bainbridge and paid into the No. 3 account, and continued:] The claim is for damages for conversion of the cheques, and that is the usual claim in this type of case. There are, however, two features in this case which deserve attention. First, there is the fact that Mr. Bainbridge was not converting something in which he had no interest himself; he was converting the joint property of himself and the plaintiff; and, secondly, there is the fact that this is not a case of a forged or unauthorised indorsement. The cheque is a perfectly good instrument, but Mr. Bainbridge had no right or authority to

hand it over to Mr. Jeffcott and allow it to be paid into Mr. Jeffcott's account. A

With regard to the first feature, I think it is quite clear that one co-owner can commit an act of conversion in respect of joint property. Of course, the mere fact that he takes possession of it will not be sufficient to amount to a conversion, because he is entitled to the possession of it. Neither party, however, is entitled to exclusive possession, and, if one of the two does an act which can be justified only by the right to exclusive possession, then he converts. That proposition B is illustrated by a number of cases. *Wilkinson v. Haygarth* (1) was cited in support of it, and I have looked also at *Morgan v. Marquis* (2), and *Farrar v. Beswick* (3), where, I think, that proposition was made abundantly clear. The point is summarised in POLLOCK ON PARTNERSHIP (15th Edn.), p. 155, in these words:

"First, what is a fraudulent conversion of partnership property to a partner's separate use within the meaning of the rule? A wilfully dishonest intention, or conduct, which, in the language of LORD ELDON, adopted by JESSEL, M.R.*, amounts to *stealing* the partnership property . . ."

That is what I think Mr. Bainbridge was doing on the facts of this case. In all these matters I have to draw what I consider to be the right inference from the facts as they have been proved in the evidence, bearing in mind that neither side D has brought Mr. Bainbridge or Mr. Jeffcott into the witness-box to give any explanation of his conduct. I think there was some evidence that Mr. Bainbridge had disappeared.

The other point is whether the fact that this was a good indorsement makes any difference to the claim for conversion. That situation was considered in *A. L. Underwood, Ltd. v. Bank of Liverpool* (4), which is not dissimilar to the present case. In that case the bank's customer, Underwood, who was the sole director of the plaintiff company, paid into his own private account, instead of into the company's account with another bank, cheques which were drawn on the company, and which he had indorsed on behalf of the company, as he had authority to do. I start from the point that Underwood had converted the cheques of the company, F just as I have already satisfied myself that Mr. Bainbridge had converted the cheques of the partnership in the present case. SCRUTTON, L.J., took up the argument at that point in these terms ([1924] 1 K.B. at p. 790):

"If, as appears to be the fact, A. L. Underwood converted the cheques of the company, I think the authorities show that the defendant bank by collecting those cheques and placing the proceeds to A. L. Underwood's private account, converted them as against the plaintiff company. There is, no doubt, considerable difficulty in defining the limits of conversion, where servants or agents do ministerial acts in relation to the goods converted in good faith and on behalf of the apparent owner. The different statements of the law by BLACKBURN and BRETT, JJ., in advising the House of Lords in *Hollins v. Fowler* (5), are proof of this . . ."

SCRUTTON, L.J., then considered some of the authorities and quoted (*ibid.*, at p. 791) the statement by LORD CHELMSFORD in *Hollins v. Fowler* (5), which is, I think, now generally regarded as the true statement of the position. LORD CHELMSFORD said (L.R. 7 H.L. at p. 795):

"Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."

SCRUTTON, L.J., then went on to say ([1924] 1 K.B. at p. 791):

"Now bankers who collect borrow from their customers the proceeds

* See *Lacey v. Hill* (1876) (4 Ch.D. at p. 543).

- A when collected, and in collecting exhaust the operation of the cheque. These operations have been held to be conversion . . .”

After referring to a number of authorities, SCRUTTON, L.J., said (ibid.):

- B “ Unless therefore the defendant bank can show some excuse in law, they are guilty of conversion. Their first line of defence was that as Underwood was acting within his apparent authority, the fact that he was using that authority for his own benefit was immaterial, ‘ the apparent authority was the real authority ’: see per LORD MACNAGHTEN in *Bryant Powis & Bryant v. Quebec Bank* (6) ([1893] A.C. at p. 180) . . .”

The learned lord justice considered that position and then said ([1924] 1 K.B. at p. 792):

- C “ So in the present case, if the bank were purchasing the cheques for value, apart from any question of the Bills of Exchange Act, on finding from the company’s documents that the sole director had authority to indorse cheques on their behalf, it would be immaterial whether he was using that power for his own benefit, and privity would be created between the alleged principal and the bank, so that the property would pass. But in the present case A. L. Underwood in asking the bank to collect and pay the proceeds into his private account was not purporting in this transaction to act as agent for his company, or to create privity between them and the bank, he was acting and purporting to act for himself as principal. Just as you cannot ratify the act of an agent who did not profess to act for you: *Keighley, Maxsted & Co. v. Durant* (7), so in my view you cannot rely on the apparent authority of an agent who did not profess in dealing with you to act as agent. This line of defence, in my opinion, fails.”

SCRUTTON, L.J., then went on to consider the other line of defence under s. 82 of the Bills of Exchange Act, 1882, which protects bankers who in good faith and without negligence collect crossed cheques for a customer who has no title to them.

- F That statement of the law, while showing and establishing that, prima facie, the bank in this case was guilty of a conversion, points also to two of the defences which are open to the bank in a case of this sort and which the bank has, in fact, relied on in the present case. The first is an allegation that the bank was a holder for value, or holder in due course. If that were so, since the cheque was properly indorsed—it was not a forgery and it was not a nullity—
- G it would be immaterial that Mr. Bainbridge, through the instrumentality of Mr. Jeffcott, paid it in for his own benefit and in fraud of the partnership. As SCRUTTON, L.J., said ([1924] 1 K.B. at p. 792):

- H “. . . in the present case, if the bank were purchasing the cheques for value, apart from any question of the Bills of Exchange Act, on finding from the company’s documents that the sole director had authority to indorse cheques on their behalf, it would be immaterial whether he was using that power for his own benefit, and privity would be created between the alleged principal and the bank, so that the property would pass.”

- I If, therefore, the cheques were being taken by the bank as a holder in due course, the bank could, in my judgment, succeed; and that is one of the three lines of defence on which the bank relies. If that was not the nature of the transaction, however, if the cheque was being given to the bank, not so that the bank might give value for it, but so that the bank might collect it as agent, then the actual or apparent authority of Mr. Bainbridge to indorse is immaterial. He had no right to deliver the cheque physically to Mr. Jeffcott or to the bank. There is, therefore, a conversion, and the bank, unless it can itself set up a good title, must rely on the defence under s. 82 of the Bills of Exchange Act, 1882. Those are, therefore, two of the defences which are relied on by the bank in this case.

The third defence (and I think perhaps the one that is most convenient to consider first) is that Mr. Baker, as one only of the partners, cannot in this case sue. It is contended on behalf of the bank that it is necessary that all the partners should be joined. That is a different point from the one which I have been considering up to now in relation to co-ownership. Let it be assumed, as I have held, that one co-owner can convert the property of another co-owner; nevertheless, it is alleged that, as a matter of procedure, one co-owner cannot sue alone, or that one partner cannot sue alone. Either he must sue in the firm name, if there is a firm name, or, if not, then all the partners must be joined as plaintiffs. The plaintiff submits that there is no objection to one partner, or one co-owner, suing in respect of his interest in goods—in this case the cheques. The plaintiff concedes that, where the other partner has been fraudulent and where, therefore, the bank would have on any view a good defence against Mr. Bainbridge if Mr. Bainbridge sued, neither Mr. Bainbridge nor any other partner can recover in respect of Mr. Bainbridge's interest. Therefore, the plaintiff concedes that he can in this action recover only half the value of the cheques, but he submits that there is no objection to his recovering that half interest in which he is concerned, and that the fact that Mr. Bainbridge, his partner, has been fraudulent is for that purpose irrelevant.

In my judgment, the plaintiff's submission on this point is the right one. I will take, first, the position in relation to co-owners, for after all the interest of partners in goods which are the partnership property is simply that it is their joint property. I will then consider whether the fact that the co-owners are also partners makes any difference. It has been settled for a very long time past that one of several co-owners of a chattel can sue for conversion, relying on his own right to possession and recovering damages according to his interest in the chattel. Thus in *Bloxam v. Hubbard* (8) LORD ELLENBOROUGH, C.J., held that three out of four co-owners of a ship might recover three-fourths of the value of that ship, saying that each might recover according to his own interest. LORD ELLENBOROUGH said (5 East, at p. 420):

"As to the first of these objections, assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are three out of the four assignees in whom the property of the ship originally was (and until a new assignment is made under the order of the Lord Chancellor, continues to be) vested, from recovering more than their three-fourth parts in value of the property in question. For it is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz. that all the several part owners in a chattel have not joined in an action of trespass, or of tort brought in respect to it, by plea in abatement. I will only refer to *Addison v. Overend* (9), in which most of the cases on the subject are collected; and *Sedgworth v. Overend* (10)."

I was also referred in the course of the argument to a statement by LORD DENMAN, C.J., in *Wilkinson v. Haygarth* (1), where he said (12 Q.B. at p. 850): "The plaintiff can recover such damages only as are proportionate to his interest in the property . . ."

Bloxam v. Hubbard (8) makes it plain that the only objection that can be taken to one of several part-owners suing is the procedural objection taken by means of a plea in abatement. Plea in abatement was a purely procedural matter, and it has now disappeared.* It disappeared under the practice established by the Judicature Acts, and it has been replaced, if one can call it a replacement, by R.S.C., Ord. 16, r. 11, which says:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the

* See R.S.C., Ord. 21, r. 20; ANNUAL PRACTICE, 1955, p. 383; and note to R.S.C., Ord. 16, r. 11, *ibid.*, at p. 252.

- A matter in controversy so far as regards the rights and interests of the parties actually before it."

I think that makes it quite plain that, whereas before by plea in abatement, one could require as a matter of procedure that all the relevant parties should be brought before the court, now under R.S.C., Ord. 16, r. 11, it is immaterial to the rights of the parties to the cause or action whether all the proper parties are before the court or not; no cause or matter shall be so defeated, and the court is entitled to deal with the rights and interests of the parties actually before it. The rule goes on to provide, of course, that the court may, at any state of the proceedings, make such order as might be just with regard to striking out the names of parties who are improperly joined, and then says that the court may order that

- C "the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

But for this rule, no doubt it would be necessary that Mr. Bainbridge should have been joined, and, if he refused to join as plaintiff, he should have been joined as defendant. It is now quite plain, however, that it is only if the court considers that it cannot deal effectually and completely with the questions involved in the matter that the court would make an order requiring Mr. Bainbridge to be joined.

Counsel for the bank relied on *Brewer v. Westminster Bank, Ltd.* (11), but that case is, in my judgment, clearly distinguishable. In that case MCNAIR, J., was not dealing with an action by one of two co-owners based on a right of property, but with an action by one of two joint contractors based on a breach of contractual duty. He held that the right under the contract was a single joint right and, therefore, that the inability of one party to enforce it was fatal to the claim. It destroyed the right, which was indivisible. The authorities which he cited for that proposition related entirely to a claim under contract; he was not dealing with a claim based on a right of property, which is governed by the well-established principles in *Bloxam v. Hubbard* (8).

Counsel for the bank referred me also to *Welch v. Bank of England* (12), a recent decision, because he rightly thought that I ought not to be invited to consider *Brewer v. Westminster Bank, Ltd.* (11) without considering the observations made on it by HARMAN, J., in the later case. It is sufficient for the purposes of this case that I should say that *Welch v. Bank of England* (12) appears to be based on a right of property. It was an action for a declaration that the Bank of England should be required to rectify its register, and it was based, therefore, on the alleged ownership of the plaintiff of the stock, and a requisition that the bank should rectify its register according to the true position as to the ownership of the property. It was, therefore, like the case I am now considering, an action based on a right of property.

Counsel for the bank went on to contend that, whatever the position might be in the case of co-ownership generally, it was different if the co-owners were also partners. I can see no reason in principle why it should be. In LINDLEY ON PARTNERSHIP (11th Edn.), p. 361, the right of a co-owner to sue is considered and it is not suggested that any different rule applies in the case of a partnership. It is there stated:

"An action for the recovery of goods of the firm or for damages for their loss or injury ought to be brought in the name of the firm or by all its members; but if one only sues he will be entitled to recover damages in respect of his interest in the goods . . ."

Counsel for the bank relied on the inconvenience that could be caused if one partner were allowed to sue for his own interest, and submitted that in such a

case as this the plaintiff ought to have had the partnership wound up before he could proceed. These considerations, however, appear to me to be procedural only and not to go to the question whether the plaintiff has a good cause of action. They are all questions which fall to be determined under R.S.C., Ord. 16, r. 11. Under that rule, the court has ample power to deal, where necessary, with this sort of action either by staying the action until partnership proceedings have been taken or by requiring the other party to be joined; and, no doubt, in the ordinary case of a flourishing partnership, if one partner suddenly took it into his head to sue in respect of his interest in some particular goods, that is the course which the court would take. I can see no advantage, however, in taking that course in this case. Indeed, I have not been invited to. I have been invited only to find that there is no good cause of action, but in any event I could see no advantage in taking it. There is nothing to be gained by putting the plaintiff in this case to the expense of taking partnership proceedings against Mr. Bainbridge and having the partnership wound up, and there is certainly nothing to be gained by requiring that Mr. Bainbridge should be joined as a party, since it is common ground that the bank would have a good defence to any claim in respect of Mr. Bainbridge's interest.

[His LORDSHIP considered whether the dissolution of the partnership between the plaintiff, Mr. Bainbridge and Mr. Tattersall was proved and held that it would be impossible for Mr. Tattersall now to maintain that he had an interest as a partner. HIS LORDSHIP continued:] That, therefore, disposes of the first line of defence; and, in my judgment, the plaintiff is entitled to sue in respect of his interest in the cheques.

I must consider now the other two contentions, which were relied on, under the Bills of Exchange Act, 1882. I shall take, first, the submission that the bank became a holder in due course. That submission is based on s. 29 and s. 30 of the Bills of Exchange Act, 1882. Section 29 (1) defines "a holder in due course" and reads:

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely . . . (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

As to the burden of proof on that point, the bank relies on s. 30, which reads:

"(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. (2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

The bank contends that both Mr. Jeffcott and the bank were holders in due course. There is no evidence, apart from his own story to the bank, of how Mr. Jeffcott came into possession of the cheques, but it is submitted that, under s. 30, he must be presumed to be a holder in due course until the contrary is proved, and that the contrary has not been proved. I am not prepared, on the evidence that I have, to find that Mr. Jeffcott was a party to the fraud. He may or may not have been, and I think that is a point which is left in doubt on the evidence. It is at least possible that he was deceived by Mr. Bainbridge as much as the bank was deceived.

I shall consider, therefore, first, the question whether Mr. Jeffcott was, on the evidence, a holder in due course. I am not entirely clear how it benefits the bank to establish that he was, but I shall consider the point briefly. I do not

- A think that he was a holder in due course. His story to Mr. Jones, if it is to be believed, shows that he became a holder merely for the purpose of administering Mr. Bainbridge's money, and not in order that he could claim the title to the cheques so that he could deal with the money as he liked. In short, on his own story, he is to be regarded merely as agent or trustee for Mr. Bainbridge. If his story is not to be believed, then the proper explanation of any taking by him is
- B that he did not take in good faith. I do not think that the bank can, in the circumstances of this case, successfully rely on s. 30 (2). It is, I think, clear, both from the wording of sub-s. (2) itself and from the authorities that were decided before 1882, that if fraud is proved at any stage of the transaction, then the burden is shifted. Once I am satisfied, as I am, that the proper inference is that Mr. Bainbridge was fraudulent, then the burden is shifted to
- C Mr. Jeffcott or to the bank, if it wishes to advance that contention, to prove that Mr. Jeffcott took in good faith and for value. I am certainly not prepared in the state of the evidence to find that he did. As I have said, I do not think that there is sufficient evidence in the case for me to find one way or the other whether Mr. Jeffcott was a party to the fraud or not. That interpretation has been given to the section since the Act in *Tatam v. Haslar* (13), but I think it is worth
- D referring to *Fitch v. Jones* (14), which was decided before the Act was passed, because LORD CAMPBELL, C.J., shows what is the true position of a man in the position of Mr. Jeffcott in this case. LORD CAMPBELL, C.J., said (5 E. & B. at p. 244):

- E "The other question is one of general importance. It is, whether in such a case as this it lies on the plaintiff to show that there was consideration for the indorsements, or on the defendant to show that there was none; or in other words whether the facts proved raised a presumption that there was no consideration. It is clear that, when there is illegality or fraud shown in a previous holder, a presumption that there is no consideration for the indorsements does arise; for the person who is guilty of illegality or fraud,
- F and knows that he cannot sue himself, is likely to hand over the instrument to some other person to sue for him. It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that there was no consideration lies, has by proving fraud or illegality in the former holder raised a *prima facie* presumption that the plaintiff is agent for that holder, and has therefore, unless
- G that presumption be rebutted, proved that there was no consideration."

I think it is plain enough that, on Mr. Jeffcott's story in this case, he was a holder simply as agent for Mr. Bainbridge and his whole story is quite inconsistent with his having given consideration.

- H With regard to the position of the bank itself, it is not suggested that the bank did not take in good faith. It is not suggested that it had any notice of the defect in the title of the person who negotiated it, because "notice" in s. 29 (1) (b) means actual notice—a very different question from that which I shall have to consider when I come to s. 82 of the Act and the question whether the bank was negligent. It is not suggested that the bank had actual notice, but merely that it was put on inquiry. What is suggested is that the bank did not give value, and the question arises which often arises in cases of this sort, namely, whether,
- I when a cheque is given to a bank in these circumstances, the bank takes the cheque giving value for it, and then becoming a holder in due course, or whether the bank takes the cheque merely to collect the amount of the cheque for someone else.

That is a question of fact. The true relationship has to be inferred from the acts of the parties. In this case the only fact which was relied on by counsel for the bank as making the bank a holder in due course was the fact that there was an overdraft on Mr. Jeffcott's No. 2, or loan, account. If the accounts had

been combined, Mr. Jeffcott would have been indebted to the bank and, accordingly, it is said that the bank gave value for the cheques. Counsel relies on *M'Lean v. Clydesdale Banking Co.* (15). This appears, on the facts of this case, to be a misconception. Since Mr. Jones believed, as he says, Mr. Jeffcott's story, he must have appreciated that the cheque represented Mr. Bainbridge's money and as such the bank could not possibly take it in satisfaction of Mr. Jeffcott's debt. There can, therefore, have been no agreement on the part of the bank to give value by taking it as against an existing indebtedness. The point was considered in *A. L. Underwood, Ltd. v. Barclays Bank* (4). Sometimes it has been suggested that, if the bank credits the customer with the amount of the cheque in his account before it has been cleared, by so doing the bank is giving value. I think that the statement of the position which is now accepted is that made by ATKIN, L.J. ([1924] 1 K.B. at p. 805), in *A. L. Underwood, Ltd. v. Barclays Bank* (4), where he said that it was not enough to show merely that the bank had entered the value of the cheques on the credit side of the account on the day on which the bank received the cheques. ATKIN, L.J., went on to say (*ibid.*):

"To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will before receipt of the proceeds honour cheques of the customer drawn against the cheques."

I did not understand counsel for the bank (and I have no doubt that he was wise) to put his case on any ground of that sort. It was not suggested to Mr. Jones, the bank manager, in the box that he had entered into any agreement, express or implied, of that character; and I think, indeed, that the point would necessarily have failed, because an agreement of this sort, whether or not it was made through the agency of Mr. Jeffcott, would have been an agreement between Mr. Bainbridge and the bank for the bank to give value to Mr. Bainbridge, since the bank must have regarded him as the true owner of the cheques. There is, as I have said, no evidence of any such agreement, and what Mr. Jones' intentions were in respect of Mr. Bainbridge's cheques, which he was allowing to be mixed with what he, presumably, supposed to be Mr. Jeffcott's own money, must necessarily be obscure. I think, therefore, that that defence fails.

I pass now to the third defence, which is under s. 82 of the Act of 1882, which I have already summarised. I have already held* that, on the facts, Mr. Jones was careless in not making inquiries; and under s. 82 the burden is on the bank to prove that the bank received the cheques without negligence. I have, however, also held that the natural suspicion which one would have expected to be aroused in Mr. Jones' mind was the suspicion that Mr. Jeffcott was defrauding Mr. Bainbridge. I do not think that Mr. Jones had any reason in the first instance to suspect that the true owner, or part-owner, was Mr. Baker, and that Mr. Bainbridge was defrauding a partner. Does that matter when s. 82 of the Act puts on the banker the burden of proving that he took in good faith and without negligence? Must he prove that he was not careless in any respect whatsoever, or is it enough for him if he can show that, although he was careless, his carelessness did not affect the matter; in other words, that the inquiries which he might properly have been expected to make would not have unearthed the true position and would not, therefore, have protected the true owner? Counsel for the plaintiff contended that, as soon as it was established that Mr. Jones was careless in his failure to make inquiries, the bank's defence under s. 82 goes and it is irrelevant to consider whether such inquiries, if made, would have protected Mr. Baker's interest in the cheques.

This is a point on which there does not seem to be much authority, and, in fact, none was cited to me; but there are, I think, one or two dicta which assist the contention of counsel for the plaintiff. I refer, first, to an old dictum of SIR JOHN ROMILLY, M.R., which I take from *A. L. Underwood, Ltd. v. Bank of*

* See p. 575, letters D and E, ante.

A *Liverpool* (4), where it was quoted by BANKES, L.J. ([1924] 1 K.B. at p. 789). LORD ROMILLY's dictum was made in *Jones v. Williams* (16), where he was concerned with the inquiries that ought to be made in regard to mortgages, but BANKES, L.J., took it as a general principle which was equally applicable to s. 82. SIR JOHN ROMILLY, M.R., said (24 Beav. at p. 62):

B "With respect to the argument that it was unnecessary to make any inquiry because it would have led to no result, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith* (17) that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry, but I think it impossible, beforehand, to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, viz., a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

C In *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (18), which went both to the Court of Appeal and to the House of Lords, there is a dictum by GREER, L.J., in the Court of Appeal, and also another relevant dictum by LORD WRIGHT in the House of Lords. In the Court of Appeal GREER, L.J., said ([1932] 2 K.B. at p. 148):

D "It is, I think, also true to say that a banker who has not exercised reasonable care cannot claim the benefit of the section even though it may seem probable that the exercise of care would not have enabled him to discover the defective title of his customer. The protection is given to careful bankers, and any banker who does not exercise reasonable care is outside the section altogether, even though he may be able to say: 'If I had exercised care the fraud would not have been discovered.'"

E LORD WRIGHT, in the House of Lords, said ([1933] A.C. at p. 233):

F "Nor is it any answer to a charge under s. 82 of neglecting a proper precaution, that if it had been taken it might have been fruitless. Nor does a precaution cease to be proper for purposes of s. 82 merely because, though generally effective, it may in special circumstances be ineffectual."

G Counsel for the bank submitted that, accepting (which, of course, he does not do, but on which I have already found against him) that Mr. Jones was careless in not making inquiries, then all the inquiries which he would have needed to have made would have been those which were necessary to allay suspicion that Mr. Jeffcott might be paying into his own account Mr. Bainbridge's cheques for the purpose of defrauding Mr. Bainbridge. For this purpose, counsel for the bank submits that the inquiries could have been limited to verifying that Mr. Jeffcott had Mr. Bainbridge's authority to act as he did; all that Mr. Jones would have needed to have done would have been either to ask for a written authority or to see Mr. Bainbridge, and, if he had seen Mr. Bainbridge, that is the only point which would have been discussed. It is said that, since Mr. Bainbridge himself was fraudulent, then he would obviously have taken part in hoodwinking Mr. Jones, and Mr. Jones' inquiries would necessarily, therefore, have been fruitless so far as the plaintiff's interests were concerned. I do not think, however, that, in the light of the dicta which I have quoted, I ought to speculate about what would have happened if Mr. Jones had asked to see Mr. Bainbridge. If I were to speculate, however, I am not at all sure that the right answer would be that the discussion would have been limited to the points which counsel for the bank has, so to speak, put on the agenda. Discussions of this sort may very well roam more widely. Moreover, I am not satisfied that the only point about which Mr. Jones ought to have inquired was the point whether Mr. Jeffcott was acting in fraud of Mr. Bainbridge. That was the main point, no doubt, but I think that one of the points which he might certainly have been

expected to have inquired into, even if it was not his duty to do so (which I think perhaps it was), is why Mr. Bainbridge wanted to use Mr. Jeffcott's account at all. One might have expected Mr. Jones to ask whether Mr. Bainbridge had a banking account already, and, if not, why he did not create one for himself instead of obtaining his banking facilities by this means, because, after all, the effect of what was being done, and of what was in fact done later, when, in response to Mr. Jones' insistence, the account was put, as he called it, on a proper basis, was that a new account was being created for Mr. Bainbridge. Mr. Bainbridge was the real customer, and it was his money which was being used, through the agency of Mr. Jeffcott. Quite apart from what I should have thought to have been the irregularity of mixing Mr. Bainbridge's money with Mr. Jeffcott's money, on the story which Mr. Jones has told the position was, in effect, that Mr. Bainbridge was having a new banking account created for him, and he was not the bank's customer already. There is no doubt that, in such circumstances, it is either the practice or the duty of the bank to make inquiries from a prospective customer, and Mr. Jones, therefore, should have inquired into that aspect of the matter.

I observe a passage in LORD WRIGHT's speech in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (18) in which there is a reference to that point. LORD WRIGHT said ([1933] A.C. at p. 231):

"It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under s. 82 if a cheque were converted subsequently in the history of the account."

If Mr. Jones had made inquiries of that sort about Mr. Bainbridge, it is, in my judgment, impossible to say where they might not have led. I know nothing about Mr. Bainbridge. I do not know what his capacity for deceit is and whether he would have succeeded in lulling Mr. Jones is a mere matter of speculation. He might have deceived him or he might not.

I do not think that in this case I need go so far as to hold that every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under s. 82. It is not necessary that I should hold that such carelessness is fatal even if the bank can show affirmatively that the failure was immaterial. In my judgment, however, if a bank manager fails to make inquiries which he should have made, there is, at the very least, a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner; and that burden the bank has, in my judgment, failed to discharge in this case. Accordingly, all three of the defences relied on by the bank fail, except to the extent, which is conceded, that the amount claimed must be reduced by half. There will be judgment for the plaintiff for half the amount claimed, that is to say, for £580 8s. 3d., with costs.

Judgment for the plaintiff.

Solicitors: *Pilgrim & Webster*, Hinckley (for the plaintiff); *Edge & Ellison*, Birmingham (for the bank).

[Reported by GWYNEDD LEWIS, Barrister-at-Law.]

A

OTTWAY v. JONES.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.JJ.), May 25, 1955.]

B

County Court—Costs—Discretion of judge—Proceedings for possession of premises subject to Rent Restrictions Acts—Landlord successful in establishing jurisdiction of court to grant relief—Order for possession refused as being too harsh in circumstances—Landlord awarded costs of proceedings—Discretion as to costs properly exercised—County Court Rules, 1936, Ord. 47, r. 1.

C

Rent Restriction—Costs—Possession action—Discretion of judge—Landlord successful in establishing jurisdiction of court to grant relief—Order for possession refused as being too harsh in circumstances—Landlord awarded costs of action.

D

A landlord sought possession of premises, which were within the protection of the Rent Restrictions Acts, on the ground that the tenant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers, within Sch. 1, para. (b), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The incidents on which the landlord relied in support of his claim took place during 1953 and in June, 1954. The particulars of claim were dated Oct. 23, 1954, but, through no fault of the landlord, the proceedings did not come before the county court judge until March, 1955. The judge found that the tenant's conduct amounted to a nuisance or annoyance within para. (b) of Sch. 1 to the Act of 1933, and, although the judge held that, in all the circumstances of the case and having regard to the fact that the last incident complained of occurred as long ago as June, 1954, it would be unreasonable to make an order for possession, he ordered the tenant to pay the landlord's costs of the proceedings. On an appeal by the tenant from the order as to costs,

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Held: the plaintiff had succeeded in establishing facts, viz., nuisance and annoyance by the tenant, which empowered the court in its discretion under the Act of 1933 to make an order for possession; the exercise of that discretion might involve the consideration of matters (e.g., the circumstances of the tenant) which might be unknown to the landlord, and, in the circumstances of the present case, although the county court judge had not made an order for possession, he had not, by awarding costs against the defendant, erred in principle in exercising his discretion over costs and the Court of Appeal would not alter his award.

G

Dictum of LORD ALVERSTONE, C.J., in *Andrew v. Grove* ([1902] 1 K.B. at p. 627) considered; dictum of BRETT, L.J., in *Re Foster v. Great Western Ry. Co.* (1882) (8 Q.B.D. at p. 521) distinguished.

Appeal dismissed.

H

I

[**Editorial Note.** The judgment of SIR RAYMOND EVERSLED, M.R., confines the decision in this case to costs in cases of actions for possession of rent restricted premises where a plaintiff has, in effect, two fences to surmount, viz., (i) to establish the facts which give the court power to make an order for possession and (ii) to obtain the exercise in his favour of the court's discretion, under Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, over the granting or withholding of the order of possession. The facts that the plaintiff surmounted the first fence but failed to obtain an order for possession because the county court judge considered that to be too harsh a penalty distinguish the present case from the more ordinary case of an unsuccessful plaintiff who fails to establish facts necessary in law to entitle him to relief. It is important also to note that the grounds of application for possession were nuisance and annoyance, which are grounds akin to those giving rights of action at common law.]

As to the discretion of the judge as to costs, see 9 HALSBURY'S LAWS (3rd Edn.) 302, para. 731, and 26 HALSBURY'S LAWS (2nd Edn.) 96-98, paras. 181-184; and for cases on the subject, see DIGEST (Practice) 853-855, 3991-4004.]

Cases referred to:

- (1) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732, 812; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 855, 4004.
- (2) *Re Foster v. Great Western Ry. Co.*, (1882), 8 Q.B.D. 515, 521; 51 L.J.Q.B. 233; 46 L.T. 74; Digest (Practice) 851, 3970.
- (3) *Cumming v. Danson*, [1942] 2 All E.R. 653; 112 L.J.K.B. 145; sub nom. *Cumming v. Dawson*, 168 L.T. 35; 31 Digest (Repl.) 697, 7879.
- (4) *Andrew v. Grove*, [1902] 1 K.B. 625; 71 L.J.K.B. 439; 86 L.T. 720; Digest (Practice) 891, 4324.
- (5) *Witt v. Corcoran*, (1876), 2 Ch.D. 69; 45 L.J.Ch. 603; 34 L.T. 550; Digest (Practice) 849, 3957.
- (6) *Dicks v. Yates*, (1881), 18 Ch.D. 76; 50 L.J.Ch. 809; 44 L.T. 660; Digest (Practice) 869, 4111.

Appeal.

The defendant appealed from an order as to costs made by His Honour JUDGE ELDER JONES at Wandsworth County Court on Mar. 15, 1955, in an action for possession of premises which were subject to the Rent Restrictions Acts. The plaintiff, the landlord of the premises, sought possession on the ground that the defendant had been guilty of conduct which was a nuisance or annoyance to adjoining occupiers, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. 1, para. (b). The learned county court judge found on the facts that he had power to make the order, but held that, having regard to all the circumstances, it would not be reasonable to do so. He gave judgment for the defendant, but ordered the defendant to pay the plaintiff's costs of the proceedings.

D. H. W. Vowden for the defendant, the tenant.

H. Lester for the plaintiff, the landlord.

SIR RAYMOND EVERSHED, M.R.: This is an appeal, solely on the question of costs, from a decision of a county court judge. Whereas under the procedural enactments applicable to the Supreme Court* leave would be required prima facie to appeal to the Court of Appeal on a question of costs only, no comparable provision finds a place in the county court rules. The relevant rule now is County Court Rules, 1936, Ord. 47, r. 1:

"Subject to the provisions of any Act or rule, the costs of proceedings in a county court shall be in the discretion of the court . . ."

Then follows a proviso relating to executors, and the like, which has no application to the present case. There appears to be no provision in the County Courts Act, 1934, directed to this matter. It may, however, be relevant to observe that the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), which is one of the provisions as to costs in that Act which relates in terms to the Supreme Court, reads:

"Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

I have read that sub-section as lending, as I think, some support to the view that, if regard is had only to the terms of the County Court Rules, 1936, Ord. 47,

* See the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h); 5 HALSBURY'S STATUTES (2nd Edn.) 357, 359.

A r. 1, it would appear to rest entirely in the discretion of the county court judge by whom the costs of any proceedings should be paid, even though the person ordered to pay the costs had, in substance or in fact, wholly been successful—a view which again, I think, is supported by the reasoning in the speeches in the House of Lords in *Donald Campbell & Co. v. Pollak* (1): see particularly the language of VISCOUNT CAVE, L.C. ([1927] A.C. at pp. 811 and 812). Although, B however, the terms of the rule on the face of them appear to put no limit on the way in which, as to costs, a judge exercises his discretion, there is, I think, no doubt that, in what I will call (and I will later define what I mean by the phrase) “the ordinary case”, where there is a decision to the effect that a defendant has been wholly successful, it is not a proper judicial exercise of the discretion to order such a defendant to pay the plaintiff’s costs. That the judge may deprive the C successful defendant of the costs which prima facie he would expect to recover is another matter. Decisions to which our attention has been drawn by counsel for the defendant (of which *Re Foster v. Great Western Ry. Co.* (2), in this court, is an example) do, however, undoubtedly establish as a general proposition, in what I have called “the ordinary case”, that it is not a good exercise of judicial discretion to order a successful defendant to pay the plaintiff’s costs; so that D such an order would be one on which an appeal in this court would be entertained. Nevertheless, since the matter of costs is so much a matter of discretion, it is equally true to say that the Court of Appeal will entertain appeals on matters of costs with great caution.

When counsel for the defendant, who is the appellant before us, first opened this case, it looked to me, I must confess, very much as though there had been E here an error on the part of the learned county court judge in what I have called the judicial exercise of the powers vested in him; for this was a case in which the plaintiff sought an order for possession of his premises which were in the occupation of the defendant, admittedly having the protection of the Rent Restrictions Acts; and the plaintiff, in the end, failed to get the order which he sought, or, indeed, to get any relief such as he prayed against the defendant. Nevertheless, F the judge, quite deliberately (because his attention was particularly drawn to the matter) ordered the defendant to pay the costs of the unsuccessful plaintiff. I propose to read the whole of the note of the county court judge’s judgment because it states the facts of the case and also includes an expression of the judge’s grounds for making the order as to costs which he did. The judgment is as follows:

G “I find that the plaintiff has become psychopathic about the activities of the defendant not perhaps without reason—and he sees an enemy under every bush. Almost anything annoys him and is a nuisance, so I have to take his evidence with great caution. But I am satisfied that there were serious incidents on May 2 and 3, 1953, and in June, 1954, i.e., drunkenness, bullying behaviour frightening the plaintiffs, and urinating—and unpardonable H bullying behaviour over the shed. Also malicious teasing of the plaintiffs by turning off water. I think other incidents of water are quite unproved and are imaginary, and the objection to the fires and dog are similar. Only those three incidents are proved to my satisfaction and are nuisance and annoyance. Defendant is a liar, and is not to be trusted at all. I find him a bully and that he did try (and successfully) to dominate the I tenants, but plaintiff certainly provoked. As all three incidents long ago not reasonable to order possession. Can’t make suspended order for possession usefully. No order for possession, but as nuisance and annoyance established defendant pay plaintiff’s costs Scale 2. Note. [Counsel for the defendant] asked me if my order as to costs was per incuriam, or did I mean it. I told him that I did mean it; that I had decided it was unreasonable to make an order because the three incidents which I considered serious were long ago. But that I found his client had been a ‘nuisance and annoyance’,

and that, had this been a claim analogous to an action for trespass and an injunction where damages could be given in lieu of an injunction . . . ” A

Then there appears: “(sic; in lieu of order for possession)”, which I am not quite sure that I follow, but it may be “secus, in lieu of an order for possession”—

“ . . . then I would have awarded damages. I was satisfied that the case was made out sufficiently to carry costs, but in the circumstances it seemed to me the extreme penalty of eviction of the defendant would be harsh.” B

To that narrative in the judgment I desire to add only a little, but that little must, I think, be added. It will be apparent that the nature of the case which the plaintiff set out to prove was that the defendant had acted in such a way as to cause a nuisance and an annoyance. That is a reference to Sch. 1, para. (b), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: C

“the tenant . . . has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose . . . ”

The other matter which I must add is this. The case was eventually heard and the judgment pronounced in March, 1955. The proceedings had been begun a great deal earlier, the date on the particulars of claim being Oct. 23, 1954. It will be appreciated that the last of the three episodes which the learned judge mentioned and which he said constituted acts of nuisance or annoyance within para. (b) of the schedule occurred in June, 1954. We were informed that the hearing of the case was postponed for one reason or another, but not for a reason for which the plaintiff was in any way at fault, so that when the judge heard the case in March there was nothing proved as having constituted an act within para. (b) since the previous June. That is the explanation of the emphasis, which twice occurs in the judgment of the county court judge, on the fact that the incidents had taken place some time ago. D

In those circumstances it appeared to me, when we heard the case opened, that what the judge really had decided was that, having regard to the distance of time which had elapsed since the last incident of which there had been a valid complaint, it would be unreasonable to make an order for possession: in other words, that, in considering the question whether he should make an order for possession, the judge was not influenced by the order for costs which he later made and which he then anticipated. I am, however, left in a little doubt as to that in view of the last three lines of the notes: E

“I was satisfied that the case was made out sufficiently to carry costs, but in the circumstances it seemed to me the extreme penalty of eviction of the defendant would be harsh.” F

Accordingly, there was raised and discussed during the course of the argument the question whether a judge, in making up his mind whether it was reasonable to make an order for possession, could consider what order for costs he could or would make and allow his decision on reasonableness to be influenced by a forecast in his own mind of the order which he would be later likely to make as to costs; or, to put the matter in another way, whether a judge, in considering the reasonableness of an order for possession, could or should consider what order as to costs he would (or, if the defendant is right, could) make if no order for possession were made. I do not find it necessary to express any final view on the question, for I have come to the conclusion, in all the circumstances of the case, on another ground, that we ought not to interfere with the order which the judge made. I should like to say (what is, indeed, obvious) that, where a plaintiff in the end fails, it must be a very unusual thing to order the successful defendant to pay the costs, and it would only be in exceptional cases that a judge would think it right to make such an order. Still, this is a matter of discretion; and, G H I

A unless it is shown in the present case that the judge erred on some matter of principle, we should not, according to the well-established rules applicable to such matters, vary the discretion of the judge or seek to substitute a discretion of our own.

B The basis on which, in my judgment, this case ought to be decided lies in the peculiar jurisdiction of the court under the Rent Restrictions Acts. It will be convenient to read the opening words of s. 3 (1) of the Act of 1933:

C “No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in Sch. 1 to this Act.”

It will be seen, therefore, that Parliament has erected, so to speak, two fences both of which a plaintiff must surmount if an order is to be made in his favour for possession. The two fences, if I may adhere to the metaphor, are, however, of dissimilar character and structure; for, first, the plaintiff must establish as a matter of fact or of right that the court has power to make such an order. In order to do that, where the case falls within para. (a) of s. 3 (1), the plaintiff has to establish that his case is within one or other of the paragraphs of Sch. 1. In that respect the plaintiff is in the same position as the plaintiff in what I have called an “ordinary action”, which I will now proceed to define. In an ordinary action the plaintiff seeks to establish some matter of right, the existence of which depends on his proving the necessary facts, and then invoking whatever is the appropriate provision of the law. It is, however, a matter of right: if the facts are proved, the right is established. That is the first stage in a case under the Rent Restrictions Acts where a plaintiff seeks possession. Having surmounted that fence, however, there is still the second obstacle; but in regard to that the plaintiff is no longer in the position of one seeking to establish a matter of right: there is no matter of right. The plaintiff having established his right, that is, having shown that he is in a position to invoke the jurisdiction, the court has to decide, as a matter of its own discretion, whether the remedy suggested, or, indeed, any relief, ought to be given. In determining that matter the court has to exercise a discretion, the character of which has been laid down in language often cited from the judgment of LORD GREENE, M.R., in *Cumming v. Danson* (3). LORD GREENE, M.R., said ([1942] 2 All E.R. at p. 655):

G “. . . the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive . . . ”

H It is plain from the nature of that discretion that its exercise may depend on matters of which a plaintiff might have no knowledge at all before the matter is tried out—circumstances affecting the personal or domestic considerations of the defendant, and the like. It seems, therefore, to me that in a Rent Act case, unlike in an ordinary action, the question is not one of the plaintiff seeking to establish some matter of private right which, if he does succeed in establishing it, gives him the palm of victory; and so that, if he fails, as a matter again of right, prima facie at any rate he would expect to have to pay the costs which would be the fruit for the defendant of his victory.

I Looking at the matter in that way, I return again to the facts of the present case. From the judgment which I have read it is quite plain that, though the incidents proved were in number but three, they were incidents of a very startling character, and a reference to the notes of the evidence emphasises what the judge says, that the defendant, in addition to being a liar and not to be trusted at all,

was a bully; he behaved, beyond a doubt, outrageously on each one of these three occasions. The plaintiff is by trade or profession a musician and plays in the Symphony Orchestra of the British Broadcasting Corporation. He may, therefore, well be a man of somewhat sensitive nature, and, as the judge says, and as counsel for the plaintiff emphasised, the bullying and extremely vulgar behaviour of the defendant would be likely enough to have a serious effect on, not only the plaintiff's peace of mind, but also on his imaginative faculties. One may indeed ask, in such circumstances, what could the plaintiff do to protect himself? He brought his action. So far as the matter rested on private right and on his establishing such a case as empowered the court to give him relief, he succeeded. Then, however, the judge, basing himself (and, I assume, basing himself substantially, if not exclusively) on the fact that when he tried the matter in March, 1955, no incident had been proved since June, 1954, and after considering, no doubt, the other circumstances—for example, the circumstances of the defendant's household and family—came to the conclusion, to use his own words, that “the extreme penalty of eviction would be harsh”. In those circumstances, however, can it be said that the learned county court judge departed from a due exercise of his judicial duty in dealing with costs, having regard to the circumstance that, the plaintiff having done all that he could as plaintiff to establish his cause of action, he nevertheless did not get the relief which it was within the discretion of the judge to give? I said earlier that to make the defendant, who, in the end, succeeds in the sense that no relief is ordered against him, pay the costs of the plaintiff, who fails in the sense that no relief is obtained at his suit, requires a strong and exceptional case. I cannot, however, think that in a rent case such an award of costs must necessarily be in excess either of the powers of the county court judge or of a proper exercise of his judicial discretion.

Reverting for a moment to the cases which were cited, it is here, as I think, that the contrast appears with such a case as *Andrew v. Grove* (4), to which counsel for the defendant referred. In that case LORD ALVERSTONE, C.J., who delivered the leading judgment of the Divisional Court on an appeal from a county court judge, referred to s. 113 of the County Courts Act, 1888 (which was repealed by the County Courts Act, 1934, s. 193 (4), and Sch. 5) and said ([1902] 1 K.B. at p. 627):

“In my opinion [s. 113] is a section which enables the county court judge to award costs in the exercise of a judicial discretion, but to give him that discretion there must be some right established by the plaintiff.”

In that case the plaintiff had failed to establish a right, because the defendant set up, as he was entitled to do, the Gaming Acts as an answer to the plaintiff's case. In the present case, however, applying strictly LORD ALVERSTONE's dictum, the question of right was successfully litigated by the plaintiff, because the plaintiff did establish what he had to set out to prove, namely, power in the county court, by virtue of conduct by the tenant falling within para. (b) of Sch. 1 to the Act of 1933, to grant relief if, in all the circumstances, the court thought fit to grant it. Beyond that the plaintiff could not, as a matter of right, establish anything: he could only submit himself to the discretion of the judge. Moreover, I think that the present case is to be distinguished from the sort of case which this court had in mind in the language which was cited to us from the judgment of BRETT, L.J., in *Re Foster v. Great Western Ry. Co.* (2), for the lord justice, referring to the old Chancery cases of *Witt v. Corcoran* (5) and *Dicks v. Yates* (6), said (8 Q.B.D. at p. 521):

“... [they] seem to me to show that in the opinion of the judges in the Court of Appeal, which if it is the ground of their judgments is binding upon us even although we did not agree with it, the meaning of Ord. 55 is that there should be an absolute discretion over all costs within the jurisdiction

A of the High Court, and that the jurisdiction of the High Court should be precisely what the jurisdiction of the Court of Chancery was before, and therefore that where the defendant has absolutely succeeded no order can be made against the defendant in favour of the plaintiff for any part of the costs of the litigation."

B In the present case that observation seems to me inapplicable. It cannot, I think, be true to say of the defendant here that he "absolutely succeeded". On the matter of private right (as I have many times said) he failed: the plaintiff succeeded. Therefore, this case, being within the ambit of the Rent Restrictions Acts, must be considered, as I think, in the light of the very special provisions of those Acts and of the peculiar nature of the limitations put on a plaintiff's right to a remedy by virtue of the wide discretion reposed in a judge on the matter of reasonableness. I think that it is indeed important, if justice is to be done, that these discretions should be of the widest possible character, and I should be very sorry to limit them. In the present case justice, undoubtedly, was done, to my mind, because I do not see what else the unfortunate plaintiff could have done but bring the case to the attention of the court in an attempt to get relief from the tempestuous conduct of the defendant. The judge, having regard to the length of time, felt that "the extreme penalty would be harsh"; but I should find it very difficult to say that, in the result, it would be just that the plaintiff should have to pay any costs or, indeed, that there should be any other result than that the plaintiff should have the costs to which he had been put paid by the defendant, who was responsible for all that had occurred. For these reasons I think that we ought not to interfere with the learned judge's discretion, and I would dismiss the appeal.

E **HODSON, L.J.:** I entirely agree with the judgment of the Master of the Rolls, and cannot usefully add anything.

PARKER, L.J.: I have come to the same conclusion. It is, I think, clear that the discretion of the county court judge under the County Court Rules, 1936, Ord. 47, r. 1, just as that of a High Court judge under s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, is, on the face of it, completely unfettered. I say "on the face of it" because, of course, the discretion cannot be exercised arbitrarily; it must be exercised judicially and on fixed principles dictated by reason and justice. One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the successful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right. It seems to me, however, that those cases and that principle do not and cannot apply where the case, as under the Rent Restrictions Acts, is a case calling for discretionary relief. Under the Rent Acts a plaintiff has to prove certain facts before the jurisdiction of the court arises to grant any relief at all. Once those facts are proved and the plaintiff has succeeded in establishing jurisdiction, then it may be that he will nevertheless fail to get his relief because of something which may be completely unknown to him, such as the extent and the needs of the defendant's family. In such a case I can see no reason for limiting the wide discretion which exists to order the defendant to pay the plaintiff's costs. No doubt, cases when that will be done will be rare: in general it will be sufficient to deprive the successful defendant of his costs and not to order him to pay the plaintiff's costs. So far as this case is concerned, however, it is quite clear that the defendant's conduct was such as not merely to provoke the plaintiff but to make it inevitable and necessary that he should bring the

proceedings—proceedings in which he ultimately failed, although, so far as lay in his power, he proved his allegations and satisfied the judge of the jurisdiction to grant the relief. I would, in these circumstances, dismiss this appeal.

Appeal dismissed.

Solicitors: *H. C. L. Hanne & Co.* (for the defendant); *Thomas V. Edwards & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re FLETCHER, *Ex parte* FLETCHER v. OFFICIAL RECEIVER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.JJ.), May 5, 6, 17, 18, 26, 1955.]

Bankruptcy—Adjudication—Official Receiver's application—Resolution of creditors that debtor be not adjudged bankrupt—Jurisdiction of the court—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 219—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 105, s. 132 (1), (2), s. 168 (3).

Statutory Instrument—Validity—Rule in terms identical with former rule—Former rule continued by superseding Act as if made under that Act—New rule replacing former rule intra vires—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 219—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 132 (1), (2), s. 168 (3).

On Oct. 12, 1954, a receiving order was made against the debtor. On Nov. 5, 1954, at a first meeting of creditors it was resolved that the meeting be adjourned until Jan. 7, 1955. On that day, the creditors carried a resolution that the debtor be not adjudged bankrupt, but that the meeting be adjourned for three months to enable such proceedings to be taken as might be advised. On Jan. 27, 1955, the Official Receiver applied under the Bankruptcy Rules, 1952, r. 219, for an order adjudging the debtor bankrupt, and on Apr. 1, 1955, the order was made. The debtor appealed on the ground that r. 219 (which was made in purported exercise of powers afforded to the Lord Chancellor by the Bankruptcy Act, 1914, s. 132 (1)) was ultra vires.

Held: rule 219 of the Bankruptcy Rules, 1952, was validly made under s. 132 (1) of the Bankruptcy Act, 1914, because s. 168 (3) of that Act, by providing that the rules in force (which meant the rules de facto existing or current) under the Bankruptcy Acts, 1883 to 1913, among which former rules was one identical with r. 219 of the Rules of 1952, should continue in force and have effect as if made under the Act of 1914, showed that a rule in the terms of r. 219 could validly be made under s. 132 (1) of the Act of 1914.

Semble: section 105 of the Bankruptcy Act, 1914, does not confer a general overriding power to adjudicate a debtor bankrupt, but is directed rather to matters incidentally arising in the course of a bankruptcy (see p. 597, letter H, post).

Appeal dismissed.

[**Editorial Note.** If the enactment under which a statutory instrument is made is repealed, the statutory instrument ceases to have effect for the future, unless there is some saving provision in the repealing Act. Such saving provisions are common in modern statutes, and their principal purpose is to save existing statutory instruments from lapse, as, for example, when several statutes are replaced by a consolidating Act. The present case shows that the ordinary saving clause in a statute, which continues statutory instruments in force as if they were made under the new Act, may have a further operation, viz., confirming, in effect, the validity of particular provisions in instruments which were in existence, and accepted as valid without challenge, at the date of the new Act,

A even where, as in the present case, the validity of the provision might be open to grave question if it had been enacted initially immediately after the commencement of the new Act.

As regards the lapse of statutory instruments, see 1 HALSBURY'S STATUTORY INSTRUMENTS 14.

B As to the application for an adjudication order, see 2 HALSBURY'S LAWS (3rd Edn.) 348, para. 679; and for cases on the subject, see 4 DIGEST 169, 170, 171, 1585, 1587, 1591-1596.

For the Bankruptcy Rules, 1952, r. 219, see 3 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 206.]

Cases referred to:

- C (1) *Re de la Porte*, [1915] H.B.R. 98; sub nom. *Re a Debtor* (No. 518 of 1910), (1910), 130 L.T.Jo. 176; 4 Digest 169, 1587.
- (2) *Ex p. Foreman, Re Hann*, (1887), 18 Q.B.D. 393; 56 L.J.Q.B. 161; 4 Digest 526, 4810.
- (3) *Re Silber*, [1915] H.B.R. 97; 4 Digest 170, 1591.
- (4) *Caledonian Ry. Co. v. North British Ry. Co.*, (1881), 6 App. Cas. 114; 42 Digest 638, 410.
- D (5) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; 42 Digest 649, 563.
- (6) *R. v. Crewe (Earl), Ex p. Sekgome*, [1910] 2 K.B. 576; 79 L.J.K.B. 874; 102 L.T. 760; 16 Digest 249, 493.
- (7) *Sobhuza II v. Miller*, [1926] A.C. 518; 95 L.J.P.C. 137; 135 L.T. 215; Digest Supp.
- E (8) *Re Barned's Banking Co., Kellock's Case, Re Xeres Wine Shipping Co., Ex p. Alliance Bank*, (1868), 3 Ch. App. 769; 39 L.J.Ch. 112; 18 L.T. 671; 42 Digest 641, 456.
- (9) *Patent Agents Institute v. Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 75; 71 L.T. 205; 42 Digest 613, 139.
- F (10) *Minister of Health v. Regem, Ex p. Yaffe*, [1931] A.C. 494; 100 L.J.K.B. 306; Digest Supp.
- (11) *Re Thurlow (Lord), Ex p. Official Receiver*, [1895] 1 Q.B. 724; 64 L.J.Q.B. 479; 72 L.T. 642; 59 J.P. 309; 4 Digest 170, 1592.
- (12) *Re Pinfold, Ex p. Pinfold*, [1892] 1 Q.B. 73; 61 L.J.Q.B. 161; 65 L.T. 683; 4 Digest 170, 1590.

G Appeal.

The debtor appealed against an order adjudicating him bankrupt dated Apr. 1, 1955, made on the application of the Official Receiver under the Bankruptcy Rules, 1952, r. 219. The sole ground of the appeal was that r. 219 was ultra vires.

Cyril Salmon, Q.C., and *R. O. C. Stable* for the debtor.

Gilbert Beyfus, Q.C., and *A. L. Figgis* for the Official Receiver.

Cur. adv. vult.

H May 26. The following judgments were read.

SIR RAYMOND EVERSLED, M.R. : This is an appeal from an order, adjudicating the debtor a bankrupt, dated Apr. 1, 1955. The order was made on the application of the Official Receiver, pursuant to r. 219 of the Bankruptcy Rules, 1952 (S.I. 1952 No. 2113). The sole point taken by the debtor on the appeal has been that the making of the rule was beyond the rule-making powers conferred by s. 132 of the Bankruptcy Act, 1914, so that, the rule being ultra vires and invalid, the order of adjudication made thereunder was wholly ineffective.

Rule 219 is in the following terms:

"Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the court may, on the application of the Official Receiver or of any person interested, adjudge the debtor bankrupt."

Section 132, in purported exercise of the powers of which the rule was made, A
is as follows:

"(1) The Lord Chancellor may, with the concurrence of the President of
the Board of Trade, make general rules for carrying into effect the objects
of this Act: Provided that the general rules so made shall not extend the
jurisdiction of the court. (2) All general rules made under this section B
shall be laid before Parliament within three weeks after they are made if
Parliament is then sitting, and, if Parliament is not then sitting, within three
weeks after the beginning of the then next session of Parliament, and shall
be judicially noticed, and shall have effect as if enacted by this Act."

It has been the contention of the debtor that the powers of the court to make
orders of adjudication being limited by other sections of the Act (of which the
most material section is, for present purposes, s. 18), r. 219, which purports to confer C
power on the court to make orders for adjudication in circumstances other than
those specified in the sections in question (and particularly s. 18) offends against
the proviso to s. 132 (1): "Provided that the general rules so made shall not
extend the jurisdiction of the court"; and so is, *ex facie*, beyond the powers of
the nominated rule-making authority; and that is so, notwithstanding the fact D
that the rule (together with the other rules comprised in the statutory instrument
of 1952) was admittedly laid before Parliament in accordance with s. 132 (2).

I shall have to refer presently to a number of the sections of the Bankruptcy
Act, 1914, and also more specifically to the facts of the present case. But it
may be said at once that if the law of bankruptcy, now contained in the Act of
1914 (as amended in 1926), had been enacted for the first time, say, in 1953 and E
if the present general rules in bankruptcy had been promulgated for the first time
in 1954 in purported exercise of the powers to make such rules conferred by the
Act, it would, I think, have been difficult to contend successfully (apart from
the argument of counsel for the Official Receiver based on the effect of s. 132 (2)
and the fact of the rules having been laid before Parliament as prescribed by that
sub-section) that the rule in question did not, by purporting to confer on the court F
powers in excess of those specified in the Act, exceed the limits of the authority
delegated by Parliament. The rule in question is, however, the successor
of other rules in substantially identical terms which have formed part of the
bankruptcy code under the Act of 1914 and the earlier Act of 1883 for about
two generations; and it has accordingly been the substance of the argument on
behalf of the Official Receiver that, on various grounds, including particularly the G
language of s. 168 of the Act of 1914, it is now too late to challenge successfully
the validity of the rule.

Having regard to the nature of that argument, it will, I think, be useful for
me to begin this judgment by some recollection of the history of our bankruptcy
jurisdiction. That jurisdiction rests exclusively on enacted law. The first of
the statutes regulating the affairs of insolvent persons and the distribution of H
their effects was that of 34 & 35 Hen. 8 c. 4, in 1542. It is, however, un-
necessary to go further back than the Bankruptcy Act, 1869. By that Act it was
provided that, if a debtor committed any of the acts known as acts of bankruptcy
and defined by s. 6 of the Act in terms corresponding to s. 1 of the present Act, a
petition might be presented for his adjudication as a bankrupt. Section 8 of the
Act then provided in perfectly general terms that (subject to satisfaction of I
conditions as to proof of the act of bankruptcy and the like) the court (as defined
in the Act) should make an order for adjudication. The Act also contained, in
s. 72, a general statement of the powers of the court in terms corresponding to
those of s. 105 of the present Act (to which I shall later refer) and, in s. 78, a
general rule-making power.

The Act of 1869 was replaced by the Bankruptcy Act, 1883. Section 4 of the
latter Act specified, in the same way as had s. 6 of the Act of 1869, the acts of

A bankruptcy, the commission of one or other of which was the necessary foundation for the exercise of bankruptcy jurisdiction by the court. The Act of 1883 introduced for the first time the innovation of the receiving order, which (apart from certain cases where a debtor sought adjudication on his own petition) became the first consequence liable to ensue on the invocation of the powers of the court after the commission of an act of bankruptcy. The effect of a receiving order, as its title implies, is not to divest the debtor of his assets for distribution among his creditors, but to require the Official Receiver to receive and hold them, the debtor being thenceforward, in general, protected from proceedings against him by his creditors. The purpose of the receiving order is, I think, quite plainly, to give to the creditors an opportunity of deciding whether, as an alternative to adjudication, they would be prepared to accept a proposal for a composition or scheme of arrangement. So much appears to me to follow from the provisions in the statute for calling meetings of the creditors, to which I will presently return. The operation of the receiving order was and is intended, in my view, to be of strictly limited duration. As was said in this court in *Re de la Porte* (1) in 1910 (a case which was concerned with r. 192 under the Act of 1883, a rule identical in terms with the present r. 219, and to which I shall later again refer):

“ . . . the legislature does not think that it is desirable that there should be a large class or a small class of men against whom a receiving order has been made and who occupy that peculiar status for an indefinite time. The view of the legislature is that under ordinary circumstances, unless a scheme is accepted either at the first meeting or at one adjournment thereof, then on the application of the Official Receiver the debtor may be adjudicated bankrupt.”

Accordingly by s. 15 of the Act of 1883 (the terms of which correspond with those of s. 13 of the present Act) it was provided that as soon as might be after the making of a receiving order a general meeting of creditors should be held for the purpose of considering whether a proposal for a composition or scheme of arrangement should be entertained or whether it would be expedient that the debtor should be adjudged bankrupt. It will be observed that the alternatives suggested for the meeting were either (a) acceptance of a composition or scheme, or (b) the debtor's adjudication. When, however, I turn to those sections which, under the Act of 1883, provide in terms for adjudication, it will be noted at once that (in lieu of the general terms of the provisions of s. 8 of the Act of 1869) the circumstances in which an order for adjudication might or should be made appear on the face of them to be specific and limited. Section 16 (3) (now s. 14 (3) of the Act of 1914) and s. 18 (11) (now s. 16 (16) of the Act of 1914) provided respectively for the cases where the debtor failed to comply with his obligations as regards a statement of affairs or had made default in payment of an instalment under a scheme or composition. For present purposes, these sections need not be further noticed except to observe that in each case, as in their modern counterparts, the court's functions are expressed on the face of them as discretionary rather than obligatory—“ the court *may* adjudge the debtor bankrupt ”. It is also unnecessary to notice for present purposes the special provisions for adjudication on the debtor's own petition.

I turn to s. 20 (1) of the Act of 1883, which is in terms identical with s. 18 (1) of the Act of 1914. The sub-section is as follows:

“ Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the

property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

There is no other provision in the Act of 1883 (or, correspondingly, in the Act of 1914) which is in terms directed to the making of orders for adjudication by the court. It will be seen at once that on the face of the sub-section which I have quoted the power (or duty) of the court to adjudicate appears to be limited to the happening of one or other of the events specified therein. The facts in the present case are that, at the first and adjourned meeting of the creditors, after the making of the receiving order on Oct. 12, 1954, the creditors, having before them no proposal for a composition or scheme of arrangement, resolved (at the adjourned meeting)

"that the debtor be not adjudged bankrupt but that this meeting be adjourned for three months to enable such proceedings to be taken as may be advised after further consideration by counsel of the matters referred to at this meeting."

It has, therefore, been contended for the debtor that since the creditors did pass a resolution, and since in fact no examination of the debtor has yet taken place, the case is outside the purview of the present s. 18 and that it is outside the powers of the court as defined by the statute to make any order for adjudication. As counsel for the Official Receiver contended in the course of his argument, it would appear to follow, if the debtor's contention is correct, that where a debtor had left the country and could not therefore be examined, then, so long as meetings of his creditors (who might include among their number friends or associates favourable to him) were minded to pass resolutions of some kind other than a resolution in favour of adjudication, the "peculiar status" under the receiving order would continue indefinitely.

I must, however, first complete my references to the Act of 1883. Section 102 (1) of that Act is in terms identical with s. 105 (1) of the Act of 1914. The sub-section contains (in each case) the only general statement of the powers of bankruptcy courts. It is as follows:

"Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case . . ."

I need not read the proviso.

Finally, in s. 127 of the Act of 1883, there was conferred a power to make general rules, the section corresponding to s. 132 of the Act of 1914 (already quoted), save that the all-important proviso to sub-s. (1) of the latter section appeared as a separate sub-section in the Act of 1883.

Thus, the character of the statute of 1883, so far as material for present purposes, is wholly similar to that of the Act of 1914. But, notwithstanding the apparently limited and defined powers of the court to adjudicate, the rule-making authority proceeded in 1886 and 1890 to promulgate a body of general bankruptcy rules which included as r. 190, r. 191 and r. 192 counterparts of the present r. 217, r. 218 and r. 219. Rule 192, indeed, took in 1890 the precise form which has ever since been followed and which is now comprised in r. 219. It will be noted that it purports to empower the court to make an adjudication order whenever the creditors have not resolved to accept a composition or scheme at their first meeting or one adjournment thereof, without regard to the happening of any other of the events specified in s. 18 (1) of the present Act (s. 20 (1) of the Act of 1883)—in particular whether or not the creditors have passed any other form of resolution. It will be noticed, also, that the power so expressed to be

A conferred may be exercised "on the application of the Official Receiver or of any person interested", whereas the duty to adjudicate which s. 18 (1) of the present Act (or s. 20 (1) of the former Act) appears to impose is not expressed to be dependent on any application on the part of anyone.

It is not open to doubt that the rules first made in 1886 and 1890 and their successors have ever since their first appearance been generally accepted as part of the bankruptcy code; nor can it be doubted that numerous persons have, during that substantial period of time, been adjudicated bankrupt by the court in the exercise of its professed jurisdiction under the old r. 192 and its later successors. In *Ex p. Foreman, Re Hann* (2) in this court, the question was raised whether the old r. 111 (2) (see now r. 127 (a)) restricting rights of appeal in certain instances from decisions of the bankruptcy court was intra vires the rule-making authority under s. 127 of the Act of 1883; and this court held that it was, the subject-matter being fairly within the "objects of the Act", having due regard to the terms of s. 104 (2) (d) of the Act. Apart from *Re Hann* (2), no case has been found or was cited to us in which the validity of the rules, and particularly of the old r. 192, was ever challenged in the courts. Not only so, but in *Re de la Porte* (1), an appeal against adjudication under that rule was dismissed by this court. I have already quoted from the language used in his judgment in that case by LORD COZENS-HARDY, M.R. It does not, however, appear from the available reports of the case and the official file (which we have examined) that the question of the validity of the rule was raised in the course of the case, though I observe that the counsel engaged included no less an authority than Mr. E. W. Hansell for the appellant debtor and Sir John Simon as Solicitor-General for the Official Receiver. Five years later the successor to r. 192 was before this court, which again treated the rule as valid and dismissed the appeal against an adjudication order made thereunder: see *Re Silber* (3).

The first argument on behalf of the Official Receiver was based on the interpretation of the Act of 1914 without regard to the matters of history to which I have referred—a question, as he put it, of "pure construction"—and was that the rule did not offend against the proviso to s. 132 (1) of the Act, because the words of s. 105 (1) were wide and apt enough to confer on the court power to make an adjudication order at any time after the making of a receiving order, or at least at any time after a failure of the creditors at their first-meeting or one adjournment thereof to accept a proposal for a composition or scheme of arrangement.

This argument is, to my mind, fraught with formidable difficulties. I should have expected a section, intended to confer a general overriding power to adjudicate, to be found, or at least referred to, in that part of the Act devoted to adjudication. I find instead, under the cross-heading "Adjudication of bankruptcy", the specific provisions of s. 18 which, on the view contended for, are at any rate in large measure otiose: for it has been held that the word "shall" in s. 18 is directory rather than obligatory. Further, the terms of s. 105 (1) are, in their natural sense, directed rather to the court's general jurisdiction in incidental matters arising in the course of a bankruptcy. I need not, however, pursue the point further or express any final conclusion, having regard to the view I have formed on one branch of the later and more substantial argument of counsel for the Official Receiver. I add, however, that I have referred to WILLIAMS ON BANKRUPTCY (5th Edn.), published in 1891 and edited by Mr. E. W. HANSELL, and I have not found in the notes to s. 102 (1) of the Act of 1883 any suggestion that the makers of r. 190 to r. 192 of the old rules derived their authority from that sub-section.

The first branch of what I have called counsel's more substantial argument invoked what he claimed to be the sense and purpose of the legislation and also the long-established practice to which I have alluded, in order to influence the construction of the Act and particularly of s. 105 (1) in his favour. Counsel prayed

in aid the well-known canon of the construction of statutes to the effect that the courts will tend, if it is fairly open to them to do so, to construe the language of a statute in a way which will avoid an anomalous or insensible result (see, for example, *Caledonian Ry. Co. v. North British Ry. Co.* (4), 6 App. Cas. at p. 122, per LORD SELBORNE, L.C.). In this connection, counsel referred to the passage from LORD COZENS-HARDY's judgment in *Re de la Porte* (1) in support of his proposition that the legislature could not be taken to have contemplated, in any circumstances, a substantial period of operation of the receiving order. Counsel went further and cited to us the dicta of great judges to the effect that the courts will construe a statute in conformity with well-established practice thereunder, even though the terms of the statute do not prima facie tend to such an interpretation (*Income Tax Special Purposes Comrs. v. Pemsel* (5), [1891] A.C. at p. 590, per LORD MACNAGHTEN; *R. v. Earl of Crewe, Ex p. Sekgome* (6), [1910] 2 K.B. at p. 596, per VAUGHAN WILLIAMS, L.J.; and the Privy Council case of *Sobhuza II v. Miller* (7), [1926] A.C. at p. 524, per VISCOUNT HALDANE delivering the judgment of the Board). To the natural question, What was the provision in the Act of 1914 which he sought so to construe?, counsel replied that the Act should be read, in accordance with the general scheme of bankruptcy jurisdiction which had found clear expression in the Act of 1869, as containing an implied power in the court to adjudicate subject only to the necessary incidence of the introduction of the stage of the receiving order. Alternatively, counsel fell back on the general terms of s. 105 (1).

There is, to my mind, obvious and serious difficulty in the way of reading a power by way of implication into a statute containing express provisions which would be inconsistent with the power so implied or would be rendered redundant by it; and no case was cited illustrative of such a process. As to the terms of s. 105 (1), I have already pointed out objections to a reading of them so as to enable them to confer a general power of adjudication. Attention was also drawn in the course of the argument to the terms of r. 218, which provides for the making of an order of adjudication (inter alia) if "any of the other events specified in the Act have occurred". (The old r. 191, though different in form, made similar provision.) Rule 218 derives its force from the same authority as r. 219; but it is difficult to suppose that the phrase which I have quoted could have been intended to refer to events other than those specified in s. 14, s. 16 and s. 18, a view which is not easy to reconcile with the proposition that, by virtue of s. 105 of the Act, a wide power of adjudication was contemplated, not limited to the events particularised in the three named sections.

Counsel for the debtor therefore contended that the argument on behalf of the Official Receiver involved not so much a construction of s. 105 as a torturing of its language. Nevertheless (as counsel frankly conceded), it is not only natural but desirable and proper that the court should, if it fairly can, so construe the statute as to make it conform to long-established and well-accepted bankruptcy practice; and all the more so if Parliament must be assumed, in enacting the Act of 1914, to be conscious of that practice, as suggested by the language of SELWYN, L.J., in *Re Barned's Banking Co., Kellock's Case* (8) (3 Ch. App. at p. 781). I feel therefore, for myself, the force of this part of the argument of counsel for the Official Receiver. And, as he showed, VAUGHAN WILLIAMS, L.J., in *R. v. Crewe* (6) felt able, on this ground, to accept a construction of the statute there in question which was inconsistent with the interpretation to which its language would, naturally and unaided by considerations of established practice, have led. He said ([1910] 2 K.B. at p. 596):

"I think that the power given by s. 5 of the Act of 1890 to extend the operation of certain repealed enactments in Sch. 1 to any foreign country in which for the time being Her Majesty has jurisdiction as if the country were a British possession, and as if Her Majesty in Council were the legislature of the possession, rather favours the limitation of the statute to Her Majesty's

- A subjects suggested by Mr. Hall; and I think that s. 2 and s. 12 recognize this limitation of extra-territorial jurisdiction to Her Majesty's subjects. I think, however, that the interpretation which has been acted upon for so many years in Orders of Council and the proclamations thereunder applying the provisions of the Foreign Jurisdiction Act, 1890, to natives of such foreign countries as well as to British subjects resident in or resorting to such
- B foreign country makes it impossible now to adopt the interpretation suggested by Mr. Hall."

But, again, I find it unnecessary to express on this matter any concluded opinion. For, in my judgment, counsel for the Official Receiver is entitled to succeed on the second branch of this part of his case, which turns on the language of s. 168 (3) of the Act of 1914. That sub-section reads:

- C "Until revoked or altered under the powers of this Act, any fees prescribed and any general rules and orders made under the Bankruptcy Acts, 1883 to 1913, and the Bankruptcy (Discharge and Closure) Act, 1887, which are in force at the commencement of this Act, shall continue in force, and shall have effect as if made under this Act."

- D Counsel contended, and I think rightly, that the effect of that sub-section was not only to give, notwithstanding the repeal of the Act of 1883, statutory force to the existing Bankruptcy Rules of 1886 to 1890 (including particularly r. 192) but also to give a legislative imprimatur to the proposition that such rules would have been validly made under s. 132 (1); with the necessary consequence that
- E rules subsequently made in identical or substantially identical terms under the same section would have the same force and efficacy.

- The first answer given by counsel for the debtor to this argument was to suggest that it involved a *petitio principii*, inasmuch as s. 168 (3) was in terms confined to "general rules . . . made under the" earlier Act; and that the whole of his challenge to the validity of r. 219 was founded on the proposition that its predecessor, r. 192, had not been "made under", i.e., properly made under or in accordance with, the Act of 1883. But, in my judgment, Parliament must be clearly taken, by the phrase I have quoted, to have intended a reference to the general code of rules, part of the existing body of Statutory Rules and Orders, and (as I have many times said) long accepted and established as effectually "in force". As regards r. 192, the case is all the stronger since Parliament must,
- F according to well-settled principles, be taken to have taken notice of the decision of this court in *Re de la Porte* (1), in which the rule had been "enforced" in fact. (See also the reference to the observations of SELWYN, L.J., in *Kellock's Case* (8) (3 Ch. App. at p. 781) above mentioned.)

- G Counsel for the debtor, however, further submitted that even if the old rules must be taken, as a consequence of the sub-section, to remain in force until revoked as if made (i.e., validly made) under the Act of 1914—as, in my judgment, they clearly must—the efficacy conferred should not extend beyond the old rules, so that when those rules were revoked or replaced by the new code, the latter must be justified, without regard to s. 168 (3), by establishing that they were, in truth, within the competence of the rule-making authority to make them under the other sections of the Act. I am also unable to accept this argument. If the effect of the sub-section is that r. 192 (for I can confine myself to that rule for the purposes of the present case) is to be treated as having been made, and validly made, under s. 132 (as I think it necessarily is by virtue of the words "shall continue in force"), then it must, in my judgment, follow that r. 219, being in terms identical with r. 192, must be regarded as validly made under the same section.
- H
- I

My conclusion on the last point is sufficient to dispose of the case. But, out of respect for the arguments presented to us, I will deal briefly, though inconclusively, with the last two contentions of counsel for the Official Receiver.

The first turns on s. 132 (2), which I have already read. It is conceded that the present series of rules, comprised in S.I. 1952 No. 2113, was in fact duly laid before Parliament as provided by the sub-section, as had been the Rules of 1886 and 1890 pursuant to the corresponding s. 127 (2) of the Act of 1883. It is also conceded that in neither case was any adverse resolution passed by Parliament. Counsel has accordingly contended that the validity of the present rules cannot now be challenged, and the competence of those who made them cannot now be questioned in the courts; and that the same was true of the old Rules of 1883 to 1890. Counsel cited to us the well-known dicta of the majority of the House of Lords in *Patent Agents Institute v. Lockwood* (9), and the dicta of the House (and particularly of LORD THANKERTON) to the contrary effect in *Minister of Health v. Regem, Ex p. Yaffe* (10). The circumstances of the present case provide, however, one special feature which may well be said not to have been present in *Lockwood's* case (9); for the power of the Lord Chancellor with the concurrence of the President of the Board of Trade to make general rules "for carrying into effect the objects of the Act" is expressly qualified by the proviso that such general rules "shall not" extend the jurisdiction of the court—and it is the gist of the argument of counsel for the debtor that r. 219 does purport so to extend the court's jurisdiction. If a rule were made which quite plainly—and, if you will, deliberately—extended the court's jurisdiction, would the fact of such rule having been, without result, laid before Parliament as provided by s. 132 (2) disable the court from pronouncing it invalid? In *Re Hann* (2), a similar argument was put to this court; i.e., that the effect of s. 127 (2) of the Act of 1883 was to prevent the court from inquiring into the validity of the rule then being discussed. In the event, it was unnecessary for this court to decide the question; and LORD ESHER, M.R. (18 Q.B.D. at p. 399), preferred not to express any opinion one way or the other on it. I prefer, for my part, to follow LORD ESHER's example.

Second, and last, counsel for the Official Receiver argued that the present appeal ought in any event to be dismissed, since the case fell, in truth, within the terms of s. 18 (1) of the Act. As I have earlier observed, the effect of s. 13 may be said to be that the creditors are given the choice of two alternatives, viz., (a) accepting a composition or scheme, or (b) resolving that the debtor be adjudicated. The creditors are not, according to the argument, entitled to embark on a third course, declining to accept a composition but resolving that the debtor be not adjudicated; a course which might be said to be an usurpation by the creditors of the powers and duties of the court: see *Re Lord Thurlow, Ex p. Official Receiver* (11) where LORD ESHER, M.R., said ([1895] 1 Q.B. at p. 729):

"The administration of bankruptcy matters from beginning to end takes place under the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of Parliament. It is not for the creditors in the case to decide how the bankruptcy law shall be administered; the court constantly overrules their views, if it thinks they have been persuaded to agree to some course which the court thinks an improper one . . ."

So, counsel argued, the words "no resolution" in the phrase in s. 18 (1) "if the creditors . . . pass no resolution" should be interpreted as equivalent to "no relevant resolution"; and the resolution passed by the creditors at the adjourned meeting, which I have quoted, was not a relevant resolution, not a resolution which it was, for the purposes of the section, competent for the creditors to pass.

Counsel for the debtor conceded that some limitation must be put on the words "no resolution". It would not be possible, he agreed, for the creditors to seek to avoid the effect of s. 18 (1) by passing some purely extraneous resolution—to take the example given in the course of the argument, a resolution that Parliament be dissolved. On the other hand, if Parliament had meant that the

A court's duty should arise if the creditors did not pass a resolution in favour of adjudication, it would have been easy enough to say so. In the circumstances, as I have already indicated, I prefer also to express no view on the question.

For the reasons which I have given, I think that the argument on behalf of the Official Receiver on s. 168 (3) of the Act should succeed and that the appeal, accordingly, ought to be dismissed.

B **HODSON, L.J. :** On Oct. 12, 1954, a receiving order was made. On Nov. 5, 1954, at a first meeting of creditors it was resolved that the meeting be adjourned until Jan. 7, 1955. On that day, the creditors carried a resolution that the debtor be not adjudged bankrupt, but that the meeting be adjourned for three months to enable such proceedings to be taken as might be advised. C On Jan. 27, 1955, the Official Receiver applied under r. 219 of the Rules of 1952 to adjudge the debtor bankrupt, and on Apr. 1, 1955, the order was made. The debtor appeals on the ground that r. 219 is *ultra vires*.

Section 132 of the Bankruptcy Act, 1914, contains the power to make rules. It reads as follows:

D “ (1) The Lord Chancellor may, with the concurrence of the President of the Board of Trade, make general rules for carrying into effect the objects of this Act: Provided that the general rules so made shall not extend the jurisdiction of the court. (2) All general rules made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and, if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, E and shall be judicially noticed, and shall have effect as if enacted by this Act.”

The argument is that r. 219 is invalid because its operation involves an extension of the jurisdiction of the court. The relevant statutory provision is contained in s. 18 of the Act, which is said to give no such discretionary power to the court as is contained in r. 219, which must accordingly be *ultra vires*. Section F 18 (1) reads as follows:

G “ Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.”

Rule 219 reads as follows:

H “ Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the court may, on the application of the Official Receiver or of any person interested, adjudge the debtor bankrupt.”

I It is unnecessary to decide the question whether there is in the scheme of the Bankruptcy Act, 1914, implied authority for the rule, or, in particular, whether assistance can be gained from consideration of s. 105 which deals with the general powers of the bankruptcy court.

Counsel for the debtor contends with some force that if there is a general power of adjudication in s. 105, or elsewhere in the Act, it is surprising that s. 14, s. 16 and s. 18 of the Act were included since they would then be merely examples of when that general power could be exercised. He conceded that the rule or its predecessor had been recognised as valid for many years; in particular, by this court, in 1910, in *Re de la Porte* (1), reported as a footnote to *Re Silber* (3).

The rule then acted on was r. 192, made in 1886 (which assumed its present form in 1890), under the powers contained in the Act of 1883. Rule 192 was in similar terms to the rule now in question, and the Act of 1883 contained in s. 20 a section corresponding to s. 18 of the Act of 1914 and in s. 127 a section corresponding to s. 132 of the Act of 1914. A

In my judgment, all doubt as to the validity of the rule is set at rest by the terms of s. 168 (3) of the Act of 1914, which reads as follows: B

"Until revoked or altered under the powers of this Act, any fees prescribed and any general rules and orders made under the Bankruptcy Acts, 1883 to 1913, and the Bankruptcy (Discharge and Closure) Act, 1887, which are in force at the commencement of this Act, shall continue in force, and shall have effect as if made under this Act." C

The effect of the sub-section is to declare that the previous rules are recognised as being in force and that they shall continue in force and shall have effect as if made under this Act until revoked or altered. It would not, I think, be legitimate to read s. 168 (3) as confined to rules which must necessarily, apart from this sub-section, have been within the strict jurisdictional limits of the Act. The language is quite general in its reference to the rules and describes and identifies those which are to continue in force and effect and so cannot have been regarded by Parliament as made in breach of s. 132 of the same Act. The reference to rules includes those of 1886 and 1890 in which r. 192 appears. The revocation of the Rules of 1886 and 1890 by r. 2 of the Rules of 1915 which contained a fresh rule, viz., r. 223, in the same terms as the previous r. 192, merely confirmed the existing position; r. 223 was itself replaced by the present r. 219 of the Rules of 1952, which also, by r. 2, revoked the Rules of 1915. It would, to my mind, be wrong to hold that a rule expressly declared to have force and effect in 1914 until revoked, should, when later published in the same terms in further rules, be regarded as invalid as being in excess of jurisdiction, while its predecessor was expressly declared to be effective and so necessarily not in excess of jurisdiction. D E F

I agree, therefore, that the appeal should be dismissed.

ROMER, L.J. : The only question in issue on this appeal is whether the adjudication order made against the debtor by the learned registrar on Apr. 1, 1955, is invalid on the ground that r. 219 of the Bankruptcy Rules, 1952, under which the order was made, is *ultra vires* in view of the proviso to s. 132 (1) of the Bankruptcy Act, 1914. This sub-section authorises the Lord Chancellor, with the concurrence of the President of the Board of Trade, to make general rules for carrying into effect the objects of the Act and the proviso stipulates that "the general rules so made shall not extend the jurisdiction of the court." G

Counsel for the debtor submitted to us that the grounds, and the only grounds, on which the court can make an order of adjudication are those specified in s. 14, s. 16 and s. 18 of the Act and that its jurisdiction in this respect is limited accordingly; and that it therefore follows that, inasmuch as r. 219 purports to add to these grounds, it is invalid because it is *pro tanto* extending the jurisdiction of the court. Counsel for the Official Receiver supported the validity of the rule in a number of ways, and points both difficult and interesting were argued before us. In my opinion, he is entitled to succeed by reason of s. 168 (3) of the Act of 1914 and, with the Master of the Rolls, whose judgment I have had the advantage of reading, I would prefer to express no concluded opinion whether r. 219 should be upheld on any other ground as well. H I

This rule first made its appearance under the Bankruptcy Act, 1883, and later became r. 192 of the rules which were made in 1890 by virtue of s. 127 of that Act, which was to the same effect as s. 132 of the Act of 1914 and contained (in sub-s. (4)) a similar proviso. It is clear, therefore, that r. 192 was open to the same accusation of *ultra vires* as has been levelled against its successor in

- A the present case. No case, however, or text-book was brought to our attention in which any such criticism has ever been made. Nor can it be said that the rule never came up for discussion or consideration. It was, for example, cited in argument before the Divisional Court in *Re Pinfold, Ex p. Pinfold* (12). One member of that court was VAUGHAN WILLIAMS, J., who had a knowledge and experience of bankruptcy law and bankruptcy jurisdiction which has seldom, if ever, been rivalled. The report of the case reveals no indication that that learned judge expressed any doubt as to the validity of the rule. Again in *Re Silber* (3) and in *Re de la Porte* (1) the rule was considered by this court and it does not appear to have been suggested by counsel or by any of the members of the court that the validity of the rule was open to suspicion. The effectiveness of the rule was, indeed, assumed by all concerned. It is true that its validity
- B was not put in issue in any of the cases to which I have referred; and indeed it is because there has been no judicial decision on the point that it has been brought before us in the present case. It is, however, clear, I think, that by 1914 the powers conferred by the Rules of 1890 had become part of the de facto jurisdiction of the court and had been accepted by the profession as such without, so far as is known, any dissonant voice being raised. Such, then, was the position
- D when the Bankruptcy Act, 1914, passed into law. Section 168 (3) of that Act provided, so far as material, as follows:

“Until revoked . . . any general rules and orders made under the Bankruptcy Acts, 1883 to 1913 . . . which are in force at the commencement of this Act, shall continue in force, and shall have effect as if made under this Act.”

- E Prima facie, r. 192 of the Rules of 1890 would be within the scope and operation of this provision. Counsel for the debtor, however, submitted the contrary and said that only such of the earlier rules as had been validly made were continued in force by the section; and that inasmuch as r. 192 was ultra vires on the same grounds as he is challenging the validity of r. 219 of the Rules of 1952, s. 168 (3) of the Act had no effect whatever on it. His contention was, in short, that r. 192
- F had never had any force and, therefore, could not be continued in force; and that the words “shall have effect as if made under this Act” do not carry the matter any further, because if r. 192 had in fact been made under s. 132 (1) of the Act of 1914 it would have been no more valid than its present successor. It appears to me that this is not a permissible way of construing s. 168 (3). It
- G cannot, in my judgment, be supposed that Parliament, when enacting that sub-section, were contemplating that some of the rules which were then current were invalid or were even of doubtful validity; for if any suspicion had been entertained on the subject, the legislature would presumably have revoked such of the doubtful rules as it disapproved of and expressly validated the others, rather than have left it to the courts on some future occasion to decide which
- H of the rules were ultra vires and which were not. In my opinion, the reference in the sub-section to the previously made rules and orders “which are in force at the commencement of this Act” embraced the rules and orders which were de facto in force, whether validly made or not; and a fortiori the reference would include a rule such as r. 192 which had for years past been treated as valid by the courts. The intention of the legislature, as expressed by s. 168 (3) can hardly,
- I I think, be open to doubt. A period of time would necessarily elapse after the passing of the Act of 1914 before any new rules could be made under s. 132 thereof; and during that period the whole body of existing rules and orders was to continue in force—for otherwise there would be none. Interpreting, then, s. 168 (3) in this way, the sub-section may (for present purposes) be read as follows: “Until revoked, r. 192 made under the Bankruptcy Act, 1883, shall continue in force and shall have effect as if made under this Act”. So read, it seems to me to be impossible to accept the suggestion of counsel for the debtor that if the rule were in fact made, or purported to be made, under the Act of 1914,

it would be invalid as being in conflict with the proviso to s. 132 (1); for Parliament cannot have intended to enact a nullity. It is clear that the legislature intended r. 192 (among others) to have statutory force and effect. So also, of course, was s. 132 (1) intended to have force and effect, and, accordingly, these two provisions, simultaneously enacted, must be read, if possible, so as to harmonise with one another. There is no difficulty, in my opinion, in achieving such harmony. As Parliament were continuing a power which had been conferred some twenty-five years previously, they must be taken (as they very reasonably may be taken) to have been treating that power as forming a part of "the jurisdiction of the court" within the meaning of that phrase as used in s. 132 (1) of the Act. If the phrase be read in that sense, the apparent conflict between the rule and the sub-section which would follow on the interpretation of the phrase on the construction which forms the basis of the argument on behalf of the debtor is avoided. In my judgment, the expression "the jurisdiction of the court" in s. 132 (1) has the inclusive scope which I have indicated; from which it follows that neither r. 223 of the Rules of 1915 nor r. 219 of the present rules can be said to have extended the jurisdiction of the court, because the power to adjudicate in the events prescribed by these rules has at all times since, at all events, the passing of the Act of 1914 been within the legislative conception of that jurisdiction and the rules constitute a recognition, or confirmation, of that fact.

I accordingly agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stoneham & Sons* (for the debtor); *Solicitor, Board of Trade.*

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WOODLANDS v. HIND.

[CHANCERY DIVISION (Vaisey, J.), May 24, 1955.]

Specific Performance—Summary procedure—Agreement to purchase or find a purchaser of shares at a fixed price—Claim for specific performance or damages in lieu—Plaintiff electing to claim damages—R.S.C., Ord. 14A (S.I. 1954 No. 1728), r. 1 (1).

By an agreement which was originally oral but was either reduced into writing or evidenced by a letter dated Jan. 14, 1952, the defendant agreed that in consideration of the plaintiff's taking preference and other shares in H., Ltd., a private company of which the defendant was a director, he, the defendant, would purchase at par (or find a purchaser at par for) such of the preference shares as the plaintiff might hold on Dec. 25, 1954. The plaintiff took up the shares, but apart from a small payment which he made to the plaintiff and which was treated as an interim payment under the agreement, the defendant failed to carry out his part of the agreement. The plaintiff issued a writ dated Jan. 27, 1955, indorsed with claims for specific performance of the agreement, or, alternatively, damages in lieu of specific performance. The plaintiff elected to treat the agreement as repudiated and issued a summons for summary judgment under R.S.C., Ord. 14A*, for an inquiry as to damages.

*R.S.C., Ord. 14A, r. 1 (1), provides: "In any action in the Chancery Division commenced by a writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit, the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the court or a judge for judgment and the court or judge may thereupon give judgment in the action unless the defendant by affidavit, or by his own viva voce evidence or otherwise, satisfies the court or judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the court or judge, to entitle him to defend". The order came into operation on Jan. 11, 1955 (see r. 9 (2)).

A **Held:** an agreement either to purchase shares or to find a purchaser for them was an agreement for the sale or purchase of property within r. 1 (1) of Ord. 14A, and, as that order extended to alternative claims within the scope of the words "alternative claims for damages, for rescission or for the forfeiture or return of the deposit" in r. 1 (1), the inquiry as to damages would be ordered.

B **Procedure Summons.**

The plaintiff in an action for specific performance of an agreement, or damages in lieu, issued a summons under R.S.C., Ord. 14A, for an inquiry as to damages, having elected to treat the agreement as repudiated. The relevant facts are summarised in the headnote.

C *A. C. Sparrow* for the plaintiff.
D. D. H. Sullivan for the defendant.

VAISEY, J.: This summons raises a somewhat curious point on the proper construction, first, of an agreement which was originally oral but has either been reduced into writing or evidenced by a letter dated Jan. 14, 1952, and also on the true construction of the new order, R.S.C., Ord. 14A (see S.I. 1954 No. 1728), which came into operation on Jan. 11, 1955.

D The chief difference between the new Ord. 14A and the old one is that the old Ord. 14A only applied to agreements in writing whereas the new Ord. 14A applies to agreements whether in writing or not. There are also other differences between the two orders, some of which are material for the purposes of the present case. The first is this: The old Ord. 14A is headed by the words "Summary judgment for specific performance", but the new Ord. 14A is headed with the words "Summary judgment in actions for specific performance". Arising from that difference, it is to be observed that the kind of action to which Ord. 14A in its old form and its new form applies is a claim for specific performance of an agreement for the sale or purchase of property, but the new order has these additional words:

F ". . . with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit . . ."

The difference reflected or anticipated in the heading of the new order is the difference between a case of summary judgment for specific performance and a case of summary judgment in an action for specific performance, where the action, as r. 1 (1) indicates, may be an action for specific performance of an agreement for sale with or without a number of alternative claims.

G Under the new r. 1 (1), following very closely the words of the old rule, it is provided: ". . . the court or judge may thereupon give judgment in the action unless the defendant by affidavit . . ." satisfies the court that he is entitled to defend. The new Ord. 14A covers a case in which the alternative claims or some or one of them are associated as an alternative to the main claim for specific performance. That is what is happening here. The plaintiff has elected to treat the agreement in question as repudiated and is asserting a claim for damages which is one of the claims set out in the indorsement to the writ.

H Another point was taken, and very rightly abandoned, viz., that "property" here means real property, land, or, at any rate, chattels real or real property. Quite obviously "property" is a word of the widest possible import and includes personal property and real property and certainly includes the shares in a limited company.

I The agreement in question either as expressed in or evidenced by the letter of Jan. 14, 1952, consists, so far as material, of an undertaking by the writer of the letter, the defendant in the present action, either to purchase himself or to find a purchaser for certain preference shares in a named company at par. It is contended that a contract either to purchase or to find a purchaser at a

fixed price for the property is not an agreement for the sale or purchase of property and that the alternative claims which are mentioned in the new order do not include a claim to find a purchaser as an alternative to an agreement to purchase. I think that there are several answers to that. The first is that the agreement is an agreement for sale or purchase of property, even though it contemplates that the purchase will be effected either by the contracting party himself, or by somebody whom he can produce in good time before the appointed date to take it over on the same terms in place of himself. Besides coming within the words of the new order in the way which I have indicated, I doubt very much whether in such a case as the present the agreement to find a purchaser, as an alternative to becoming a purchaser, really adds anything to the sense of the arrangement. Every contract for the purchase of property may be carried out by the person who agrees to carry it out in his own person or by the substituted action of somebody found by that person to do it. At any rate, when one comes to the question of damages—and I am assuming and holding that the claim for damages comes within the new order—I do not think that there is any difference. The damages would be precisely the same. It can be tested in this way. Suppose that the purchaser, the signatory of this letter, became bankrupt so that he was wholly unable to perform the contract, or died. If his trustee in bankruptcy or his legal personal representative found somebody else to take over the contract, it would not be permissible for the vendor to say that he was only contracting with the immediate contractor and was not going to enter into an agreement with anybody else. Of course, the purchaser who is found, i.e., the purchaser who is ready to purchase these shares at par, must have certain qualifications. In the first place, he must have the money. He must not be a man of straw. Secondly, he must be of full age and as these appear to be shares in a private company he must be somebody who possesses the necessary qualification to be accepted as a shareholder by the directors of the company.

On all these grounds, in spite of the objections which have been very well taken and ably expressed by counsel for the defendant, I am prepared to hold that this contract comes within the new Ord. 14A. I must make the order asked for and the costs must be the plaintiff's costs in any event.

Order accordingly.

Solicitors: *Whitlock & Storr* (for the plaintiff); *Abbott, Baldwin & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

A CHIVERS & SONS, LTD. v. SECRETARY OF STATE FOR AIR (QUEENS' COLLEGE, CAMBRIDGE, Third Party).

[CHANCERY DIVISION (Wynn-Parry, J.), May 16, 17, 27, 1955.]

Ecclesiastical Law—Improprate rectory—Repair of chancel—Liability of lay impropriators to contribute—Whether impropriator liable after sale of rectorial property—Covenants for title—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), Sch. 2, Part 1.

Sale of Land—Covenants for title—Improprate rectory—Sale of rectorial land—Liability under implied covenants—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), Sch. 2, Part 1.

C In 1834, by an inclosure award made pursuant to a private Act of Parliament (3 & 4 Will. 4 c. 15) lands were allotted to Queens' College, Cambridge, in lieu of rectorial or great tithes in the parish of Oakington. Until 1924 Queens' College was the sole impropriate rector of Oakington and as such was liable to repair the chancel of the parish church. In 1924 Queens' College conveyed part of the rectorial land to the plaintiff in fee simple. In June, 1940, Queens' College conveyed the fee simple of a further part of the rectorial property to P. and in December, 1940, the college conveyed the remainder of the rectorial property to the defendant in fee simple. Since the last mentioned conveyance the college held no rectorial property. The parochial church council of Oakington requested the plaintiff to pay £80 10s. which represented the reasonable costs of repair to the chancel effected in 1949, and the plaintiff complied. The plaintiff now sought a declaration that the defendant was an impropriator of the rectory and as such liable to maintain, or to contribute to the maintenance, in a proper state of repair the chancel of the parish church. The defendant disputed the claim, and alternatively sought compensation from Queens' College.

F **Held:** (i) the liability to repair the chancel fell severally on each owner for the time being of any part of the rectorial land including the defendant, and Queens' College, since it held no rectorial land, was not a lay rector and under no liability; and, therefore, the plaintiff was entitled to the declaration claimed.

Wickhambrook Parochial Church Council v. Croxford ([1935] 2 K.B. 417) applied.

G (ii) Queens' College was not in breach of the covenants implied by virtue of the Law of Property Act, 1925, Sch. 2, Part 1, and was not, therefore, liable to compensate the defendant, because the liability to repair was not imposed by any act or omission of Queens' College, but was attached to the owner of the land in the moment when the college received it, and, as the college received the land in 1834 by way of exchange and was accordingly in the position of a purchaser for value, the liability was not imposed by any act or omission of any person through whom the college derived title otherwise than by purchase for value.

Browning v. Wright (1799) (2 Bos. & P. 13) and *David v. Sabin* ([1893] 1 Ch. 523) applied.

Stock v. Meakin ([1900] 1 Ch. 683) distinguished.

I *Egg v. Blayney* (1888) (21 Q.B.D. 107) considered.

[As to liability to repair the chancel, see 11 HALSBURY'S LAWS (2nd Edn.) 865, para. 1569; and for cases on the subject, see 19 DIGEST 460, 3070-3073.]

Cases referred to:

- (1) *Wickhambrook Parochial Church Council v. Croxford*, [1935] 2 K.B. 417; 104 L.J.K.B. 635; 153 L.T. 187; Digest Supp.
- (2) *Hauxton Parochial Church Council v. Stevens*, [1929] P. 240; Digest Supp.

- (3) *Browning v. Wright*, (1799), 2 Bos. & P. 13; 126 E.R. 1128; 40 Digest 281, 2441. A
- (4) *David v. Sabin*, [1893] 1 Ch. 523; 62 L.J.Ch. 347; 68 L.T. 237; 40 Digest 283, 2455.
- (5) *Church v. Brown*, (1808), 15 Ves. 258; 33 E.R. 752; 40 Digest 281, 2444.
- (6) *Stock v. Meakin*, [1900] 1 Ch. 683; 69 L.J.Ch. 401; 82 L.T. 248; 40 Digest 128, 1017. B
- (7) *Egg v. Blayney*, (1888), 21 Q.B.D. 107; 57 L.J.Q.B. 460; 59 L.T. 65; 52 J.P. 517; 40 Digest 196, 1638.
- (8) *Re Bettesworth & Richer*, (1888), 37 Ch.D. 535; 57 L.J.Ch. 749; 58 L.T. 796; 52 J.P. 740; 26 Digest 536, 2359.

Action.

The plaintiff, Chivers & Sons, Ltd., claimed a declaration that the defendant, the Secretary of State for Air, was liable as impropiator of the rectory of Oakington to maintain in a proper state of repair the chancel of the parish church of Oakington. The defendant gave a third-party notice to the President and Fellows of the Queens' College of St. Margaret and St. Bernard, commonly called Queens' College, in the University of Cambridge, and claimed against the third party a declaration that the third party was the sole impropiator of the said rectory and was wholly and solely liable to maintain the said chancel in a proper state of repair; and if the defendant were held liable in respect of the repair of the chancel, the defendant claimed to be indemnified by the third party, or, alternatively, damages for breach of the third party's covenants for title contained in a conveyance to the defendant dated Dec. 9, 1940.

Neville Gray, Q.C., and *Peter Foster* for the plaintiff.

Denys B. Buckley and *H. A. P. Fisher* for the defendant.

W. S. Wigglesworth for the third party.

Cur. adv. vult.

May 27. **WYNN-PARRY, J.**, read the following judgment: In this action the plaintiff company, on the basis that it is, as it admits, one of the impropiators of the impropriate rectory of Oakington in the county of Cambridge, sues the defendant, the Secretary of State for Air, for a declaration that the defendant is also one of the impropiators of that rectory and as such is liable to maintain or to contribute to the maintenance in a proper state of repair of the chancel of the parish church of Oakington; and, as the plaintiff on May 16, 1950, at the request of the parochial church council of Oakington paid £80 10s., which, it is agreed, represented the reasonable costs of repair to the chancel effected in November and December, 1949, the plaintiff sues also for an order that the defendant should pay a proper contribution to the plaintiff. It is agreed that, for the purposes of this case, if the defendant is liable so to contribute, the proper basis on which to calculate his liability is by reference to the acreage of the rectorial land held by the plaintiff and the defendant respectively. The defendant denies that he is an impropiator of the rectory, and therefore claims that he is not liable to make any such contribution: but in case that defence should fail, he has brought in by third-party proceedings the third parties (to whom, for convenience, I shall refer as Queens' College) in order, in that event, to claim compensation from Queens' College.

The relevant facts have been agreed between the parties, and conveniently embodied in a document described as agreed admissions. Accordingly, I take my statement of facts from that document. By a conveyance dated Feb. 8 in the second year of the reign of Queen Elizabeth I (1559-60) and made between Anthony Pope of the one part and Queens' College of the other part the said Anthony Pope conveyed unto Queens' College the lordship and manor of Oakington in the county of Cambridge and the rectory and parsonage of Oakington with all tithes and emoluments belonging thereto together with the

- A patronage gift and nomination of the vicarage of the parish church of Oakington, and other interests therein contained. By an inclosure award made on Nov. 6, 1834, in pursuance of a private Act of Parliament 3 & 4 Will. 4 c. 15, the lands edged green on the map (appended to the agreed admissions of fact) were allotted to Queens' College as to part in lieu of rectorial or great tithes and as to part in lieu of glebe lands and rights of common belonging to the
- B rectory of Oakington. Prior to the said inclosure award the rectorial property consisted exclusively of all the great tithes, arising within the parish and certain glebe lands and rights of common, and after the said inclosure award the rectorial property was replaced exclusively by the lands edged green on the map. During the period between the said conveyance of Feb. 8, 1559-60, and Oct. 1, 1924, Queens' College was the sole lay rector of the inappropriate rectory of
- C Oakington and as such was entitled prior to the said award to all tithes, rights of glebe and rights of common appurtenant to the said rectory and thereafter to the lands edged green on the map. By a conveyance dated Oct. 1, 1924, and made between Queens' College of the one part and the plaintiff of the other part, Queens' College conveyed to the plaintiff the fee simple in the land coloured blue on the map. The plaintiff has since Oct. 1, 1924, remained
- D and still is the owner of the fee simple in those lands. By a conveyance dated June 7, 1940, and made between Queens' College of the one part and Philip Charles Papworth and Charles Harold Papworth of the other part Queens' College conveyed to Philip Charles Papworth and Charles Harold Papworth the land coloured yellow on the map. Queens' College has not been at any time since June 7, 1940, and is not now, the owner of the land coloured yellow or any part
- E thereof or has any interest therein. By a conveyance dated Dec. 9, 1940, and made between Queens' College of the one part and the Secretary of State for Air of the other part Queens' College conveyed to the Secretary of State for Air the fee simple in the land coloured red on the map. The Secretary of State for Air, the defendant, has since Dec. 9, 1940, remained and still is the owner in fee simple of the land coloured red on the map. The lands respectively coloured
- F blue, yellow and red so conveyed form the whole of the lands included in the inclosure award which were allotted to Queens' College as rector in lieu of their former rectorial property pursuant to the inclosure award.

It has long been established that the liability of an impropiator of a lay rectory to maintain the chancel is rested on the maxim that he who has the profits of the benefice should bear that burden. This burden is imposed for

G the benefit of the parishioners who by the custom of England have the liability to repair the nave but the corresponding right to require the rector to repair the chancel, and the rector in turn has the rectorial property out of the profits of which he is considered to have the means to do this. The history of the matter is dealt with at length by the Court of Appeal in *Wickhambrook Parochial Church Council v. Croxford* (1), and there is no need for me to refer to

H the older authorities which were so exhaustively reviewed in that case. It is sufficient for me to say that, as that case shows, the liability, which, where there is more than one impropiator, is a several and not a joint liability, is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property. Before

I *Wickhambrook Parochial Church Council v. Croxford* (1), it was thought by writers that the liability of an impropiator was limited to the profits which he derived from the rectorial property, but in that case the Court of Appeal held that it is not so limited. As I read the judgments in that case, they proceed on the basis that the duty to repair the chancel arises out of the fact of owning the rectorial property or some of it, and that the only question left open was the extent of the liability. Now, if that be a correct appreciation of the basis of those judgments, it follows that in order to decide who is liable to repair the chancel of a church, all that is necessary is to find the owner of the rectorial

property. If there is only one owner, he is solely liable. If there is more than one owner, each is severally liable. A

Counsel for the defendant, however, contended that this is not the test. He submitted that although Queens' College had alienated the whole of the rectorial property they still constituted the lay rector. What they had done by the several transactions to which I have referred, was, according to him, merely to substitute one type of property, namely, cash, for the previous property, namely, land. They might, he said, reinvest these proceeds of sale in land, and that land would then constitute the rectorial property. His proposition appears to me to involve saying "once a rector, always a rector", and further to involve shutting one's eyes to the reality of a transaction involving, according to the language of the documents brought into existence to evidence it, a sale of rectorial property. B C

The conveyance of Dec. 9, 1940, by Queens' College to the defendant and of each of the documents which preceded it and which will be found detailed in para. 8 of the agreed admissions, proceed on the basis that Queens' College are selling and conveying land which in fact is rectorial land. If the transaction is indeed a sale and transfer, with what show of reasoning can it be said that Queens' College retained in respect of the land sold and transferred that personal liability to repair the chancel, which attaches to the owner of rectorial property? D It was urged that the documents are silent as to this liability, and that therefore Queens' College must be taken to have intended to retain the liability. I am quite unable to accept this argument. The abstract of title shows on the face of it that the subject-matter of the sale is rectorial land, and in my view it would necessarily follow that the duty of repairing the chancel of Oakington Parish Church would pass to the defendant on the conveyance of the property to him whatever was inserted in or omitted from the conveyance. In my judgment, an express clause in the conveyance designed to provide for the retention by Queens' College of the personal liability to repair in exoneration of the defendant would have been quite ineffective against a subsequent claim by the parochial church council against the defendant. The most that could have been achieved by the conveyance, to which the parochial church council was not a party, would have been the inclusion of a provision by which Queens' College indemnified the defendant against any claim by the parochial church-council in connection with the repair of the chancel: see *Hauxton Parochial Church Council v. Stevens* (2), where on the sale of most but not the whole of the lands of a rectory there was as between the Ecclesiastical Commissioners as vendors and the purchaser a covenant to repair the chancel. E F G

Lay rectors as contrasted with spiritual rectors have always enjoyed the right freely to alienate the rectorial property: and on a sale by a lay rector, or, for that matter, one of several impropriators, of a lay rectory of the whole of his interest in the rectorial property, he could not prior to the Chancel Repairs Act, 1932, have been admonished to repair the chancel, for having no longer any interest in the rectorial property he would not have been a proper object of admonishment, and therefore no money judgment could be given against him since the passing of that Act. The action therefore succeeds. H

I turn now to the claim in the third-party proceedings. Counsel, on behalf of Queens' College, admitted that the solicitors for Queens' College overlooked the liability to repair the chancel when negotiating for and carrying through the sale to the defendant: but he pointed out with force that the abstract of title began and ended with the inclosure award, which showed that the lands in question were allotted in lieu of rectorial property to Queens' College as impropriators and therefore the solicitors acting for the defendant had full opportunity of raising the point on the requisitions. The matter, however, proceeded to conveyance, and in the result the case against Queens' College is I

A rested solely on the implied covenants in the Law of Property Act, 1925, Sch. 2, Part 1.

The case for the defendant is that the liability to repair the chancel falls within the words

B “such . . . claims and demands, other than those subject to which the conveyance is expressly made, as, either before or after the date of the conveyance, have been or shall be made, occasioned, or suffered by that person . . .”

C In his submission the result of the parcels being vested in Queens' College was to subject the college to the liability to repair, and therefore by accepting the allotment the college suffered the liability to claims or demands to repair the chancel to arise.

In *Browning v. Wright* (3), LORD ELDON, sitting as Chief Justice, said (2 Bos. & P. at p. 22):

D “This transaction is a purchase of an estate of inheritance in fee, and the first question is, What will be the nature and effect of a conveyance carrying such a contract into execution? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood prima facie that he sells the estate as he received it: and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor; and if by devise, it is not unusual for him to covenant against the acts of the deviser as well as his own. In fact, he says, I sell this land in the same plight that I received it, and not in any degree made worse by me. It was argued, that if this were so, a man who has only an estate for life, might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser into the same situation in which he stood himself.

E If he has bought an estate in fee, and at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither

F hardship or injustice can ensue. What is the common course of business in such a case? An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not, and if any doubts arise on the title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. Prima facie, therefore,

G in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs.”

H In *David v. Sabin* (4), LINDLEY, L.J., said ([1893] 1 Ch. at p. 531):

I “On looking at the covenant set out in s. 7 (1) (A) of the Conveyancing Act, 1881, it will be seen that the covenants for right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance, are not four separate and distinct covenants, but parts of one entire covenant beginning with and controlled throughout by the words, ‘That notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value’. These words

render a vendor's covenant a qualified covenant, and not an absolute warranty of title, as is the covenant by a mortgagor who conveys as beneficial owner (see cl. C of the same section). The statute has, in this respect, followed the long-established and well-known practice of conveyancers, as may be seen from *Browning v. Wright* (3), *Church v. Brown* (5), and the ordinary forms of conveyances. But, although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions covenanted against are reducible to four heads—viz., (1) the acts and omissions of the vendor himself; (2) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3) the acts and omissions of persons claiming through him; (4) the acts and omissions of persons claiming in trust for him."

As LINDLEY, L.J., points out the covenant is one and is controlled throughout by the opening words. The covenant extends, therefore, to the acts and omissions of the vendor and to the acts and omissions of anyone who has conveyed to him otherwise than for value. It is clear to my mind that Queens' College received the lands allotted to them under the inclosure award of 1834 by way of exchange and therefore that they were in the position of purchasers for value. Thus the covenants for title extend to the acts and omissions of Queens' College between the date of the award, Nov. 6, 1834, and the conveyance to the defendant of Dec. 9, 1940. Queens' College did not impose the liability to repair the chancel of Oakington Parish Church on the owner for the time being of the land in question. That liability was imposed by a combination of the common law, the Inclosure Act, 1833, and the inclosure award of 1834. It is a liability which attached to the owner of the land in the moment in which Queens' College received the land by allotment under the inclosure award. That was the plight in which the college received it. Thus it follows that the liability is not one which is covered by the implied covenants in the Law of Property Act, 1925, Sch. 2, Part 1.

I should perhaps refer to *Stock v. Meakin* (6), on which counsel for the defendant relied. The headnote to that case reads as follows ([1900] 1 Ch. 683):

"The amount of the apportioned expenses of private street works executed by a local authority under the Private Street Works Act, 1892, becomes a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, and not merely as from the date of the final apportionment. If, therefore, the premises are sold by the owner free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises."

Towards the end of his judgment, which was the judgment of the court, VAUGHAN WILLIAMS, L.J., said (*ibid.*, at p. 694):

"The charge takes effect under the [Public Health Act,] 1875 before the apportionment is made, and in our judgment it is intended that this shall be so under the Act of 1892. If this view is right, we have no doubt that this charge is an 'outgoing' which the vendor was bound by his contract to discharge. We also have no doubt that the charge is an 'incumbrance, claim or demand suffered' by the vendor, notwithstanding the fact that the expenses were incurred without any default on his part, and that the time for payment had not arrived before the conveyance was executed. Nor have we any doubt that this charge is inconsistent with the express terms of the conveyance."

Now, apart from the circumstance that the liability in question became a charge on the premises, in contrast to the liability under consideration in this case, it is clear that the claim or demand to which the Court of Appeal held that that liability gave rise was a claim or demand suffered by the vendor during his

A ownership, and on that ground the case is distinguishable from the present case. *Egg v. Blayney* (7) more nearly approached this case. The headnote reads as follows (21 Q.B.D. 107):

B “The expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, are not a charge upon the property in respect of which they are payable, and therefore if the owner sells the property while the expenses are unpaid, and conveys as beneficial owner, and the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of s. 7 (1) (A) of the Conveyancing and Law of Property Act, 1881.”

C In the course of his judgment, FIELD, J., said (*ibid.*, at p. 108):

D “If this were a charge under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the plaintiff’s contention would be correct, for that Act, by s. 257, expressly makes the expenses a charge upon the land, as was held by NORTH, J., in the case of *Re Bettsworth & Richer* (8). In the Act now before us, however, there is nothing which makes these expenses a charge on the land, and, therefore, it was only a claim or demand upon the defendant personally up to the time of the sale, and did not affect the land. The county court judge was, therefore, right in holding that it was not an incumbrance within the meaning of the statutory implied covenant.”

WILLS, J., said (*ibid.*):

E “I am of the same opinion. It is clear that there is no charge upon the land in the present case, but only successive personal liabilities imposed upon the successive owners, and therefore there is no liability under the implied covenant.”

For these reasons, I am of opinion that the claim in the third-party proceedings must fail.

F *Judgment for the plaintiff against the defendant. Judgment for the third party against the defendant.*

Solicitors: *Field, Roscoe & Co.*, agents for *Ginn & Co.*, Cambridge (for the plaintiff); *Treasury Solicitor*; *Taylor, Jelf & Co.*, agents for *Francis & Co.*, Cambridge (for the third party).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SILVER (orse. KRAFT) v. SILVER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), May 25, 27, 1955.]

Nullity—Consent to marriage—Purpose to enable wife, a German, to live in England with another man with whom she had been living as his wife—No cohabitation between the parties to the marriage—Absence of duress.

In 1919 the petitioner, who was a German by birth, met and became engaged to be married to one A.S., an Englishman. In 1921 she discovered that A.S. was married and living apart from his wife. The petitioner and A.S. decided to live together in Germany as husband and wife. In 1925 A.S. returned to England. To enable the petitioner also to live in England it was arranged that she should go through a ceremony of marriage with the respondent, a step-brother of A.S. Accordingly, on Nov. 13, 1925, they were married in Germany and travelled together to London, where they were met by A.S. A.S. and the petitioner then went off and lived together. Six months later the petitioner went with the respondent to the Home Office to declare that they had cohabited for six months, so that it would not be necessary for the petitioner to return to Germany. She did not see the respondent again until after the death of A.S. with whom she lived as his wife until he died in June, 1948. In 1951 the petitioner met another German whom she now wished to marry. She met the respondent and discussed the possibility of divorce. In 1954 the petitioner discovered that the respondent had since 1940 been living with another woman who had borne him three children. The petitioner now sought a decree of nullity on the ground that the purported marriage was null and void for want of consent, alternatively for a divorce on the ground of the respondent's adultery.

Held: by the ceremony of marriage on Nov. 13, 1925, the petitioner and respondent intended to become man and wife and since there was no element of duress the prayer for a decree of nullity would be rejected (dictum of KARMINSKI, J., in *H. (otherwise D.) v. H.* ([1953] 2 All E.R. at p. 1234) applied); the petitioner would, however, be granted a divorce, in the exercise of the court's discretion.

[As to the necessity for voluntary consent to a marriage, see 16 HALSBURY'S LAWS (2nd Edn.) 560, para. 838; and for cases on the subject, see 27 DIGEST (Repl.) 36, 134, 135.]

Cases referred to:

- (1) *Brodie v. Brodie*, [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 27 Digest (Repl.) 217, 1726.
- (2) *H. (otherwise D.) v. H.*, [1953] 2 All E.R. 1229; 3rd Digest Supp.
- (3) *United States v. Rubinstein*, (1945), 151 Federal Reporter, 2nd Series 915.

Petition for nullity, alternatively for divorce.

By a petition dated Apr. 7, 1955, the petitioner alleged:

"1. On Nov. 13, 1925 [she], then Bertha Anna Kraft, went through a ceremony of marriage with Samuel Silver . . . at the Register Office, Stuttgart, Wurtemberg, Germany. 2. After the said ceremony the petitioner and the respondent did not cohabit with each other either within or outside the jurisdiction of this Honourable Court . . . 8. The petitioner and the respondent agreed to go through the said ceremony only for the purpose of representing themselves as married to the United Kingdom Immigration Authorities and without any intention of living together as husband and wife. In the premises the said purported marriage was void for want of consent.

"Alternatively, if there was a valid marriage between the parties: 10. The respondent has since the celebration of such marriage committed adultery."

A The petitioner prayed (i) that the purported marriage be declared null and void, alternatively (ii) that the court would exercise its discretion in her favour and decree that the marriage be dissolved. The petition was undefended.

H. V. Brandon for the petitioner.

Cur. adv. vult.

B May 27. **COLLINGWOOD, J.:** The petitioner was born in Stuttgart and there in 1919 met one, Abraham Springer; they fell in love with one another and became engaged. At that time she thought that Abraham Springer was unmarried. She went to England with him in 1921 and met his parents. She then for the first time discovered that he was a married man and had several children, though he was living apart from his wife. She returned to Germany, C telling her parents nothing of the discovery which she had made during her visit to England. Later Abraham Springer returned to Germany and made it clear that he was unable to obtain a divorce from his wife, and the petitioner and he decided to live together as man and wife. This they did for a short time in England and then later she returned to Germany with him and they lived together as man and wife in Cologne where he, Mr. Springer, had civilian D employment with the Army of Occupation. This state of things continued until 1925 when his employment in Germany ceased and he returned to England and she to her mother in Stuttgart. In the summer of that year Mr. Springer went out to Germany again and it was agreed between them that the petitioner should go through a ceremony of marriage with Samuel Silver (who is the step-brother of Mr. Springer), the object of this marriage being to enable the petitioner to enter E England and remain there as long as she wished. In accordance with this plan on Nov. 13, 1925, the respondent, Silver, and the petitioner went through a ceremony of marriage at the Register Office in Stuttgart. After the ceremony they travelled back to London together, the petitioner met Springer at the station in London, and they went off and lived together. The petitioner saw the respondent only once more before the death of Mr. Springer in 1948 and that F was on an occasion some six months after the marriage when she accompanied him to the Home Office and there declared that she and the respondent had cohabited for six months, the object of that being to prevent her having to return to Germany again. Apart from that application she had no contact with the respondent from the time they parted in London until 1951. She continued to live with Springer until he died on June 23, 1948.

G In 1951 she met another man, a German, and she and he now wish to marry. Some time after meeting him she traced the respondent and arranged to meet him, and they did so, and discussed the possibility of a divorce. It was not, however, until 1954, after she had again met the German to whom I have referred, that any further meeting was arranged between herself and the respondent. A meeting was arranged, the respondent did not attend and sent his sister, and from her the petitioner for the first time discovered, as the fact is and as has H been proved before me, that the respondent had since 1940 been living with a woman who has had three children by him. On those facts the court is asked to say that the parties having agreed to go through a ceremony of marriage, solely for the purpose of representing themselves as married to the immigration authorities of this country and without any intention of ever living together as I man and wife, the purported marriage was null and void for want of consent.

The voluntary consent of both parties is necessary for a valid marriage and the marriage is void if such consent is lacking, as, for example, where it is procured by threats or duress; but mental reservations on the part of one or both of the parties to a marriage do not affect its validity. Thus, in *Brodie v. Brodie* (1), the wife petitioned for restitution of conjugal rights and the husband pleaded an agreement signed by both parties before the marriage whereby it was agreed that he should, after the marriage, live separate and apart from his wife and that she should not require him to live with her by any legal proceeding. **HORRIDGE, J.,**

held the agreement to be void as against public policy and that the husband's plea was no answer to the petition and he granted the wife a decree of restitution, thereby affirming the validity of the marriage which, indeed, was never in question in that case. A

In *H. (otherwise D.) v. H.* (2), the wife petitioned for a declaration of nullity on the ground of duress. The ceremony took place in Budapest at a time when the Communist government ruled Hungary and the object of the marriage was to enable her to obtain a French passport and to leave the country. The parties agreed that it should be in name only and it was never in fact consummated. KARMINSKI, J., found that the fear entertained by the wife of the danger which remaining in Hungary would entail was of such a kind as to negative her consent to the marriage and he granted a decree of nullity. In the course of his judgment the learned judge said ([1953] 2 All E.R. at p. 1234): B

"If the present case were devoid of the element of fear I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent." C

He declined to follow the reasoning in a decision in the United States Circuit Court of Appeals, *United States v. Rubinstein* (3) (151 Fed. Rep., 2nd Series at p. 918), that D

"if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all."

I respectfully agree with the view of KARMINSKI, J., and hold that the parties here intended that they should become man and wife and went through the ceremony with that object, and that there being no element of duress the prayer for a decree of nullity must be rejected. E

As to the prayer for dissolution, the court is asked to exercise its discretion in the petitioner's favour. In coming to a decision on that question I have had regard to the interests of the petitioner, who wishes to marry again, the fact that no question arises of a possible reconciliation between the spouses, the interests of the woman with whom the respondent has been living for a number of years and the interests of the children whom she has borne, for though marriage will not legitimize them they can at least be adopted by their parents in the event of their marriage; and, finally, the interests of the community at large. I can see no social advantage in insisting on the maintenance of a union which has been a mere travesty from the beginning. Accordingly there will be a decree nisi in the exercise of the discretion of the court. F

Decree nisi. G

Solicitor: *Edward S. Isaacs* (for the petitioner).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A

J. v. J.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Parker, L.J.J.),
May 11, 12, 13, 16, 1955.]

B

Income Tax—Annual payments—Maintenance order—Order to pay “free of tax”—Effect—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 170.

Divorce—Maintenance of wife—Assessment—Factors to be considered—Ability of husband—Husband living on overdrafts—Conduct of wife—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 19 (3).

C

In December, 1953, the wife obtained a decree nisi for divorce and an order for the custody of the two children of the marriage. The husband's standard of living during 1954 was in excess of £1,000 per annum, with the use of a car in addition, but his total income for income tax purposes during the years of assessment 1951/52, 1952/53, 1954/55 never exceeded £69, his occupation being the conduct of building developments financed by loans out of which he also lived. On Feb. 9, 1955, the registrar ordered the husband to pay to the wife interim maintenance at the rate of £2 per week. On Mar. 18, 1955, the judge allowed the wife's appeal and ordered the husband to pay to her interim maintenance as from Sept. 1, 1954, for their joint lives until Oct. 1, 1955, at the rate of “£5 10s. per week free of tax”. On appeal by the husband,

D

E

Held: (i) the intention of the court when making the order for payment of interim maintenance to the wife at the rate of “£5 10s. per week free of tax” had been that she should receive that sum weekly without deduction, but not that she should be able to recover tax relief in relation to a gross income sufficient after deduction of tax to leave £5 10s. weekly, as would be the consequence of an order in that form; in order to provide the wife with approximately £5 10s. weekly the appropriate order in the present case would be for maintenance at a rate of £7 weekly less tax, which would be deducted at the standard rate, leaving the wife to apply for income tax relief and such advantage as she would gain thereby.

F

(ii) in determining the amount which the husband should pay to the wife under s. 19 (3) of the Matrimonial Causes Act, 1950, the interim order had been rightly based on the husband's current expenditure over a substantial period, there had been no error in law or as to factors taken into consideration and, apart from the tax adjustment, the order was one with which the Court of Appeal would not interfere.

G

Order made by SACHS, J. (ante, p. 85), varied.

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[**Editorial Note.** In *Stokes v. Bennett* ([1953] 2 All E.R. 313 at p. 315, letters B, C) both parties agreed, and the court accepted, that an order for payment of maintenance “free of tax” was in effect an order for payment of such a gross sum as, after deduction of tax, would leave the net payment which was to be made and received. This applies whether the payment is made out of profits and gains brought into charge to income tax (see *Income Tax Act, 1952*, s. 169; 31 HALSBURY'S STATUTES (2nd Edn.) 164), or is not so made (see *Income Tax Act, 1952*, s. 170; 31 HALSBURY'S STATUTES (2nd Edn.) 165), as would seem to be the position in the present case. As a matter of practical expediency, therefore, the amount of an order for maintenance should be such as after deducting income tax at the current standard rate will leave in cash the sum which it is intended that the payee should receive; and the order should be made for payment of a sum less tax, see *Wallis v. Wallis* ([1941] 2 All E.R. 291). If, however, the payment in question is one of the class of small maintenance payments which are within s. 205 of the *Income Tax Act, 1952*, 31 HALSBURY'S STATUTES (2nd Edn.) 197, this is not so, because such payments are to be directly assessed and are paid without deduction of tax (*ibid.*, s. 206).

As to the effect of tax provisions on orders for alimony and maintenance, see 17 HALSBURY'S LAWS (2nd Edn.) 264, para. 530, and Supp.; as to orders for maintenance and deduction of tax thereon, see also 10 HALSBURY'S LAWS (2nd Edn.) 791, para. 1253.]

Cases referred to:

- (1) *Chichester v. Chichester*, [1936] 1 All E.R. 271; [1936] P. 129; 105 L.J.P. 38; 154 L.T. 375; 27 Digest (Repl.) 617, 5768.
- (2) *Bellenden (formerly Satterthwaite) v. Satterthwaite*, [1948] 1 All E.R. 343; 27 Digest (Repl.) 624, 5835.
- (3) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; sub nom. *Bartlam v. Evans*, 157 L.T. 311; Digest Supp.
- (4) *Osenton (Charles) & Co. v. Johnston*, [1941] 2 All E.R. 245; [1942] A.C. 130; 110 L.J.K.B. 420; 165 L.T. 235; 2nd Digest Supp.
- (5) *N. v. N.*, (1928), 138 L.T. 693; 27 Digest (Repl.) 618, 5772.
- (6) *Rose v. Rose*, [1950] 2 All E.R. 311; [1951] P. 29; 114 J.P. 400; 27 Digest (Repl.) 618, 5777.
- (7) *Ward v. Ward*, [1947] 2 All E.R. 713; [1948] P. 62; [1948] L.J.R. 997; 112 J.P. 33; 27 Digest (Repl.) 706, 6739.
- (8) *Duchesne v. Duchesne*, [1950] 2 All E.R. 784; [1951] P. 101; 27 Digest (Repl.) 615, 5760.
- (9) *Alhadeff v. Alhadeff*, (1951), 95 Sol. Jo. 547; 27 Digest (Repl.) 598, 5585.
- (10) *Spilsbury v. Spofforth*, [1937] 4 All E.R. 487; 21 Tax Cas. 247; Digest Supp.
- (11) *Stokes v. Bennett*, [1953] 2 All E.R. 313; [1953] Ch. 566; 34 Tax Cas. 337; 3rd Digest Supp.
- (12) *Dayrell-Steyning v. Dayrell-Steyning*, [1922] P. 280; 91 L.J.P. 210; 127 L.T. 846; 27 Digest (Repl.) 633, 5936.

Appeal.

The husband appealed against an order of SACHS, J., dated Mar. 18, 1955, and reported ante, p. 85, allowing the wife's appeal against an order of Mr. Registrar FORBES dated Feb. 9, 1955, and ordering the husband to pay to the wife as from Sept. 1, 1954, interim maintenance for herself during their joint lives until Oct 1, 1955, at and after the rate of £5 10s. per week free of tax, the first payment to be made on Mar. 25, 1955: SACHS, J., further ordered that the accrued arrears under this order be paid by instalments of £30 a month, the first instalment to be paid on Apr. 5, 1955. The husband's total income, according to his income tax returns, was £44 for 1951/52, £69 for 1952/53 and £60 for 1953/54, these sums being derived from insurance commissions. He paid no income tax. He had, however, in the past earned a salary of £3,500 annually plus expenses and had, before the order under appeal was made, been engaged in the development of landed property, viz., a freehold estate of fifty acres in Buckinghamshire, which was conveyed to him in May, 1953, by the liquidator of a company of which he was virtually the sole shareholder, and a leasehold property at South Kensington, which he acquired in February, 1954, for £10,800. The value of the property in Buckinghamshire, on completion of the development, had been assessed at an estimated figure of £34,800; but no estimate had been given of the developed value of the South Kensington property. The husband was occupied with the development of these properties, which involved continuous attendance and, according to his evidence which had been accepted, made it reasonable for him to use a motor car mainly for business purposes. His debts, apart from his indebtedness to his bank, amounted to £7,600 in June, 1954. The deeds of his properties were pledged to a bank who had made on that security loans to him of £12,000 which sum was said to be reduced to a lower unstated figure. The husband was being financed by a building society up to £40,000 for the development of the South Kensington property. Some of the developed property in Buckinghamshire had been sold early in 1954 for undisclosed amounts and the

A husband lived in a small house on that estate. He had also an asset in the form of a claim against the Central Land Board for £4,500.

The wife had not earned at any time during her married life, but after the marriage broke up she had sought training and for a period had had employment as a saleswoman, which she had had to give up owing to an operation affecting her feet. She thereafter became available for sedentary work and had subsequently found a temporary post at £8 weekly. She had no other source of income and lived with her parents.

Gilbert Beyfus, Q.C., Joseph Jackson and J. C. J. Tatham for the husband.

Leonard Caplan, Q.C., and G. B. M. Reed for the wife.

C **SIR RAYMOND EVERSHED, M.R. :** I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J. : This is an appeal from an order of SACHS, J., made on Mar. 18, 1955, by which, reversing an order of Mr. Registrar FORBES for interim maintenance at the rate of £2 a week, he ordered the husband to pay to the wife interim maintenance at the rate of £5 10s. a week free of tax as from Sept. 1, 1954, until Oct. 1, 1955. The wife had obtained a decree of divorce on Dec. 17, 1953, and an order for the custody of the two children of the marriage, in respect of whom maintenance orders had also been made. The order appealed from was made in the exercise of the judge's discretion conferred by the Matrimonial Causes Act, 1950, s. 19, reproducing corresponding sections of the earlier Acts*. Section 19 reads:

E “(1) On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just. (2) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . (3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section.”

G The reference in sub-s. (2) to the fortune of the wife, the ability of the husband and the conduct of the parties applies equally to sub-s. (3): compare *Chichester v. Chichester* (1).

H The appeal being against an order made in the exercise of the judge's discretion, the matter is not open to review in the sense that this court can be asked to substitute its discretion for that of the learned judge. The position in this class of case is clearly stated by ASQUITH, L.J., in *Bellenden (formerly Satterthwaite) v. Satterthwaite* (2) ([1948] 1 All E.R. at p. 345):

I “We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. That is, I think, the principle which emerges from the decision of the House of Lords in *Evans v. Bartlam* (3), and *Charles Oseinton & Co. v. Johnston* (4).”

Counsel for the husband has argued that the learned judge has so misconceived the financial position of his client that the court should interfere with the order

* Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3), (1) and (2).

of the learned judge and restore the order of the registrar before whom his client had been cross-examined at length on his affidavits. Further, it is said, the learned judge erred in failing to give proper consideration (i) to the fortune of the wife and (ii) to the conduct of the wife. I am not persuaded that there was such misconception of the financial position, nor do I think that there was any failure on the part of the judge to give proper consideration to the matters referred to in the section. Subject to the form of the order, which appears not to carry out the intention of the learned judge and to have been based on a misunderstanding of the effect of the Income Tax Acts, I think, therefore, that the appeal fails. [HIS LORDSHIP referred to the time occupied by the application, which was concerned only with an interim order, saying that much profitless inquiry might have been avoided by discovery before cross-examination; referred to the affidavits of the husband concerning his financial position, intimating that one of them could not be regarded as an honest statement of the husband's financial position, and referred to the fact that he made a defective affidavit of documents and to the facts concerning the husband's means as shown by the evidence. HIS LORDSHIP continued:]

The date when the husband's ambitious schemes will fructify and yield a substantial profit may not be long distant, but the learned judge came to the conclusion, which is not challenged and with which I agree, that no order for maintenance, interim or otherwise, could sensibly be made at this time based on a capital valuation and a notional income attributed thereto. He based his interim order on the only material available to him, namely, the husband's current expenditure.

In considering the ability of the husband, he derived assistance from the language used by LORD MERRIVALE, P., in considering the different facts in *N. v. N.* (5). LORD MERRIVALE, P., said (138 L.T. at p. 696):

"The ecclesiastical courts showed a degree of practical wisdom . . . They were not misled by appearances . . . they looked at the realities . . . The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term 'faculties' describes the capacity and the ability of the respondent to provide maintenance . . . I conceive that I must take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation . . ."

In a later passage, also cited by SACHS, J., LORD MERRIVALE, P., said (*ibid.*, at p. 698):

"Here is an interest in a great business. Here is great business capacity. All of these are advantages to which the wife during the marriage, the petitioner, was legitimately entitled to look forward. They are not accidental accessions of fortune. They are benefits which have arisen during the course of years, and by the development of the husband's 'faculties' and position he has secured the sum, which has been spoken of, as available."

I agree that LORD MERRIVALE's words have application to a case such as this, where a husband, by means of bank loans, is enabled to maintain a consistent standard of living over a substantial period. The standard here is, in my opinion, a proper and, indeed, the only guide to be followed by the court in making provision for the maintenance of the wife. The learned judge made a careful analysis of the figures of current expenditure and arrived at the conclusion, which was justified by the evidence, that, taking into consideration his non-business expenditure, there was much to be said for looking at the husband as a £1,500-a-year man who paid no income tax. He did not, I think, base his final order on this figure. In an earlier passage in his judgment he stated his conclusion, again supported by evidence, that, having regard to benefits in meal

A and in malt, the husband and his wife appeared to be adopting a standard in excess of £1,000 per annum*, with a car in addition. This last figure included a notional value for the house in which the husband lived, he having given no evidence to assist the court on this matter, but did not include an annual sum of £100 paid for the maintenance of the two children and £140 paid for school fees. These payments were also being financed by the bank in the same way as all the other expenditure of the husband over and above his income of about £50 a year (using the word "income" in its ordinary sense). Taking into account that the loan from the bank carries interest, the position appears to be that, having regard to the possibilities (if not probabilities) of the future fruition of his development schemes, the husband was not travelling headlong to financial ruin by living on borrowed money and that it was reasonable that the wife, other things being equal, should share in the moneys which he was able to use for current expenditure from time to time. My conclusion is that the learned judge had evidence before him on which he could properly have reached the conclusion at which he arrived, that the husband's current expenditure for non-business purposes was at least £1,200 a year and that he rightly formed the opinion that the registrar had taken a view too favourable to the husband in putting this figure as low as £800 a year.

There remains, therefore, the question whether the learned judge misdirected himself in any way as to the fortune of the wife or her conduct. As to her fortune, the wife had worked before her marriage at the age of twenty. After marriage, her position, as found by the judge (ante, p. 91), was as follows:

E ". . . I note that at no stage during her married life did the wife enter into employment outside the matrimonial home, except in so far as she assisted the husband in the joint enterprise of running a country club during the period before the fire. Having regard to her duties towards the children and the fact that the husband was previously earning a considerable salary this is not surprising. After the marriage broke up there came a time when the wife of her own initiative sought training to become a saleswoman with a well-known firm, but this employment she had to give up in August, 1954, owing to an operation affecting her feet. In respect of that operation and subsequent treatment she has incurred liabilities of £147, which have been met in the first instance by her father who is about to retire. From then onwards there has been a period when she has been unable to work. So far as can be gathered from the evidence she is now available for sedentary work, but so far has secured only a temporary post at £8 a week at the Ideal Home Exhibition. She has no other income. She now lives with her parents in a small flat. This is a source of inconvenience when the son comes on his holidays, and it would not be practicable for the daughter, who has had to go into a National Health Scheme institution, to come there on the visits which the doctor has advised she should make so as to have the company of her mother and her brother. The wife wishes to have accommodation of her own."

Having regard to a decision of this court in *Rose v. Rose* (6), and a decision of LORD MERRIMAN, P., in *Ward v. Ward* (7), the judge stated his conclusion as follows (ante, at p. 91, letter H):

I "I take the view that the wife is not under an obligation in the circumstances to go out and earn, and that if she does obtain employment the husband is not entitled to have the whole amount of what she earns taken into account in any calculations which affect maintenance. On the other hand, I propose to assume that she will work when she can and that there should accordingly be some 'discount' applied to whatever amount would otherwise be ordered against the husband as regards maintenance."

I agree with this view.

* See p. 96, letters F to G, ante.

So far as the wife's adultery and its attendant circumstances are concerned, the wife's counsel on the appeal sought to argue that it was not open to the husband to raise it now, since his answer was struck out and he had not raised it at the trial. Reliance was placed on the decision of PEARCE, J., in *Duchesne v. Duchesne* (8), dealing with an entirely different situation, namely, that of a respondent who sought to raise in maintenance proceedings matters not raised in the main suit for divorce, although he had had an opportunity so to do and those matters would have been available to him as a defence. In the present case the husband was clearly entitled to rely on the wife's own case as presented to the court by her on the footing that her evidence was accepted by the trial judge, including the statement in which she disclosed her adultery. Her adultery is relevant on the question of maintenance, for indeed she has forfeited her common law right to be maintained. In *Alhadeff v. Alhadeff* (9) LORD MERRIMAN, P., emphasises that the adultery of a wife who has obtained a decree of divorce in the exercise of the discretion of the court is a relevant matter in considering her conduct. The learned judge did take her adultery into account, but, as I understand his judgment, came to the conclusion that, having regard to the circumstances in which it occurred, following on the husband's long-continued association with the woman (his present wife) with whom he committed adultery, notwithstanding the wife's protests, bearing also in mind that the adultery of the wife had long since ceased, he need not make in the present case any material reduction from the maintenance of the wife because of her adultery. This conclusion was one which, in the exercise of his discretion, the learned judge was fully entitled to reach. Moreover, I agree with him that the delay on the part of the wife in disclosing the fact that she was in due course going to admit adultery has not any bearing on the case. She did at the hearing disclose her adultery, and the discretion of the court was exercised in her favour.

I agree also with the trial judge who found, contrary to the opinion of the registrar, that the fact that the wife made a charge of cruelty for the first time in a supplemental petition and dropped the charge when the petition was no longer defended, was irrelevant and did not show any insincerity or relevant misconduct on her part. In a defended case in which each side was plainly guilty of adultery, she may well have been advised to allege cruelty as a counterblast to the defence raised against her in order to try to tip the scales in her favour.

I come now to the form of the order. The effect of the order to pay £5 10s. a week free of tax is to subject the husband to a gross liability of £10 a week at the rate of tax in force at the date of the order and £9 11s. 3d. at the rate now in force. The wife was entitled to recover the appropriate relief from the Commissioners of Inland Revenue whether the husband had paid the tax or not. This is shown by *Spilsbury v. Spofforth* (10) and *Stokes v. Bennett* (11). The learned judge was, I think, not conscious of this and thought that the husband, if given the opportunity, would deduct tax which he had never paid and so defeat the wife, who would, for this reason, be unable to make a claim to relief in respect of his deductions. He referred to the maintenance of the children order in his judgment in these words:

"The figure of £100 for the maintenance of the children is the approximate sum he in fact pays, as he deducts from the sums ordered by the court tax at the standard rate—though on his own account of his income he himself pays no tax and the wife thus cannot recover what he deducts from the revenue authorities."

The judge referred (ante, at p. 97) to the fact that his order was to be effective as from Sept. 1, 1954, the date when the wife's salary ceased, and so would create arrears, and continued:

"After having since September, 1952, paid nothing for the wife's maintenance, the husband from Nov. 30, 1954, to date has paid £26 17s. 6d. in all.

A So the arrears from Sept. 1, 1954, to Mar. 21, 1955, will amount to some £160 [at the rate of £5 10s. a week], which I consider should be paid by monthly instalments of £30 each. The appeal of the wife is accordingly allowed, and the registrar's interim order is varied by ordering maintenance at the rate of £5 10s. per week free of tax from Sept. 1, 1954, the first payment at the current rate to be made on Mar. 25, 1955. The arrears created by this order are to be paid separately and in addition to the £5 10s. per week as follows . . . In order to pay £5 10s. per week, obviously the husband need overdraw at no greater rate than he has been doing and yet maintain an appropriate standard of living."

B That passage ignores the fact that he would be required in addition to pay the tax to the revenue. Finally the judge said (*ibid.*):

C "The reasons leading me to make the order 'free of tax' need in the circumstances no amplification. Indeed, I do not imagine that the order in favour of the children would have been in its present form had it been realised at the time that the husband would seek so to interpret it that he would deduct tax that he had never paid. The result of his so doing is in effect to prevent the wife from obtaining the sum which the court intended her to have for the maintenance of the children."

D The passages that I have read indicate clearly that the learned judge intended to see, if he could, that £5 10s. a week reached the wife in cash, free of any deduction; not that she should receive £5 10s. a week plus income tax relief on the tax deducted. He was, I think, striving to do that which LORD MERRIVALE, E P., had endeavoured to do in *Dayrell-Steyning v. Dayrell-Steyning* (12), namely, to divide up the income of the parties in arithmetically fair shares after providing for taxation. This feat is now recognised to be impossible, and the best that can be done is, in comparable cases, to make a gross order which, in the known circumstances at the current rate of tax, will give the wife a figure approximating to that which the court intends her to receive when her allowances are taken into account. The words "free of tax" attached to a net figure, or "less tax" F attached to a gross figure, have no material effect, since the result in each case is to order a gross sum of which part must be paid to the payee and part to the revenue. In the present case the appropriate weekly figure, on the facts as at present known, on the footing that the wife is not now earning anything, would be in the neighbourhood of £7. In my opinion, therefore, the figure of £5 10s. G free of tax should be deleted, and the figure of £7 less tax should be inserted in its place. On an order in this form, the husband will be entitled, if not bound, to deduct tax at the standard rate, and in doing so will be liable to the revenue accordingly, and the wife will be entitled to make such claim for income tax rebate as is appropriate having regard to her own relevant means and circumstances.

H SIR RAYMOND EVERSHED, M.R. : I agree entirely with the judgment delivered by HODSON, L.J. I am satisfied, for my own part, that the learned judge by his order intended that the wife should receive from the husband £5 10s. per week; no less, but no more. As HODSON, L.J., has pointed out, in I appropriate application to the Inland Revenue, to increase the £5 10s. appreciably. In these matters it must always be for the court a question of approximation and calculation to reach the result intended; and, applying these tests, I agree that the correct figure to be put into the order should be £7 per week gross, a figure which, so far as can reasonably be foretold, should produce for the wife, when all is done, the intended £5 10s. a week clear. The result will, of course, be to reduce the liability of the husband under the order from what was originally £10, and is now a somewhat less sum, to the figure of £7, and to reduce also proportionately the figure for arrears.

In this matter, which was one of discretion, the learned judge erred in no matter of principle or other material respect so as to justify this court in interfering with his order. On the contrary he correctly proceeded to build his conclusion on the basis of considering what were the "faculties" of the husband, using that word in the sense in which it was used in the ecclesiastical courts, as stated by LORD MERRIVALE, P., in *N. v. N.* (5), cited by the learned judge, particularly the passage (138 L.T. at p. 696):

"The ecclesiastical courts showed a degree of practical wisdom . . . They were not misled by appearances . . . they looked at the realities . . . The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term 'faculties' describes the capacity and ability of the respondent to provide maintenance."

Here, then, the learned judge looked for and discovered, as best he could, what were the relevant expendable resources for the husband at the material (that is, the present) time. He found him to be a man whose capabilities ranked him among the class called "a £3,000-a-year man", he found that he was not now earning that sum or any appreciable sum in the way of income, but was living according to a standard appropriate to one having available not less than £1,200 per annum as free income after tax had been paid. In this connection, I agree with counsel for the husband that it would not be right to treat the sum of £240 payable by the husband in respect of his children under orders of the court as though it were part of his notional income, though the fact that that order has been made and the fact that the husband's arrangements with the bank appear to permit him to discharge it are relevant facts to be taken into account. The view which I have taken of the faculties of the husband is that which the learned judge took and I think that in other respects the learned judge correctly applied the law and the relevant principles.

I agree that to the extent which HODSON, L.J., has indicated, the order made by the judge should be varied.

I share the view expressed by the learned judge and by HODSON, L.J., in regretting the length of time that the matter took before the registrar and before the judge. That expenditure of time was in no small measure due to the failure of the husband to make a proper affidavit of documents, and the expenditure (though regrettable) does not appear to me, therefore, to be a matter of which the husband can now complain.

PARKER, L.J. : I entirely agree with both judgments, and there is nothing that I can usefully add.

Appeal dismissed. Form of order varied.

Solicitors: *Wedlake, Letts & Birds* (for the husband); *Herbert Oppenheimer, Nathan & Vandyk* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A Re MIDGLEY (deceased). BARCLAYS BANK, LTD. v. MIDGLEY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), May 26, 1955.]

Will—Lapse—Gift of residue equally to six persons by name—Revocation by codicil of gift to one—Whether share undisposed of.

- B Administration of Estates—Fund for payment of legacies—No express direction as to payment—Share of residue undisposed of—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 34 (3), Sch. 1, Part 2, para. 1.

A testatrix by her will bequeathed pecuniary legacies and gave the residue of her estate to her executor on trusts as follows, viz., on trust for sale and out of the net proceeds to pay all her just debts and funeral and testamentary expenses, and to hold the residue after such payment on trust “for the following persons in equal shares absolutely”, and the testatrix named six persons including P.H. There followed provisos for the substitution of issue for any of the six residuary legatees who might die in the testatrix’s lifetime leaving issue living at her death, and for accruer of the share of any residuary legatee dying in her lifetime who did not leave issue living at her death. By a codicil to her will the testatrix revoked the bequest to P.H. of the one-sixth share of her residuary estate, in lieu thereof the testatrix gave P.H. a pecuniary legacy of £50 and, subject to one other alteration of her bequests not material to this case, the testatrix confirmed her will. The testatrix did not direct out of what fund the pecuniary legacies were to be paid. Of the original six residuary legatees some were cousins of the testatrix (being children of her aunts or uncles) and others were strangers in blood. All were living at the testatrix’s death.

Held: (i) there was an intestacy as to the one-sixth of the testatrix’s residuary estate originally given to P.H., because the residuary gift was to six persons by name, not to a class of persons, and where there was not a class gift there was no reason to prevent lapse.

- F *Sykes v. Sykes* (1868) (3 Ch. App. 301) and *Re Forrest* ([1931] 1 Ch. 162) followed.

Re Whiting ([1913] 2 Ch. 1) and *Re Woods* ([1931] 2 Ch. 138) distinguished.

(ii) the pecuniary legacies were payable out of the share of the residue as to which the testatrix died intestate, because, no contrary intention being apparent from the will, a fund sufficient to meet the pecuniary legacies had to be retained out of the share by virtue of para. 1 of Part 2 of Sch. 1 to the Administration of Estates Act, 1925, and it was implicit in that provision that the legacies were to be paid out of that fund.

- G *Re Martin (decd.)* ([1955] 1 All E.R. 865) applied; *Re Gillett’s Will Trusts* ([1949] 2 All E.R. 893) followed.

Re Beaumont’s Will Trusts ([1950] 1 All E.R. 802) criticised.

- H [As to class gifts and gifts to individuals, see 34 HALSBURY’S LAWS (2nd Edn.) 144, para. 188; and for cases on the subject, see 44 DIGEST 760-762, 6191-6213.]

As to the order of application of assets of solvent estates, see 14 HALSBURY’S LAWS (2nd Edn.) 375, para. 704; and for cases on the subject, see 23 DIGEST 473-477, 496-498, 5425-5461, 5621-5640.

- I For the Administration of Estates Act, 1925, s. 34 (3) and Sch. 1, Part 2, para. 1, see 9 HALSBURY’S STATUTES (2nd Edn.) 737, 767.]

Cases referred to:

- (1) *Re Whiting*, [1913] 2 Ch. 1; 82 L.J.Ch. 309; 108 L.T. 629; 44 Digest 392, 2255.
- (2) *Re Woods*, [1931] 2 Ch. 138; 100 L.J.Ch. 385; 145 L.T. 206; Digest Supp.
- (3) *Sykes v. Sykes*, (1867), L.R. 4 Eq. 200; 36 L.J.Ch. 938; *affd.* L.C., (1868), 3 Ch. App. 301; 37 L.J.Ch. 367; 44 Digest 513, 3332.

- (4) *Re Forrest*, [1931] 1 Ch. 162; 100 L.J.Ch. 122; 144 L.T. 297; Digest Supp. A
 (5) *Re Martin (decd.)*, [1955] 1 All E.R. 865.
 (6) *Re Beaumont's Will Trusts*, [1950] 1 All E.R. 802; [1950] Ch. 462; 2nd Digest Supp.
 (7) *Re Thompson*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; Digest Supp.
 (8) *Re Gillett's Will Trusts*, [1949] 2 All E.R. 893; [1950] Ch. 102; 2nd Digest Supp. B

Adjourned Summons.

The plaintiff, as executor and trustee of the will of the testatrix, Hannah Midgley deceased, applied to the court by originating summons for the determination of the following questions: (1) Whether, on the true construction of the will and codicil of the testatrix, the one-sixth share of her residuary estate which was bequeathed by the will to Polly Huckley and which bequest was revoked by the codicil (i) passed to the other residuary legatees named in the will in equal shares, or (ii) was undisposed of by the will and codicil and passed as on an intestacy or (iii) passed in some other and if so what way. (2) If the one-sixth share was undisposed of by the will and codicil, whether (i) the debts, funeral and testamentary expenses were payable thereout, and (ii) the pecuniary legacies bequeathed by the will and codicil were payable thereout. C D

The testatrix by her will dated Aug. 9, 1950, bequeathed three pecuniary legacies and devised and bequeathed all the residue of her estate on trust for sale and to hold the proceeds of sale on trust to pay thereout

“ all my just debts and funeral and testamentary expenses and to hold the residue after such payments (hereinafter called ‘ my residuary estate ’) upon trust for the following persons in equal shares absolutely ” E

and the testatrix named six residuary legatees of whom one was Polly Huckley. There followed two provisos, viz., that if any of the residuary legatees should die in the testatrix's lifetime leaving issue living at her death the issue should take at a certain age by substitution the parent's share, and that if any of the residuary legatees should die in the testatrix's lifetime without leaving issue living at her death the deceased's share should accrue to the other shares whose trusts should not have failed. By a codicil dated Apr. 13, 1951, the testatrix revoked the residuary gift to Polly Huckley, in lieu thereof gave her a pecuniary legacy of £50 and having altered a pecuniary legacy, in all other respects confirmed her will. The testatrix died on June 6, 1951. F G

Having regard to the terms of the will it was conceded, in answer to question (2) (i) of the summons, that the debts, funeral and testamentary expenses were not payable out of the one-sixth share (if that was undisposed of), but out of the whole of the residue before the division into shares.

M. W. Cockle for the plaintiff. H

H. E. Francis for the first, second, third, fourth and fifth defendants, residuary legatees.

T. A. C. Burgess for the sixth and seventh defendants, representing next of kin.

HARMAN, J. : Hannah Midgley, a widow, made her will on Aug. 9, 1950. She gave her residuary estate to six persons, some of whom were relatives of hers and are in fact among the class of her next of kin, being children of aunts or uncles of hers. Two of them were strangers, of whom one was Polly Huckley, of 24, Peel Place, Keighley. After giving her residue in equal shares absolutely to these six persons, who cannot be described as a class, or even, I think, as a group, the testatrix provides in the familiar manner that if any one of them dies in her lifetime leaving issue living at her death, such issue is to be substituted for the parent. She further provides that if any of them dies in her lifetime, not leaving issue, then there is to be an accruer of the share which would otherwise I

A lapse, so that she has provided for both events and there could not be a lapse so long as any one of the six persons or their stocks survived her.

Some months later, on Apr. 13, 1951, the testatrix made a codicil and recited in it that she had left one-sixth of her residue to Polly Huckley. She goes on:

B “ I hereby revoke the bequest to the said Polly Huckley of the said one-sixth share of my residuary estate and in lieu thereof I bequeath to the said Polly Huckley a pecuniary legacy of £50 absolutely.”

She then gives a legacy to a legatee already named in her will in lieu of a smaller one which she revokes, and in all other respects she confirms her will.

C The testatrix died on June 6, 1951, and the question is: What happens to the one-sixth of her residue given by the will to Polly Huckley, which amounts to something like £1,000? The contest is between the other residuary legatees and the next of kin of the testatrix, the latter being represented for this purpose by the last two defendants.

D Counsel for the residuary legatees submitted to me that there were three categories of gift in these circumstances. First a class gift, when the revocation of the gift to one member of the class will not make it less a class gift to the others and there will be no lapse. Second a gift to A, B, C, D and E by name in equal shares; if a codicil revokes the gift to one of them, then there will be a lapse of that one share. Third an intermediate class where there is not a gift to a class, but something very like one, and the testator has shown a clear intention that those who survive him shall take. If the codicil revokes the gift to one of such a group (if the donees may be so called), there is no lapse and the gift is treated as though it were a class gift.

E That last theory is supported by two cases. One is *Re Whiting* (1), before JOYCE, J., and another is *Re Woods* (2), before MAUGHAM, J. In both, exceptions were being made to the general run of cases and the learned judges felt that to do otherwise would be to defeat the testator's intention, as they saw it; they felt themselves free to accede to the view that an expression of intention that only those who were living should take was enough to push the gift over into the first category, the gift to a class, and take it out of the nominatim category. F In *Re Woods* (2) it was easy to do that, because the persons to whom the gifts were given were in fact a class, namely daughters. It is true that their mother named them. She said “My four daughters, A, B, C and D” and went on, “or such of them as shall be living at my death”. That is as near to being a class gift as makes no matter and in fact it was argued that it was a class gift. G MAUGHAM, J., said he did not think he need decide that because he felt it was just as good as one. If I may say so, it was easy to see in that case that it would have been denying the intention of the testatrix to hold otherwise, but it is true that the learned judge was at pains to distinguish the case. It does not appear that *Sykes v. Sykes* (3) was cited to him, although another case heard in H the same year as *Re Woods* (2), *Re Forrest* (4), was cited, and *Re Forrest* (4) deals with *Sykes*' case (3). In *Re Woods* (2) MAUGHAM, J., said ([1931] 2 Ch. at p. 143):

I “ This much, however, may be asserted of a gift to A, B, and C and D, ‘ or such of them as shall be living at my death ’, that the testator is looking at them, if not as a class in the technical sense, at any rate as a group of persons who have got to be living at the death of the testator in order to take any interest under the bequest; and, if the testator is so regarding the persons named and by his codicil uses language which shows that one of the persons named is to have no benefit under the gift contained in the will, it does not, in my opinion, take a very long step to conclude that the other members of the group, using the neutral term, shall take the whole of the interest which he in the first instance was desirous of giving to those of the group who should be living at his death.”

He then goes on to explain why it is that if the primary gift be a gift to a class

there is no lapse, and he says (*ibid.*) that the ground of the decision in those cases is that where there is a gift to a class A

"... the presumption is that the testator only desires those members of the class who shall be alive at his death to take; and from that the court concludes that he also desires that only those members of the class who are living at his death and capable of taking shall take. In my opinion the same result should follow in such a case as the present." B

It is said that in the two provisos here following the original gift* the testatrix has equally provided that only those who survive her shall take, and the step I am asked to take is no longer than the one that MAUGHAM, J., took in *Re Woods* (2). I do not take that view. I do not think I am at liberty to take that step. CLAUSON, J., in *Re Forrest* (4), declined to take it, notwithstanding that JOYCE, J., had taken it earlier in *Re Whiting* (1), and he explained that he felt himself bound by the decision of LORD CAIRNS, L.C., in *Sykes v. Sykes* (3), to hold that where there was not a class gift there was not any reason to prevent a lapse. In my judgment, that is so in the present case. It appears that in *Sykes v. Sykes* (3) (as reported at first instance in L.R. 4 Eq. 200), there were in fact two provisos which were to the same effect as the two provisos in the present case. Yet the Lord Chancellor did not feel at liberty to treat the case as a class gift. I do not think I am at liberty to do so either. C

It seems to me that this is a gift by a will to six persons, not a class and not, I think, a group. It is quite true that, like most testators, this lady did not intend to die intestate: no testator does, except under very exceptional circumstances. All that happened was that when she came to make a codicil she forgot to provide for the hole she made in the structure of the will: I do not think I can fill it up. Perhaps if it had been pointed out to her that she had made a hole she would have said, "Yes, let it accrue" or something of the sort, but I do not feel at liberty to attribute to her an intention which I do not think she ever had. D

Quite apart from that feeling, it seems to me that it is important that there should be uniformity in these matters and the less exceptions made to a general rule the better. This rule is a sound one and should not be departed from unless under the stress of very strong conviction, which I do not feel here. E

Consequently, I hold that the testatrix died intestate as to one-sixth of her residue. F

[HIS LORDSHIP heard argument on question (2) mentioned above.] G

HARMAN, J. : The question now arises: Out of what sum are legacies to be paid? Having regard to the form of the will, it is clear that the debts, funeral and testamentary expenses are to be paid out of the whole fund before the division of the shares, and that is conceded, but the trust for sale created by the will says nothing about legacies and they are not charged by the will on any specific portion of the estate. H

I am to look, as it seems to me, to s. 34 of the Administration of Estates Act, 1925. Section 34 (3) deals with the method of administering the estate of a deceased person who is solvent. The section only purports to apply to the method of the discharge of the funeral, testamentary and administration expenses, debts and liabilities and there is nothing in the section about legacies. So far apparently the law about payment of legacies has not been altered, but in Part 2 of Sch. 1, referred to in s. 34 (3) as controlling the order of administration, I find: I

"Order of application of assets where the estate is solvent. 1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies."

Therefore, one has first to retain out of the property undisposed of a fund

* See p. 626, letter E, ante.

- A sufficient to meet any pecuniary legacies, and one has to pay the debts, testamentary expenses and so forth out of the rest of the undisposed of property. What is one to do then with the fund that has been retained thereout? The answer, it seems to me, is that one must pay the pecuniary legacies because it has been retained to meet them. It is, if I may say so, a tortuous way of legislating, but that is what I should have thought it inevitably meant and so, indeed,
- B DANCKWERTS, J., concluded recently in *Re Martin (decd.)* (5). It is quite true that in that case there was undisposed of real estate, and no trust for sale which applied to it. Any trust for sale would have failed because of the failure of the gift. DANCKWERTS, J., said ([1955] 1 All E.R. at p. 868):

- C “It seems to me that here I am dealing simply with one asset, the undisposed of real estate, and out of that undisposed of real estate a fund is to be raised to provide for the pecuniary legacies, and if the fund is not to be raised for the payment of the pecuniary legacies, it is difficult to see what reason there is for setting aside the fund. Therefore, I am necessarily driven to the conclusion that according to the provisions contained in para. 1 of Part 2 of Sch. 1 to the Act, the proper fund to meet the legacies in the present case is the undisposed of property.”

- D That seems to me, if I may say so, to be right.

I am told, however, that that does not apply in a case where there is a trust for sale and I am referred to a former decision of the same judge, *Re Beaumont's Will Trusts* (6). The end of the headnote reads as follows ([1950] Ch. 463):

- E “Held, that, in effect, no provision at all was made by s. 34 (3) with regard to such things as legacies, so that the law in force before 1926 applied to the legacies in question, and the pecuniary and specific legacies and the duty on them were all payable out of the whole estate before the division of the residuary estate into four equal parts . . .”

- The learned judge purports to follow *Re Thompson* (7). The argument that prevailed in *Beaumont's* case (6) was apparently that a trust for sale imposed
- F by the will excluded the Act altogether, because it excluded s. 33 of the Act. I confess that I do not follow that argument. The decision of ROXBURGH, J., in *Re Gillett's Will Trusts* (8), was not apparently cited to the learned judge. In the latter case, ROXBURGH, J. (it is true on some concessions from counsel), held that para. 1 of Part 2 of Sch. 1 made the legacies payable out of the undisposed of property. That rule may not apply when there is no intestacy apparent
- G at the death of the testator. I am not suggesting that anything I say covers that case, but where, as here, it is apparent that the testator is to some extent intestate at his death and where no contrary intention appears from the will, then, as it seems to me, the effect of para. 1 of Part 2 of Sch. 1 applies to make the pecuniary legacies payable out of the undisposed of property, and I so hold.

Order accordingly.

Solicitors: *T. D. Jones & Co.*, agents for *Hargreaves*, Barking (for all parties other than the sixth and seventh defendants); *Woodcock, Ryland & Co.*, agents for *Standring, Taylor & Co.*, Rochdale (for the sixth and seventh defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

Re CORY (*deceased*).
CORY AND ANOTHER *v.* MOREL AND OTHERS.

[CHANCERY DIVISION (Harman, J.), June 7, 1955.]

Will—Omission—Words of will showing omission of few words of power of appointment—Gift in default of appointment—Supplying of words by the court.

By his will a testator gave his residuary estate to trustees on trust for his four daughters and two sons equally, the share of each daughter to be held by the trustees on trust to pay the income thereof to her during her life and after her death "upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of such daughter and in default of and subject to any such appointment in trust . . ." for all her children in equal shares. On a summons to determine whether any and what power of appointment was conferred on the testator's daughters,

Held: the will must be read as it stood, and, as it was clear that the clause was imperfectly expressed in that it omitted operative words conferring a power of selection, it was justifiable, in view particularly of the presence of the trust "in default of and subject to any such appointment", to complete the incomplete expression of the power by inserting the words "as she shall appoint" next after the words "such daughter" in the clause.

Re Follett (dec'd.) (ante, p. 22) considered.

[As to supplying words in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 215, para. 272; and for cases on the subject, see 44 DIGEST 597, 4214 et seq.]

Case referred to:

(1) *Re Follett (dec'd.)*, [1954] 3 All E.R. 478; *revsd.* C.A., ante, p. 22.

Adjourned Summons.

The plaintiffs, the trustees of the will of the testator, John Cory, issued an originating summons to determine whether, on the true construction of the said will the power of appointment referred to in cl. 19 (f) thereof, was intended by the testator to confer on the first, second, third and fourth defendants, (i) a special power of appointment enabling them to appoint the fund therein mentioned by deed or by will or by codicil among their issue, or (ii) a special power of appointment enabling them to appoint the fund therein mentioned by will or codicil among their issue, or (iii) any and if so what other power of appointment.

By his will dated Dec. 31, 1920, the testator, John Cory, appointed the plaintiffs to be his executors and trustees and having made certain bequests which are immaterial to this report, by cl. 19 (f) gave his residuary estate to his trustees on trust for his children Amy, Alice, Florence, Edith (the first, second, third and fourth defendants), John and Charles in equal shares, the share of each daughter to be held by the trustees on trust to pay the income to her during her life and

"after the death of such daughter my trustees shall hold such share and future income thereof upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of such daughter and in default of and subject to any such appointment in trust"

for all or any of her children on attaining the age of twenty-one years or, if daughters, attaining that age or marrying, in equal shares. The testator died on Jan. 20, 1931, and probate of his will was obtained on Jan. 23, 1932. The fifth defendant was a grandchild of the testator.

C. A. Settle for the plaintiffs.

A. Heyman for the first, second, third and fourth defendants.

D. O. Thomas for the fifth defendant.

A HARMAN, J., stated the facts and continued: It leaps to the eye that the clause is imperfect. When one looks at it one sees it is very much in common form and the instinct one has is at once to say that the testator intended to give his daughters a power of appointment and that he left it out by mistake because here the power of selection was clearly begun with the words, "such one or more exclusively of the others or other of the children or remoter issue of such daughter", but was not completed. It is clear as the clause stands that there was intended to be an appointment.

B Counsel for the fifth defendant pointed to the fact that in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING (10th Edn.), vol. 2, p. 896, if one read to the end of para. 6 and went straight on to para. 7 without putting in the words to which reference has been made which create the power, exactly the same result would be produced as was produced here. It may very well be that that is what happened. Counsel says, however, that it is as easy to look at it in the one way as in the other; it may be supposed either that words were there and were purposely cut out or that words were assumed to be there and were accidentally omitted. It is as easy, he submits, to use scissors as paste on this document. A certain result can be produced by inserting words and an equally good result can be produced by striking words out.

Rightly, I think, counsel pressed me with the decision of *Re Follett (decd.)* (1), where the Court of Appeal declined to follow the speculations, as they held them to be, of ROXBURGH, J., where he inserted a number of words into a will. JENKINS, L.J., pointed out (ante, at p. 27) that it was possible that after the testator and his advisers had discussed the clause between them the testator was minded to cut out words but that the excision was imperfectly done. Counsel also made something of the fact that there is no hotchpot clause in this will. It is usual in wills giving powers of appointment unequally per stirpes to provide that an appointed child shall bring into hotchpot anything which he takes under the clause in default of appointment. The purpose of that is to produce equality between the branches of the family. Counsel urges me to hold that the draftsman cut out the power and cut out the hotchpot clause but left more lines in than he should have done. All that is very attractive, but it means that I must not read the whole of that which has been admitted to probate, and that I must strike out a portion of it because this is not such a will as the will in *Follett's* case (1) where sense could be made of it as it stood. If I am to read the will as it stands, it is clear that a power of selection was intended; all that is omitted is what power of selection was intended. I ought not to cut any words out of the will, if that can be avoided.

It is urged on me that the special powers now provided for in the various textbooks are always in a form of a power to appoint by deed or will. On the other hand there is a form of special power, which provides for various adventitious payments for education, advancement, etc., in the trustees' discretion. There are many possibilities; for example in a will drawn before 1925 a man might well have provided that the appointment should be by deed which should be witnessed by more than two persons. That trouble was avoided by the Law of Property Act, 1925, s. 159. On the whole I feel that this will must be read as it stands, even though the result must be to add words. I think that I am justified here in adding the power. It is quite true that I do not know exactly what it is that the testator might have inserted as the power, so all I propose to do is to add the power, and not state in any way what sort of power he intended. I propose, therefore, to read the clause

"for all or such one or more exclusively of the others or other of the children or remoter issue of such daughter as she shall appoint . . ."

I propose to insert the words "as she shall appoint" because the testator

continued his will with the words "and in default of such appointment". That being so, a daughter can appoint in any way which she may think fit. A

Declaration accordingly.

Solicitors: *Crawley & de Reya*, agents for *J. Harvard Davis & Winn-Jones*, Cardiff (for all parties).

[Reported by PHILIPPA PRICE, Barrister-at-Law.] B

Re MORGAN (*deceased*).

CECIL-WILLIAMS AND ANOTHER v. ATTORNEY-GENERAL AND ANOTHER. D

[CHANCERY DIVISION (Harman, J.), June 8, 1955.]

Charity—Benefit to community—Health and welfare—Inhabitants of named parish—Provision of public recreation ground—Whether valid charitable gift.

By cl. 4 of his will a testator bequeathed to his trustees the sum of £3,000 "with a view to the maintenance and improvement of the health and welfare of the inhabitants of the parish of [J.] . . . by the purchase equipment and maintenance of a public recreation ground for amateur activities," and further provided that the trustees were to apply the sum in the purchase of a piece of land near J., and in the improvement and equipping of the same as a public recreation ground for amateur activities for the benefit of the said parish. On the question whether the bequest was a valid charitable gift, and on its appearing that the parish had a football field and cricket ground but needed a gymnasium or hall for indoor recreation, E

Held: a gift of money for the provision of a recreation ground for the inhabitants of a particular area was for a valid charitable purpose (dictum of VISCOUNT SIMONDS in *Inland Revenue Comrs. v. Baddeley* ([1955] 1 All E.R. at p. 532) applied), and, accordingly, the gift contained in cl. 4 of the will was a valid charitable gift, and the money would be directed to be applied cy-près to be applied according to a scheme for something in the nature of a playground, gymnasium or village hall. F

[As to a gift for the benefit of the community in a particular locality, see 4 HALSBURY'S LAWS (3rd Edn.) 227, para. 507; and as to the application of a bequest cy-près where a particular purpose fails, see *ibid.*, 319, para. 658; and for cases on gifts for the benefit of parishes as charitable gifts, see 8 DIGEST (Repl.) 342, 237 et seq; and for cases on the application of charitable gifts cy-près, see *ibid.*, 459, 1594 et seq.] G

Cases referred to:

- (1) *Inland Revenue Comrs. v. Baddeley*, [1955] 1 All E.R. 525. I
- (2) *Re Hadden*, [1932] 1 Ch. 133; 101 L.J.Ch. 53; 146 L.T. 190; Digest Supp.
- (3) *Re Foakes*, (1933), unreported.
- (4) *Re Chesters*, (1934), unreported.

Adjourned Summons.

The plaintiffs, the trustees of the will of Henry Hall Morgan, issued an originating summons to determine whether, on the true construction of the said will, the bequest contained in cl. 4 thereof was a valid charitable gift.

A By his will dated July 12, 1946, the above-named testator appointed the plaintiffs to be his executors and trustees and having made certain pecuniary bequests which are not material to this report, provided by cl. 4:

B “. . . with a view to the maintenance and improvement of the health and welfare of the inhabitants of the parish of Jeffreyston in the said county of Pembroke by the purchase equipment and maintenance of a public recreation ground for amateur activities, I bequeath unto my trustees the sum of £3,000 . . . ”

that fund to be held by the trustees on trust to apply it

C “ in the purchase of a piece or parcel of land situated in or near the said village . . . and in the improvement and equipping of the same as a public recreation ground for amateur activities for the benefit of the said parish . . . and in the maintenance thereof until transfer of the balance of the said sum is made to the parish council as hereinafter provided.”

D The testator then provided that any surplus remaining after fulfilling the provisions of cl. 4 should be handed over to the parish council as an endowment fund for the maintenance of the recreation ground.

The testator died on Feb. 11, 1953, and probate of his will was obtained in March, 1953. The Attorney-General as *amicus curiae* appeared as first defendant and the second defendant represented the residuary legatees.

E *H. E. Francis* for the plaintiffs, the trustees of the will.
Denys B. Buckley for the Attorney-General, the first defendant.
M. O. Stranders for the second defendant.

F **HARMAN, J.**, stated the facts and continued: The first question is whether cl. 4 contains a valid charitable gift. I am inclined to hold that it does. The whole matter has recently been very much canvassed in *Inland Revenue Comrs. v. Baddeley* (1) when, sitting as judge of first instance, I called attention to certain charity cases concerning sport and what was “mere sport”, and found some difficulty in **CLAUSON, J.**’s decision in *Re Hadden* (2). **VISCOUNT SIMONDS**, in giving the leading speech in the *Baddeley* case (1) was very careful, having regard to the presence in that case of the Attorney-General as *amicus curiae*, to say this ([1955] 1 All E.R. at p. 532):

G “. . . I think it right to say that, in my opinion, a gift of land for use as a recreation ground by the community at large or by the inhabitants of a particular geographical area might well be supported as a valid charity.”

H He then makes two reservations, one where the class is to be determined by religion and the other where the nexus is a particular employment or industry. Apart from that, he is very careful to say that in his view such a gift could be supported in that way. I think **LORD SOMERVELL OF HARROW** was of the same view. **LORD REID** in his dissenting speech founded himself very much on the reasoning of **CLAUSON, J.**, in *Re Hadden* (2). There were apparently two other cases both unreported (*Re Foakes* (3) and *Re Chesters* (4)) where the gift of money for recreation grounds for the inhabitants of an area was held to be a good charitable bequest. I think I am bound so to hold, and I do so. It seems to me, therefore, that cl. 4 is a valid charitable gift.

I When I turn to the circumstances of the case I find that the parish council takes the view that a recreation ground in the ordinary sense of the word is not what Jeffreyston requires at all. They have a cricket pitch and a football ground. What the young people want is a place for indoor recreation such as a gymnasium. There appears to be a real need for something of that sort in this parish. Therefore, it seems to me that I am entitled to take the view that the attainment of the end desired by this testator, namely, the improvement of the health and welfare of the inhabitants of Jeffreyston may be carried out

in that way, i.e., by the provision of a hall for indoor recreation. That does not mean that the gift for charitable purposes fails, but merely that the immediate method by which the testator wished to effect it is not practicable. Consequently, in my judgment, the proper course is to direct the application of this sum *cy-près*, and I propose to refer the matter to chambers for a scheme to be brought in by the plaintiffs (who will, of course, consult the parish council as they are the persons who will have to administer the trust) providing something in the nature of a playground, gymnasium or village hall where recreation can be had by the inhabitants of the parish. I have no doubt that it will not be difficult to make a scheme which is practicable and conducive to attaining the objects which the testator had in his mind, namely, the improvement of the health and welfare of the inhabitants of this place.

Declaration accordingly.

Solicitors: *Cecil-Williams & Co.* (for the plaintiffs and the second defendant);
Treasury Solicitor.

[*Reported by PHILIPPA PRICE, Barrister-at-Law.*]

SANDOWN PARK, LTD. v. CASTLE (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Birkett and Romer, L.JJ.), May 12, 1955.]

Costs—Lands Tribunal—Costs awarded on county court scale 3—Appeal to Court of Appeal—No application for increased charges for a year—Subsequent application for certificate for increased charges—Delay—County Court Rules, 1936, Ord. 13, r. 5, Ord. 47, r. 21 (4)—Lands Tribunal Rules, 1949 (S.I. 1949 No. 2263), r. 42 (2).

A rating authority and a valuation officer who succeeded on a rating appeal from a local valuation court to the Lands Tribunal were awarded costs on county court scale 3. An appeal by the ratepayers succeeded and the Court of Appeal awarded them costs, including costs before the tribunal also on county court scale 3. Leave to appeal to the House of Lords was granted but the proposed appeal was abandoned. The ratepayers applied to the Court of Appeal under the C.C.R., Ord. 47, r. 21 (4) for certificates that counsel's fee in the proceedings before the Lands Tribunal should not be limited to the scale fee, that the proceedings were fit for the employment of more than one counsel, and that the solicitor's charge for instructions for brief ought not to be limited to the scale amount. The application was made a year after the hearing before the Court of Appeal, but it was contended that, particularly in view of the power to enlarge time conferred by C.C.R., Ord. 13, r. 5, the court could grant the certificates by virtue of C.C.R., Ord. 47, r. 21 (4), at any time subsequent to the hearing.

Held: the application ought to have been made at the hearing and in view of the lapse of time since then would be dismissed.

[**Editorial Note.** In general the costs of and incidental to proceedings before the Lands Tribunal are in the discretion of the tribunal. If the tribunal directs one party to pay costs to the other, it may settle the amount by fixing a lump sum or it may direct that the costs shall be taxed by the registrar on a

A specified scale of costs prescribed by the R.S.C., or C.C.R. (see Lands Tribunal Rules, 1949, r. 42 (2)). Although, as appears from the present case, orders for costs of proceedings before the tribunal, if made by reference to a scale are most often made by reference to a scale prescribed by the C.C.R., yet in the discretion of the tribunal, in appropriate cases, taxation is directed on a scale prescribed by the R.S.C.

B As to an application for increased charges to be allowed in a taxation of costs under the County Court Rules, 1936, Ord. 47, r. 21 (4), see 9 HALSBURY'S LAWS (3rd Edn.) 308, para. 748.

For the County Court Rules, 1936, Ord. 13, r. 5, Ord. 47, r. 21 (4), see COUNTY COURT PRACTICE, 1955, pp. 320, 494.

For the Lands Tribunal Rules, 1949, r. 42, see 12 HALSBURY'S STATUTORY

C INSTRUMENTS 173.]

Application.

The successful ratepayers on a rating appeal from the Lands Tribunal to the Court of Appeal, in which judgment was given by the court on May 19, 1954, who had been awarded costs on county court scale 3 in respect of the proceedings before the tribunal (which was the scale of costs awarded by the tribunal to the respondents, the rating authority and the valuation officer, on the appeal from the local valuation court to the tribunal) applied to the Court of Appeal for an order for certificates as to the costs under the County Court Rules, 1936, Ord. 47, r. 21. The certificates asked for were certificates that, in the Lands Tribunal proceedings: (i) counsel's fee ought not to be limited to the scale fee; (ii) the proceedings were fit for the employment of more than one counsel; and (iii) the solicitor's charges for taking instructions for brief to counsel ought not to be limited to the scale amount. No application for the certificates had been made at the time of the hearing before the Court of Appeal, in view of an appeal to the House of Lords, subsequently abandoned, and about a year had elapsed between the hearing before the Court of Appeal and the present application.

F *G. D. Squibb* for the applicants, the ratepayers.

Harold Brown, Q.C., and *N. H. Curtis-Raleigh* for the respondent rating authority.

P. R. E. Browne for the respondent valuation officer.

BIRKETT, L.J. : This application is made on behalf of Sandown Park, Ltd., the ratepayers, with regard to costs. The appeal was heard a considerable time ago, and the ratepayers were successful in their submission that they ought to be rated in a different way from that laid down by the Lands Tribunal. The costs were dealt with. The application today is that we should make an order for: (i) a certificate that the fee for counsel ought not to be limited to the amount appearing in county court scale 3; (ii) a certificate that these proceedings are fit for the employment of more counsel than one; and (iii) a certificate that the solicitor's charge for taking instructions for brief to counsel on trial ought not to be limited to the amount appearing in county court scale 3.

I have considerable sympathy with all three points. The case was one of some complexity and difficulty. A great deal of legal authority had to be cited and the matter was argued expertly and at considerable length. In the ordinary way the three matters asked for in this application would be normal and ordinary, and ought to be granted. The difficulty is that this was a decision of the Lands Tribunal; the costs of the appeal to this court do not enter into this matter at all: it is merely a question as to the costs before the tribunal. The tribunal ordered that the rating authority and the valuation officer should have the costs on county court scale 3. Counsel for the ratepayers tells us that that is the ordinary practice of the tribunal, though it has power under the Lands Tribunal Rules, 1949 (S.I. 1949 No. 2263), r. 42 (2), to order a lump sum to be paid by way of costs or to award costs on a specified scale according to the Rules of the Supreme

Court or according to the county court rules; but I rather gather that in practice the tribunal confines the matter of costs to the county court scale, and that was done in this case. A

Therefore, the ratepayers, who had lost their case before the tribunal, were ordered to pay costs on scale 3. When the Court of Appeal reversed that decision on appeal, apart from making the order as to the costs of the appeal, the court had to deal with the costs before the tribunal, and the court decided, quite naturally, that, as costs on county court scale 3 had been awarded against the ratepayers, now that they were successful the same rule ought to apply. At any rate, that is what the court did, the order being "Appeal allowed; costs before the Lands Tribunal to be paid on scale 3." That is the whole point of this application. Unfortunately, there has been some delay, though the ratepayers are not wholly responsible for it. When allowing the appeal from the tribunal, the Court of Appeal gave leave to appeal to the House of Lords. Nothing was done while that order was, so to speak, current, but when the appeal was abandoned it was considered to be unnecessary to take any step because the taxing master's powers were considered to be amply sufficient to deal with this matter. When the matters were raised before the taxing master, on Dec. 6, 1954, he took the view that his powers were not sufficient and that an application ought to be made to the court. B C D

The difficulty is that, under the County Court Rules, 1936, Ord. 47, r. 21 (4):

"An application for a certificate pursuant to the foregoing paragraphs of this rule may be made at the hearing or on notice which shall be served on the party sought to be made liable within seven days of the making of the order awarding costs or within seven days of the receipt of notice of payment into court or of notice of discontinuance." E

The preceding paragraphs of r. 21 relate to costs of the proceedings on scale 3, and expressly state that the judge can certify that the proceedings are fit for the employment of more counsel than one and that the registrar on taxation need not be bound by certain items. The proviso to r. 21 (4), however, reads: F

"Provided that where an application which could have been made at the hearing is made subsequently, the judge may refuse the application on the ground that it ought to have been made at the hearing." G

Counsel for the rating authority intervened to say that that really meant that the time given was limited to seven days and that the proviso meant that, if within those seven days—i.e., subsequently to the making of the order—an application was made, then the judge had power to refuse it on the ground that it ought to have been made earlier. Counsel for the ratepayers resists that and relies on C.C.R., Ord. 13, r. 5, which provides: H

"(1) Subject to the provisions of these rules, any of the times fixed by these rules for—(a) taking any step in any proceedings; or (b) filing any document; or (c) giving any notice, may be enlarged or abridged by consent of all parties or by the court on the application of any party. I

"(2) An order enlarging time may be made although the application therefor is not made until after the expiration of the time allowed or appointed."

Counsel argues, therefore, that the time is not really limited to seven days, but is any subsequent time; and, indeed, that a year or eight days makes no difference, it is "subsequently," and it is a matter for the court.

- A I do not think it is necessary for us to determine the construction of the rule or whether it is limited to seven days or not. It is plain that the application has been made subsequently to the making of the order, and the discretion is in the court, as I think, to deal with that matter. The conclusion to which I have come is that, whilst I have considerable sympathy with the substance of the application, I think that we ought not to accede to it. When the order was
- B made by the Court of Appeal, nobody suggested that costs ought not to be confined to scale 3. The applicants would have found that a little difficult to argue, seeing that the order made against them was on that same scale. It is only in the light of subsequent developments—the abandonment of an appeal to the House of Lords and the attitude taken by the taxing master—that an application is thought necessary to the Court of Appeal to vary (or, as counsel said, add to) the order as to costs.
- C

In my view, we ought not to make any such order. Having regard to the terms of the proviso to r. 21 (4), this point ought to have been raised at the hearing. Coming at this time, the application is in my opinion too late. I would therefore dismiss the application.

- D **ROMER, L.J. :** I agree. I also feel sympathy with the ratepayers in this sense, that I cannot help feeling that, if the application for these three certificates had been made when the judgment of this court was delivered, it would very probably have been acceded to, having regard to the nature of the case and the importance of the issues raised. But I cannot feel that an application made a year after judgment in this court was delivered should be acceded to now, having
- E regard to the obvious conception which was in the mind of the draftsmen of this rule that the application should be made at or within a very few days of the hearing of the trial. Accordingly, I agree with my Lord that we ought not to grant this application.

Application dismissed.

Solicitors: *Taylor & Taylor* (for the applicants, the ratepayers); *Lees & Co.*, agents for Clerk of Esher Urban District Council (for the respondent rating authority) ; *Solicitor of Inland Revenue* (for the respondent valuation officer).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

Re WEST FERRY ROAD, POPLAR, LONDON.
Re PADWICK'S ESTATE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.J.J.),
June 7, 1955.]

Compulsory Purchase—Costs—Promoter's liability—Registered land—Vendor's costs, charges and expenses—Basis of computation—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D), (H), schedule, as amended by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118).

The London County Council bought, under a compulsory purchase order made under the Town and Country Planning Acts, 1944 and 1947, certain freehold land registered under the Land Registration Act, 1925, with absolute title. The transaction having been completed, the vendors' solicitors submitted to the vendors a lump sum bill for the work done in connection with the conveyance of the land to the council, charging the scale fee appropriate to a completed transfer on sale of registered land under the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953. The vendors sought to recover the amount from the council as charges and expenses which the latter were required to bear by s. 82 of the Lands Clauses Consolidation Act, 1845.* Failing agreement between the parties, the bill was taxed under s. 83 of the Act of 1845 and was allowed. On appeal from review of taxation,

Held: the bill was rightly allowed against the council because the proper remuneration of the vendors' solicitors for the work of conveyance and deducing title, etc., mentioned in s. 82 of the Lands Clauses Consolidation Act, 1845, was, by virtue of art. 1 (D) of the Solicitors' Remuneration (Registered Land) Order, 1925, the scale fee for a completed transfer on sale, which accordingly became payable by the council under s. 82, notwithstanding that the scale fee might in suitable other circumstances cover not only work mentioned in s. 82 but also certain other work not mentioned there, e.g., work of negotiating the contract.

Decision of HARMAN, J. (ante, p. 197) affirmed.

[**Editorial Note.** The present decision is limited to compulsory acquisitions of land the title to which is registered; the Solicitors' Remuneration Orders, 1883 to 1953, expressly except compulsory acquisitions where the vendor's costs are borne by the acquiring authority (see r. 11 of the Rules applicable to Part 1 of Sch. 1 to the Order of 1883), so that charges under Sch. 2 become appropriate if the land is not registered land. To attempt to suggest reasons for this distinction is, SIR RAYMOND EVERSLED, M.R., said (p. 642, letter A, post) an exercise in speculation.

As to the taxation and recovery of costs from an authority acquiring land compulsorily, see 10 HALSBURY'S LAWS (3rd Edn.) 89, para. 146; and for cases on the subject, see 11 DIGEST (Repl.) 247, 1157-1161.

For the Lands Clauses Consolidation Act, 1845, s. 82, s. 83, see 3 HALSBURY'S STATUTES (2nd Edn.) 929, 930.

For the Solicitors' Remuneration (Registered Land) Order, 1925, as amended, see 20 HALSBURY'S STATUTORY INSTRUMENTS 205; and for the Solicitors' Remuneration Order, 1883, see *ibid.*, pp. 195 et seq.]

Case referred to:

(1) *Re Hampstead Junction Ry. Co., Ex p. Buck*, (1863), 1 Hem. & M. 519; 33 L.J.Ch. 79; 9 L.T. 374; 71 E.R. 227; 11 Digest (Repl.) 247, 1161.

Appeal.

This was an appeal by the applicants, the London County Council, from a

* The terms of s. 82 are printed at p. 639, letter F, post.

A decision of HARMAN, J., given on Mar. 25, 1955, and reported ante, p. 197, dismissing the applicants' summons to review taxation. The vendors of land compulsorily acquired by the county council in accordance with the Lands Clauses Consolidation Act, 1845, submitted to the county council the bill of their solicitors for professional charges in connection with the compulsory purchase of the land for the sum of £55,000, charging

B "in accordance with the authorised land registration scale £159 15s. for deducing title to the properties, perusing, approving and obtaining execution of instrument of transfer and completing the sale."

The county council objected to the bill, which, therefore, became taxable under s. 83 of the Act of 1845. Before the taxing master the county council objected to the allowance of the costs because, among other things, the Solicitors' Remuneration (Registered Land) Orders, 1925 to 1953, did not apply to a taxation as between the vendors and the promoters under s. 83 of the Act of 1845. The taxing master overruled that objection and the county council issued a summons to review the taxation which was dismissed.

C *Maurice Lyell, Q.C.*, and *H. E. Francis* for the applicants, the London County Council.

D *J. W. Brunyate* for the respondents, the vendors.

SIR RAYMOND EVERSLED, M.R. : This appeal concerns the extent of the liability of a local authority, on a compulsory acquisition, for the costs and expenses incurred on the part of the seller, those last words being taken from s. 82 of the Lands Clauses Consolidation Act, 1845. The section that I have mentioned imposes on a local authority in such a case as the present the obligation of paying such charges and expenses; but the section itself is in terms such that, according to the applicants' argument, it excludes from the liability of the local authority any costs, charges and expenses, which are related to work done on the seller's part, but which are not properly for work of or in connection with the conveyance itself.

F Section 82 is as follows:

G "The costs of all such conveyances shall be borne by the promoters of the undertaking; and such costs shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

H I will complete my reference to the Act of 1845 by a brief reference to s. 83. That section provides that if the promoters and the party entitled shall not agree as to the amount thereof such costs shall be taxed by one of the taxing masters of the Court of Chancery "upon an order of the same court, to be obtained upon petition in a summary way". I think it is unnecessary to read any more of that section.

I In the present case the land acquired was registered land, that is (as is conceded for the present argument) land which has been registered with an absolute or good leasehold title under the Land Registration Act, 1925. The respondents, being trustees, are or were the sellers under the compulsory purchase and they have sought to recover from the applicants, the London County Council, the amount of the costs which they became obliged to pay, as they say, to their own solicitors, the costs being charged in accordance with the Solicitors' Remuneration (Registered Land) Order, 1925. The sum involved is not, in the circumstances, very large. We were told that the bill amounts to £159 or thereabouts and it has not been suggested that that sum is by any particular amount excessive or

indeed that it exceeds what, on a taxation under s. 83, would have to be paid in any event by the London County Council. A

The matter has, however, come before us, as it is said, on a question of principle, that question being whether the terms of the Solicitors' Remuneration (Registered Land) Order, 1925, apply at all in the case of the acquisition under compulsory powers by a local authority of registered land; or alternatively, if the order does apply in any such cases, to what cases it does so apply. B

The powers and rights of solicitors to charge for their services has for some time been regulated by orders made under the authority of Acts of Parliament and in that respect for a great many years a distinction has been drawn between charges in respect of sales of registered land and charges in respect of sales of unregistered land. The question which has arisen in the present case, and the difficulty which has exhibited itself, largely I think depends on the circumstance that, as regards unregistered land, the relevant order, as amended from time to time, contains an express exclusion of its applicability to cases of sales under the Lands Clauses Consolidation Act, 1845, whereas there is no such exclusion in the case of registered land. In the case of unregistered land the matter is regulated by the Solicitors' Remuneration Order, 1883, which has been amended in certain respects, but which provides by art. 2 that a scale set out in Sch. 1 to that order shall be applied in the case of certain transactions, including completed sales; but, as I have already indicated, by r. 11* of the Rules applicable to Part 1 of Sch. 1 to that order it is provided that, in cases of sales under the Lands Clauses Consolidation Act, 1845, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply. When, however, one comes to the relevant order relating to registered land, which is the Solicitors' Remuneration (Registered Land) Order, 1925, there is no such exclusion. C D E

The relevant provisions of the Order of 1925 are as follows:

"1. The remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925, shall be regulated as follows . . . (D) For every completed transfer on sale . . . (i) Where the land is registered with absolute or good leasehold title, the remuneration shall be that prescribed in the schedule hereto." F

The schedule then contains a scale of remuneration which is related strictly to the value of the land sold. Paragraph (G) of art. 1 of the order† provides:

"In all exchanges and other transactions, save those hereinbefore specified, Sch. 2 remuneration shall apply." G

Schedule 2‡, putting it briefly, now regulates the remuneration in accordance with general principles as regard the amount of the work done, the skill in doing it, and so forth, including (but not limited to) the value of the subject-matter dealt with. Paragraph (H) of art. 1 of the Order of 1925 provides:

"The remuneration prescribed by the schedule hereto covers . . . the preparation or perusal (as the case may be) of the contract, or conditions of sale, if any, the perusal of any lease, or other deed mentioned on the register, and all other work incidental to or consequential on the transaction" H

The burden of the applicants' argument which I have already anticipated is that the liability under s. 82 of the Lands Clauses Consolidation Act, 1845, is I

* As substituted by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117).

† As amended by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118).

‡ By art. 2 of the Order of 1925 (as amended by S.I. 1953 No. 118), "Schedule 2 remuneration" means the remuneration prescribed by Sch. 2 to the Solicitors' Remuneration Order, 1883, as substituted by the Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117).

- A limited, broadly speaking, to the costs and charges incurred in respect of the conveyance and other matters properly ancillary thereto, matters of title and so forth—in respect of matters, as he says, arising after the date of any contract which the solicitor might have been employed in drafting or perusing. Therefore, says counsel for the applicants, it will be seen that para. (H) of the Order of 1925, by making the remuneration extend to and cover, and in effect be remuneration for, matters other than those specified in s. 82, imposes or would, if it were applicable, impose on the acquiring authority a liability to pay costs greater than s. 82 ordained.

- In opening the case, counsel for the applicants referred us to the decision of SIR WILLIAM PAGE WOOD, V.-C., in *Re Hampstead Junction Ry. Co., Ex p. Buck* (1) (1863) (1 Hem. & M. 519). In that case an acquiring authority, a railway company, acquired parts of certain properties and, as a consequence, the seller had to apportion the rents which he had been receiving from them. He sought to charge the railway company, under the Lands Clauses Consolidation Act, 1845, with the costs of the apportionments in question. SIR WILLIAM PAGE WOOD, V.-C., said (1 Hem. & M. at p. 523):

- “ I do not see in what way I can give any costs under s. 82, which are not costs of or incidental to the conveyance. But the conveyance is a perfectly distinct thing from that which is to be conveyed, and from preliminary negotiations. The conveyance begins when you have ascertained what is to be conveyed, and then the provision of the Act is that the company are to pay the costs of verifying the title and the expenses of conveyance.”

- The learned Vice-Chancellor then gives one or two examples and concludes this part of his judgment thus:

“ As regards the Act, I think Mr. Speed's explanation the right one. Section 82 deals simply with the legal expenses of making title and conveying the property, taking these expenses in their largest sense, but not with any costs of ascertaining what that is which is to be put into the document.”

- Counsel for the applicants argued from that judgment that the costs properly attributable, for example, to the making of any contract preceding the conveyance were necessarily outside the ambit of the obligation imposed by s. 82. It is not in my judgment necessary to express any view of the exact limits imposed by the terms of s. 82 or to say whether in all cases or in some cases the costs of solicitors in preparing or perusing a contract would or would not be within the charge. For I think, for my part, that the answer to the present case depends on the simple terms of art. 1 (D) of the Order of 1925. This is registered land. By the Order of 1925 (the competence to make which has not been challenged and which in my judgment must be treated as a valid and effective order) the remuneration of solicitors in regard to conveyance of registered land is regulated by virtue of the order, so that under para. (D), for every completed transfer on sale where the land is registered with absolute or good leasehold title, the remuneration shall be that prescribed in the schedule thereto. In my judgment it follows from those words that, the seller being liable to his solicitor by virtue of the order, which I have read, to pay a scale charge on a completed transfer, those costs are inevitably, within the fair meaning of s. 82, charges and expenses, incurred on the part of the seller, of the conveyance and assurance of the lands. I cannot for my part see any escape from that effect of the words which I find in this order. If it had not been for the exclusion, by virtue of r. 11 of the Rules applicable to Part 1 of Sch. 1 to the Order of 1883, of sales on compulsory acquisition of non-registered land, I should have thought, I must confess, that the matter was really quite plain; but it is a curious and marked feature of the code of charges which has gradually been built up over the last three-quarters of a century that there is in the case of non-registered land this express exclusion; and so it has been argued, and argued not without some force,

that if a scale charge of this character is or was treated by the requisite authority as inapplicable in the case of non-registered land to compulsory purchasers, by the same token a scale charge in respect of registered land should be treated as equally inapplicable in such cases. Some attempt has been made in the course of argument to suggest reasons which may have influenced the order-making authority in making the exclusion in the one case and not the other. It is an exercise in speculation which does not in my judgment really help the solution of the present case, although I think there is some force at any rate in the contention of counsel for the respondents that in the case of registered land, treating it in quite general terms, it would not be so easy to think of a fair method of assessing remuneration for work done which did not involve a calculation by reference to the value of the subject-matter sold—in other words, which did not bring one in effect back again to the schedule to the Order of 1925. However that may be, for some reason the exclusion is found in the one case and not in the other.

It is the function of the court now to construe together s. 82 and s. 83 of the Act of 1845, and the relevant Solicitors' Remuneration Orders, and to see what in the result is the effect in such a case as the present. I have already indicated that in my judgment there is really no escape from the plain language of the Order of 1925 and its consequence when one looks at s. 82 of the Lands Clauses Consolidation Act, 1845. There was, however, this further point made which depends on the terms of art. 1 (H) in the Order of 1925. Paragraph (H) makes it plain that the scale remuneration under the Order of 1925 covers not merely the costs and expenses of and incidental to the conveyance, but also, amongst other things, the costs related to all other work incidental to the transaction; and so, counsel for the applicants said, the scale must have been arrived at, taking one imaginary example with another, so as to give, on an average, a fair remuneration whether there was or was not in any given case work incidental to the transaction not being work properly of or incidental to the conveyance. I can see the force of the argument, but in my judgment it cannot affect the result. Quite plainly—whether it is so in this case has never been inquired into—if there were no other work than work of or incidental to the conveyance, it would be exceedingly difficult to contend that the proper amount of charge which the solicitor could make was not that regulated by the express terms of the Order of 1925 and that that sum was not in terms covered by s. 82 of the Act of 1845. But assuming that in some cases there is work done which would not be within the scope of s. 82, still, as I think, the charges made under the Order of 1925 are "charges and expenses of the conveyance"; and not the less so because the solicitor is disabled from making any additional charge in respect of other matters which might as such be outside the scope of s. 82.

There is the final point—for this reason I referred to para. (G)—that if the remuneration is not to be the scale remuneration under the Order of 1925, under what order is the solicitor's power to charge regulated at all? I think for myself that counsel for the respondents is right when he says that para. (G), which brings into operation Sch. 2, could not apply in such a case as the present since the transaction is one for which express provision has earlier been made in the order. But that is not necessarily conclusive because, as counsel for the applicants contends, one could still invite the taxing master in general terms to exercise his powers of taxation under s. 83 of the Act of 1845. I find, however, the conception not an easy one to accept; for nowadays, one hundred and ten years after the Act of 1845, it seems to me difficult to suppose that the taxing master could be invited to tax on some general discretion, altogether outside the ambit of any of the remuneration orders, the costs of a seller in a case such as the present. These matters, however, are but arguments, and no more, tending towards one or other of the two conclusions suggested on the strict wording of the Order of 1925.

A For the reasons which I have already given, it seems to me that the remuneration which the solicitor is entitled to charge, and indeed which, *prima facie*, he was bound to charge under that order for a completed transfer of sale, is within the exact language of s. 82 as being charges and expenses incurred on the part of the seller of the assurance.

B I should like to say in conclusion that I have felt and, indeed, expressed some embarrassment, as Master of the Rolls, in this matter since the order-making authority in the case of solicitors' remuneration is vested in a committee of which the holder of my office for the time being is one; and, as counsel for the applicants indicated, these matters of solicitors' remuneration have been from time to time and still were matters of anxious consideration of that committee. The last Sch. 2 Order of 1953* was made during my own term of office. But I am fortunately disembarrassed, or at any rate substantially so, by the happy circumstance that both my colleagues have arrived at the same conclusion as myself. For the reasons I have attempted to state I think that HARMAN, J., rightly concluded this matter and I think the appeal should be dismissed.

JENKINS, L.J. : I agree and have nothing to add.

D PARKER, L.J. : I agree and I would only add this. The London County Council, the promoters in this case, are bound, under s. 82 of the Lands Clauses Consolidation Act, 1845, to pay the charges and expenses of certain work. As my Lord has said, it is unnecessary to lay down exactly what is covered by s. 82, but I will refer to it as X. Accordingly, if the vendors put forward a bill rendered by their solicitors in accordance with the appropriate statutory scale for that work, E X, the promoters are bound to pay. It is perfectly true that, if the bill rendered was a bill for work which the solicitors were only entitled to charge on the basis that they had done not merely X but X plus Y, the promoters would be entitled to say that that was something more than they were bound to pay, but in the present case it seems to me to avail the promoters nothing to say that, if more work had been done than X and if X plus Y had been done, the solicitors could F not have charged any more.

It seemed to me in the course of the argument that the only basis on which the London County Council could succeed here would be, if they could show that the two orders, the order in respect of registered land and the order in respect of unregistered land, must in some way be read together so that the exception in regard to compulsory sales, which is specifically laid down in the order dealing with unregistered land, should apply equally to registered land. Not only do I G see no grounds whatever for reading the orders in that way, but it is to be observed that in 1953 both orders were amended by amending orders laid before Parliament, and whereas occasion was taken to amend that very exception in r. 11 of the unregistered land order, the opportunity was not taken, and presumably deliberately not taken, to amend the registered land order by including a similar H exception.

I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, London County Council* (for the applicants); *Coward, Chance & Co.* (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

* The Solicitors' Remuneration Order, 1953 (S.I. 1953 No. 117).

PILCHER *v.* PILCHER. SAME *v.* SAME. SAME *v.* SAME. A

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), April 29, May 16, 17, 24, 1955.]

Justices—Husband and wife—Maintenance order—Enforcement of order—Order made by Gibraltar magistrate registered in magistrates' court in England—No jurisdiction in English court to hear complaint by husband for variation or discharge of registered order—Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo. 5 c. 33), s. 1 (1). B

On Mar. 17, 1952, the husband was ordered by the magistrates' court at Gibraltar to pay maintenance to the wife. In July, 1952, the husband came to England. In July, 1953, the Gibraltar order was registered at the West London Magistrates' Court under s. 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920. Thereupon the husband applied by complaint to the West London court for the revocation of the Gibraltar order. The complaint was adjourned and transferred to the Chelsea Domestic Proceedings Court where, after adjournment, it was heard on Nov. 3, 1953. The summons was never served on the wife though she was informed of the complaint. The Chelsea court heard evidence given by the husband and ordered that the Gibraltar order be revoked. On Nov. 10, 1953, the presiding magistrate added to the minute of adjudication of Nov. 3, the entry "Dealt with in error. Not served and no jurisdiction". This entry was made by the magistrate on his own initiative and without re-assembling the Chelsea court. On Jan. 26, 1954, the West London magistrate heard an application on behalf of the wife for the enforcement of arrears alleged to be due under the Gibraltar order. The magistrate held that the entry of Nov. 10 was ineffective and that the order of Nov. 3 still stood. The arrears up to Nov. 3 were agreed at £180 and the magistrate adjourned the question of enforcing those arrears until Feb. 23, 1954, when he adjourned the summons sine die on the terms that the husband should pay off the agreed arrears at a certain sum per week. On Nov. 30, 1954, the West London magistrate dismissed a further application on behalf of the wife to enforce arrears said to have accrued due since Nov. 3, 1953. On appeal, C

Held: section 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920 is, on its true construction, limited to enforcement and does not enable complaints to be maintained for variation or discharge of orders registered by virtue of that sub-section; further, the wife was never served with any summons to appear at Chelsea for the proceedings leading to the order of Nov. 3, 1953; accordingly, that order and the orders of Jan. 26, Feb. 23, and Nov. 30, 1954, would be set aside, the husband's complaint for revocation of the Gibraltar order would be dismissed, and the two complaints on behalf of the wife for the enforcement of arrears would be remitted to the West London court for re-hearing. D

Per CURIAM: the registration of an order under s. 1 (1) of the Act of 1920 appears to be an administrative act initiated by the Secretary of State. The party against whom the order to be registered was made has no right to show cause against the registration, nor does the fact that on registration the order becomes an order of the magistrates' court give him a right to appeal either from the order itself or from the registration of it (see p. 652, letter C, post). E

Appeal allowed. F

[**Editorial Note.** There is a distinction between the registration of an order under s. 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, on the one hand, and the power for a magistrates' court in England to confirm a provisional order made by a court outside the United Kingdom, which power is G

- A** conferred by s. 4 of the Act of 1920, on the other hand. From the proceedings for such confirmation appeal may lie (*ibid.*, s. 4 (7)). Enforcement of a maintenance order such as that which was the subject of the present case is similar to enforcement of an affiliation order (as to which see 3 HALSBURY'S LAWS (3rd Edn.) 131), and the court has a discretion to remit arrears on the complaint for enforcing the order (see s. 76 of the Magistrates' Courts Act, 1952). Moreover, although in the case of a registered order there is no appeal against registration or against the order to be registered, there is an appeal against orders for enforcement (see p. 651, letter F, post).

As to the enforcement of maintenance orders made in the Dominions, see 10 HALSBURY'S LAWS (2nd Edn.) 847, para. 1353; and for cases on the subject, see 27 DIGEST (Repl.) 720, 721, 6894-6897.

- C** For the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 1 (1), s. 6 (2), s. 10, see 11 HALSBURY'S STATUTES (2nd Edn.) 856, 859, 860.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 9, see 11 HALSBURY'S STATUTES (2nd Edn.) 853.

For the Magistrates' Courts Act, 1952, s. 74, s. 76, s. 119 (4), see 32 HALSBURY'S STATUTES (2nd Edn.) 478, 480, 514.

- D** For the Maintenance Orders Act, 1950, s. 18, s. 22, see 29 HALSBURY'S STATUTES (2nd Edn.) 430, 434.

For the Magistrates' Courts Rules, 1952, r. 56, see 13 HALSBURY'S STATUTORY INSTRUMENTS 65.

For the Maintenance Orders (Facilities for Enforcement) Rules, 1922, r. 5, r. 6, see 10 HALSBURY'S STATUTORY INSTRUMENTS 246.

- E** For the Maintenance Orders Act, 1950 (Summary Jurisdiction) Rules, 1950, r. 9, see 10 HALSBURY'S STATUTORY INSTRUMENTS 250.]

Cases referred to:

- (1) *Peagram v. Peagram*, [1926] 2 K.B. 165; 95 L.J.K.B. 819; 135 L.T. 48; 90 J.P. 136; 27 Digest (Repl.) 720, 6894.
- F** (2) *R. v. Lancashire JJ., Ex p. Tyrer*, [1925] 1 K.B. 200; 94 L.J.K.B. 331; 132 L.T. 382; 89 J.P. 17; 33 Digest 428, 1414.
- (3) *Grocock v. Grocock*, [1920] 1 K.B. 1; 88 L.J.K.B. 1068; 121 L.T. 466; 83 J.P. 185; 27 Digest (Repl.) 721, 6898.
- (4) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, 6907.
- G** (5) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; 27 Digest (Repl.) 722, 6908.
- (6) *Prest v. Prest*, [1949] 2 All E.R. 790; [1950] P. 63; 114 J.P. 1; 27 Digest (Repl.) 726, 6933.
- (7) *Wood v. Wood*, [1949] W.N. 59; 93 Sol. Jo. 200; 27 Digest (Repl.) 723, 6911.

H Appeal.

The wife appealed (i) against an order of the Chelsea Domestic Proceedings Court dated Nov. 3, 1953, whereby the court revoked a maintenance order made by the Gibraltar magistrates' court on Mar. 17, 1952, and registered at West London Magistrates' Court on July 13, 1953, pursuant to s. 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920; (ii) against an order of the

- I** West London magistrate made on Jan. 26 and Feb. 23, 1954, whereby he declined to enforce the aforesaid registered order; and (iii) against an order of the West London magistrate dated Nov. 30, 1954, whereby he dismissed the wife's complaint in respect of arrears of maintenance due under the registered order as from Nov. 3, 1953, to Nov. 30, 1954.

The ground of the first appeal was that the Chelsea Domestic Proceedings Court had no jurisdiction to revoke the order of the Gibraltar court; and the grounds of the second and third appeals were that the West London magistrate was wrong in law in holding that the Gibraltar order was no longer of effect

within the jurisdiction of his court, and in holding that he had no jurisdiction A
to entertain the summonses for arrears of maintenance.

Melford Stevenson, Q.C., and Joseph Jackson for the wife.
Scott Henderson, Q.C., and Eric Stockdale for the husband.

Cur. adv. vult.

May 24. LORD MERRIMAN, P., read the following judgment of the B
court: This appeal relates to certain proceedings in magistrates' courts in the
metropolitan area arising out of the Maintenance Orders (Facilities for Enforce-
ment) Act, 1920, hereafter referred to as the Act of 1920. It originated with a
notice of appeal by the wife dated Feb. 1, 1955, from an order made by Mr.
GUEST on Nov. 30, 1954, at the West London Magistrates' Court, whereby he C
dismissed an application for the enforcement of arrears alleged to be due under
a maintenance order made in the Magistrates' Court of Gibraltar on Mar. 17,
1952. These are referred to hereafter as the Gibraltar court and the Gibraltar
order. This order was registered at the West London court on July 13, 1953,
under s. 1 (1) of the Act of 1920. The appeal was, of course, out of time, and the
notice of appeal asked that the time should be extended. When on Apr. 29,
1955, counsel for the wife opened the appeal, it became apparent that in order D
to determine the real issue between the parties it would be necessary to go back
much further in point of date. We therefore gave leave to appeal out of time
against two earlier orders, viz. (i) an order, also made by Mr. GUEST at the
West London Magistrates' Court on Jan. 26 and Feb. 23, 1954, on an earlier
application for the enforcement of arrears, and (ii) an order of the Domestic
Proceedings Court at Chelsea dated Nov. 3, 1953, hereafter referred to as the E
Chelsea court and the Chelsea order, which revoked or purported to revoke the
Gibraltar order, registered as aforesaid. Counsel for the husband thereupon
asked for leave to appeal out of time against an order said to have been made
by Mr. PRATT, also at the West London Magistrates' Court, on July 20, 1953,
whereby the hearing of the husband's application for the revocation of the
Gibraltar order was transferred from the West London Magistrates' Court to F
the Chelsea court. We were not at the time entirely satisfied that any such
order had in fact been made but indicated that, if it could be shown that such
an order had been made, we should be prepared to extend the time for appealing
against it. The hearing of the appeal was then adjourned in order to allow the
parties to prepare the further or amended notices of appeal and to take such
other steps as might be necessary. G

It is plain from what we have already said that the facts are complicated,
and it is, therefore, necessary to set out in detail the history of the various
proceedings which have taken place. On Mar. 17, 1952, the Gibraltar court
adjudged that the husband had been guilty of wilful neglect to provide reasonable
maintenance for the wife and child, and ordered him to pay to the wife through
the clerk of the court £2 per week for herself and £1 per week for the child. H
On Mar. 31, 1952, there were proceedings in the Gibraltar court in respect of a
small amount of arrears due under that order, and under an earlier interim order.
Those proceedings are not, we think, relevant to the present appeals. It appears
that not long after the making of the Gibraltar order the husband returned to
England. The wife and child continued to live at La Linea in Spain. On July
13, 1953, the Gibraltar order was registered at the West London Magistrates' I
Court, as already stated. On July 20, 1953, the husband applied by complaint
to Mr. PRATT at the West London court for the revocation of the Gibraltar
order. The statement of the grounds of his application is as follows:

"(i) That my wife, Francisca Pilcher, has refused a bona fide offer of
reconciliation.

"(ii) That she resides in Spain and not in Gibraltar, and the Spanish
government have refused me a residence permit,"

- A What happened next is somewhat obscure. At the foot of the certified copy of the complaint is a note which was originally in these terms:

“ This application is to be heard on Tuesday, Aug. 18, 1953, at the hour of 10 in the forenoon at 1A Walton Street, S.W.3.”

The date has been altered from Aug. 18 to Nov. 3.

- B We do not know what was the precise procedure adopted in order to transfer the hearing of this complaint from the West London Magistrates' Court to 1A Walton Street, which, of course, is where the Chelsea court sits, or under what authority it was so transferred. It was against this transfer that counsel for the husband suggested that he might wish to appeal. He contended that the Chelsea court has in any event no jurisdiction to hear such an application—apart
- C altogether from any question of want of service on the wife or of the construction of the Act of 1920, which, as will appear, are the points raised by counsel for the wife. At the resumed hearing before us it was conceded by counsel for the husband that in fact Mr. PRATT made no order of transfer or any order from which it would be possible to appeal. The transfer was apparently a mere administrative act. Nevertheless, he still strenuously contended that the hearing of an
- D application to discharge or revoke a registered order is not one of the matters cognisable by the Chelsea court as constituted by the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I. 1952 No. 1860). However, the husband's complaint did apparently come before the Chelsea court, presided over by Mr. MILTON, on Aug. 18, 1953. On that occasion, according to the note before us, counsel for the husband agreed that there was some doubt as to
- E jurisdiction, though on what ground is not stated. On his application the case was adjourned to Sept. 15—a date which appears nowhere on the certified copy of the complaint. On Sept. 15, 1953, the case came on again before the Chelsea court, Mr. MILTON again presiding. The note of what took place is in these terms:

“ Counsel for applicant: Summons has not been served. ? Jurisdiction in any event. Not served.”

- F These last two words are underlined.

Before the final hearing by the Chelsea court both the wife and her Gibraltar lawyer had received from the husband's solicitors notice of the proceedings and of the date of the hearing by letters (dated Aug. 25 and Sept. 18, 1953, to the lawyer and dated Sept. 18, 1953, to the wife) and a copy of the summons was also sent to the Gibraltar lawyer. There was not in the strict sense any service

- G of the summons on the wife, since there is no means whereby service of summary proceedings can be effected out of the jurisdiction—see Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), r. 76 (5).^{*} On Nov. 3, 1953, the husband's application to revoke the Gibraltar order was heard by the Chelsea court, presided over by SIR LAURENCE DUNNE. The husband gave evidence and produced copies of two letters which he said that he had written to the wife on July 21, 1952, and Jan. 13, 1953, respectively. It does not on the face of the note appear that any mention was made of either of two letters dated respectively Sept. 2, 1953, and Oct. 30, 1953, written by the wife's Gibraltar lawyers to the husband's solicitors in London. Those letters made it plain that it was being contended on behalf of the wife (i) that the English court had no power to revoke the Gibraltar order, and (ii) that in any event the husband had not made any genuine offer to resume cohabitation but had decamped from Gibraltar in order to evade paying under the order. The husband's solicitors in their letter of Nov. 4, 1953, state that the letter of Oct. 30, 1953, was brought to the notice of the court; but in a letter dated Nov. 12, 1953, they state that SIR LAURENCE DUNNE said that he did not wish to see the letter. After hearing the case the Chelsea court, as appears from the certified copy of the register, revoked the Gibraltar order.
- I

The main contention on behalf of the wife on the present appeal is that the

^{*} See 13 HALSBURY'S STATUTORY INSTRUMENTS 73, 74.

Chelsea court had no jurisdiction so to revoke the order: first, because the summons was never served on the wife, and, secondly, because, it is argued that, unlike an order confirmed under s. 4 of the Act of 1920, an order registered under s. 1 of that Act cannot be rescinded, revoked or discharged—whichever synonym happens to be used on the particular occasion—by the court in which it is registered. We refer hereafter to a “registered order” or a “confirmed order”, as the case may be. It is plain that within a few days after the Chelsea order was made the chief magistrate had second thoughts about its validity. For on Nov. 9 he caused a letter to be written to the husband’s solicitors, and, according to the certified copy of the register, on Nov. 10, he added an entry to the minute of adjudication of Nov. 3, in these terms:

“Dealt with in error. Not served and no jurisdiction.”

This entry was made, so it would appear, on his own initiative and without re-assembling the other magistrates who had composed the Chelsea court. The circumstances are fully set out in a statement by the chief magistrate himself, which was in evidence before Mr. GUEST on Nov. 30, 1954, and a further statement by him dated May 12, 1955, which was put before us. There is, in our judgment, no doubt that the action of the chief magistrate in purporting personally to annul a decision and revoke an order which had been arrived at and made by the Chelsea court, of which he was only one member, albeit the chairman, was wholly ineffective. If the Chelsea order was wrong, it could only be corrected by the court itself under its inherent jurisdiction, in an appropriate case, which in our opinion the present case was not, or by a superior court.

On Jan. 26, 1954, Mr. GUEST, sitting at the West London court, heard an application by the wife for the enforcement of arrears alleged to be due under the registered order. The arrears said to be due at the date of the complaint, on Jan. 2, 1954, were £218 2s. 10d. On Jan. 26, 1954, the date of the hearing, the arrears were £230 4s. 10d. Both parties were represented by counsel. It is plain from the note of what took place that counsel for the husband was contending that this order had been revoked by the Chelsea order. Counsel for the wife, on the other hand, submitted that by virtue of r. 56 of the Magistrates’ Courts Rules, 1952 (S.I. 1952 No. 2190)*, the court was bound by the certified copy of the chief magistrate’s entry of Nov. 10, and that if Mr. GUEST were to hold that this entry was bad he would in effect be sitting as a court of appeal from the Chelsea court. Mr. GUEST held—rightly, as we have already indicated—that the entry in question was ultra vires and that the decision of the Chelsea court was that recorded in the first entry in the register, viz., that recording the Chelsea order. Whereupon it would appear that counsel on either side agreed the arrears due up to the date of the Chelsea order at the sum of £180. On Feb. 23, 1954, to which date the question of enforcing the agreed arrears was apparently adjourned, Mr. GUEST adjourned the summons sine die on the terms that the husband should pay off the agreed arrears at £3 5s. per week. This order is the second of the orders against which the wife is now appealing. Fundamentally, of course, her appeal is still against the Chelsea order. For if that order was validly made, then it is difficult, if not impossible, to see how Mr. GUEST could have decided otherwise than he did on Jan. 26, 1954. If, however, the Chelsea order was bad the complaint in respect of arrears alleged to have accrued after its date, viz., Nov. 3, 1953, would have been at large for consideration by Mr. GUEST.

We now come to the last of the proceedings in the magistrates’ courts. On Oct. 6, 1954, a complaint was made in the West London court by the chief clerk of that court that arrears to the extent of £102 5s. were due under the Gibraltar order as registered. At the hearing on Nov. 30, 1954, it was stated in evidence that since Nov. 3, 1953, the husband had paid £49 15s. Those payments had in the clerk’s office been dealt with as if the Gibraltar order had continued in full force and effect. Had the payments been credited against the sums

* See 13 HALSBURY’S STATUTORY INSTRUMENTS 65.

A payable before the Chelsea order—which, in our view, was clearly the intention of the order made by Mr. GUEST on Jan. 26 and Feb. 23, 1954, the arrears alleged to have accrued after the Chelsea order would have been, not £118 5s. as they were said to be on Nov. 30, 1954, but £168. Mr. GUEST in effect adhered to the decision which he had reached on Jan. 26, 1954. He dismissed the application to enforce arrears said to have accrued due after Nov. 3, 1953.

B The full reasons for his decision are set out in the notes of the hearing. After a summary of the facts already stated in which the certified copy of the entry in the register of the Chelsea court is referred to as exhibit 2, and the first statement by SIR LAURENCE DUNNE is referred to as exhibit 3, the learned magistrate continued as follows:

C “Counsel for the wife (the respondent appeared but unfortunately was not represented today although he had been represented when a similar summons to this one was heard and dismissed by me earlier this year) argued three points upon which he urged I ought to hold that the order had never been revoked.

D “(i) That as the original summons which led to the hearing at Chelsea Domestic Court on Nov. 3, 1953, was never served the whole proceedings were a nullity and that therefore the order stood unimpaired. It does appear from exhibit 3 that the original summons was never served but even if so I am of opinion that the order of a summary court even if made ‘per incuriam’ and without jurisdiction stands once made until overruled by a superior court.

E “(ii) That s. 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, under which the order was registered gave no power at all to the court in which the order was registered to vary it. This is clearly a matter of interpretation of statute and although I am clear on the meaning of the section my views are quite irrelevant as this is not a court of appeal from the Chelsea Domestic Court.

F “(iii) That under r. 56 of the Magistrates’ Courts Rules, 1952, this court is bound by the entry in the Chelsea Domestic Court register. In my view, the rule makes the extract evidence of the proceedings *in that court*. The only proceedings *in* that court of which exhibit 2 is evidence are of the revocation of the order. It is clear from exhibit 3 and from the further marking of exhibit 2 on Nov. 10, 1953, that the entry ‘dealt with in error’ etc. was not a proceeding in court. As it appears to have been put upon the register without hearing the parties and in their absence I cannot feel that it concerns a proceeding in court. In any event the exhibit 2, if I am wrong and the second entry *is* a proceeding in court, is evidence of two contradictory proceedings in court and it cannot be the task of a court of co-ordinate jurisdiction to choose between them but must be a matter which can only be dealt with on appeal by a superior court. For these reasons I feel unhappily bound to conclude that the order has been and still is revoked and that I therefore have no power to make any order for payment of arrears which have accrued since that revocation.”

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I In our judgment, the learned magistrate’s reasoning was plainly correct, provided that the Chelsea order stood. Here again, therefore, we come back to the fundamental question in the present case: Was the Chelsea order validly made or not?

It would be sufficient for the determination of the present appeals for us to content ourselves with saying that, as the wife was admittedly never served with any summons to appear at the Chelsea court, that court had no jurisdiction to hear the husband’s complaint for discharge of the registered order, and, therefore, that the Chelsea order must be set aside. In our opinion, however, it is necessary for us to go further. For counsel for the husband, on the one hand, asks us to remit the husband’s complaint, not to the Chelsea court, which he

contends has no jurisdiction, but to the West London court, for re-hearing. A Counsel for the wife, on the other hand, asks us to dismiss the husband's complaint on the ground that there is no power in either court to revoke a registered order. He asks us to remit to the West London court for re-hearing the two complaints on the wife's behalf to enforce the arrears, which complaints have hitherto been dealt with on the basis that the Chelsea order stood. It would plainly be wrong for us to remit the husband's complaint for re-hearing if in our judgment that complaint cannot be entertained in either court; and in that event it would, of course, be pointless to examine the precise limits of the jurisdiction of the Chelsea court. B

The question at issue can be seen by setting out in full s. 1 (1) of the Act of 1920 in relation to the circumstances of the present case. Bearing in mind the provisions of s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, the definition of "maintenance order" in s. 10 of the Act of 1920, and the proviso to s. 6 (2) of that Act, s. 1 (1) reads as follows: C

"Where an order for the maintenance of the wife has . . . been made against the husband by the Gibraltar court, and a certified copy of the order has been transmitted by the Governor of Gibraltar to the Secretary of State, the Secretary of State shall send a copy of the order to the chief clerk of the West London Magistrates' Court for registration; and on receipt thereof the order shall be registered in the manner prescribed by rule, and shall, from the date of such registration, be of the same force and effect as if it had been an order originally obtained in the West London court, and, subject to the provisions of this Act, all proceedings may be taken on such order as if it had been an order originally obtained in the West London court, and the West London court shall have power to enforce the order in like manner as an affiliation order." D E

The provisions governing the enforcement of an order enforceable as an affiliation order are contained in s. 74 of the Magistrates' Courts Act, 1952, and the Maintenance Orders (Facilities for Enforcement) Rules, 1922, r. 5 and r. 6. It is true that this procedure involves the personal presence of the husband before the court, and that this may, if necessary, be secured by a warrant for his arrest. If, however, the warrant cannot be executed because the husband is no longer in England or Wales, it may be that the words "all proceedings may be taken on such order" in s. 1 (1) would be sufficient to bring into operation the provisions of the Maintenance Orders Act, 1950, if he is in Scotland or Northern Ireland. But if he has departed to some other country the wife would have no remedy, so long as he remains out of the United Kingdom, subject to the possibility of a fresh registration of the order in any part of the Commonwealth where similar legislation is in force. It is, however, material to note that the provisions for enforcement in s. 6 of the Act of 1920, and the rules to which reference has already been made, apply equally to orders confirmed under the provisions of s. 4 of the Act and to orders registered under the provisions of s. 1 (1). When the essential differences in the scope of these two sections are considered as distinct from the provisions for enforcement, we think that considerable light is thrown on the proper construction of s. 1 (1). F G H

Compared with the corresponding provisions of the Maintenance Orders Act, 1950, s. 18, s. 1 (1) of the Act of 1920 appears to contain a certain amount of tautology. For example, it is not obvious why, having enacted that the order is of the same force and effect as if it had originally been made in a magistrates' court in England, it was necessary to enact that all proceedings may be taken on such order as if it had originally been obtained in a magistrates' court in England, nor, having enacted that *all* proceedings may be taken on it, to enact further that the court shall have power to enforce the order accordingly. I

- A Looking at the words of this sub-section alone, even reading them in the light of the title of the Act, viz.:
- “An Act to facilitate the enforcement in England and Ireland of maintenance orders made in other parts of His Majesty’s Dominions and Protectorates and vice versa”,
- B which, it may be observed, plainly does not comprehend all the provisions of the Act, we are by no means convinced that the words
- “all proceedings may be taken on such order as if it had been an order originally obtained in [a magistrates’ court in England]”
- C are necessarily limited to the power to enforce such an order, a power which is specifically mentioned in the words which follow next in the sub-section.
- By contrast with s. 1 (1) of the Act of 1920, s. 4 deals with what are called provisional orders obtained by a wife in a part of the Queen’s Dominions outside the United Kingdom, between which and this country reciprocity in this respect obtains, and s. 3 of the Act applies to the converse position. A provisional order obtained, for example, in Gibraltar, which has no effect unless and until confirmed by a magistrates’ court in this country, may be confirmed by such a court. Before it can be confirmed, however, the husband in this country must (under s. 4 (1)) be served with a summons calling on him to show cause why it should not be confirmed, and this summons is only served on him after the depositions and relevant documents in the case have been transmitted to this country from the court outside the United Kingdom. At the hearing the court may refuse to confirm the order, or may confirm it, either without modification or with such modification as to the court may seem just (s. 4 (4)). Moreover, if the court decides to confirm it, there is a right of appeal to the Divisional Court of this Division, as if the order had been an order made by the confirming court. At one time there was an appeal by way of Case Stated to the Queen’s Bench Division: see *Peagram v. Peagram* (1) ([1926] 2 K.B. 165), in which case
- D LORD HEWART, C.J., gave a comprehensive review (*ibid.*, at pp. 179, 180) of the scope of s. 4. Now, by R.S.C., Ord. 59, r. 29 (2), appeals against any order or determination by justices in regard to the enforcement of maintenance orders made in this country, or of maintenance orders confirmed or registered under the Act of 1920, are to be heard by the Divisional Court of this Division. Finally,
- E sub-s. (6) of the section enacts that a provisional order confirmed under the section may be varied or rescinded in like manner as if it had originally been made by the confirming court, but provides that where on an application for rescission or variation the court is satisfied that it is necessary to remit the case to the court which made the order for the purpose of taking evidence, the court may so remit the case and adjourn the proceedings for the purpose.
- F Seeing that the making of a complaint in a magistrates’ court and the service of a summons thereon is, under the Magistrates’ Courts Act, 1952, and the Magistrates’ Courts Rules, 1952*, an essential preliminary to an application for a maintenance order, or for any variation thereof, or for its discharge, it is not at first sight apparent how an application against a wife under s. 4 (6) to vary or rescind an order can reach a hearing if she remains in the jurisdiction in which she obtained the original order. In our opinion, however, Parliament
- G must have intended that the interlocutory procedure for remitting cases from one court to the other in connection with the confirmation of orders and the variation or rescission of confirmed orders, aptly described in the argument as the “shuttlecock procedure”, should operate instead of a summons to the respondent to answer, in the confirming court itself, a complaint for the variation or discharge of the order.

* See ss. 43, 47 of the Magistrates’ Courts Act, 1952, and rr. 34, 76 of the Magistrates’ Courts Rules, 1952.

It is worth noticing in passing that the corresponding difficulty in connection with s. 22 of the Maintenance Orders Act, 1950, is met by r. 9 of the Maintenance Orders Act, 1950 (Summary Jurisdiction) Rules, 1950, which provides that an application to discharge may be made ex parte, whereupon the section itself brings the "shuttlecock procedure" into play. A

It is well settled that in connection with the enforcement of an affiliation order or an order enforceable as such, the validity of the order cannot be inquired into (*R. v. Lancashire JJ., Ex p. Tyrer* (2), [1925] 1 K.B. 200) but that the power to enforce the order is discretionary (*Grocock v. Grocock* (3), [1920] 1 K.B. 1). B
It must also be remembered in connection with the latter decision that on the hearing of a complaint for, inter alia, the enforcement of such an order the court may now, by virtue of s. 76 of the Magistrates' Courts Act, 1952, remit the whole or any part of the sum due thereunder. In these respects a judicial decision is involved in the enforcement of such an order under s. 1 (1) of the Act of 1920. But in no other respect is any judicial decision expressly called for under the sub-section. The registration of the order, whatever its consequences may be, appears to be an administrative act initiated by the Secretary of State. The party against whom the order to be registered was made has no right to be heard to show cause against the registration, nor does the fact that on registration the order becomes an order of the magistrates' court give him a right to appeal either from the order itself or from the registration of it. Nor is there any provision in s. 1 (1) at any stage of the proceedings for the "shuttlecock procedure" provided in s. 4. It appears to us, therefore, that the marked contrast between the wording, the scope, and the machinery of the two sections, except only with regard to enforcement, almost necessarily suggests that some limit must be put on the apparent generality of the words "all proceedings may be taken on such an order". C
As the argument of counsel for the wife about the construction of the sub-section was based on the assumption that the word "on" in this last phrase presupposes the continuing existence of an order, he was at one time disposed to suggest that the section might give power to the registering court to order the variation as distinct from the discharge or revocation of a registered order. This distinction does not seem to us to be sound. For any complaint for variation or discharge is necessarily based on the fact that at the moment of the complaint there is a subsisting order to the variation or discharge of which the court is asked to direct its mind. D E F

We appreciate, however, the force of the argument that absurd results may follow if the proper construction of the sub-section excludes the possibility of a registered order being discharged or even varied by the registering court. For example, the husband may have conclusive evidence that the wife has died; or he may have been able to initiate proceedings for divorce by virtue of the provisions for substituted service prevailing in the High Court; and may have obtained a decree on grounds which would impel a magistrates' court to discharge the order if it were in fact an order which had been obtained in that court: see *Bragg v. Bragg* (4) ([1925] P. 20); *Mezger v. Mezger* (5) ([1936] 3 All E.R. 130); *Prest v. Prest* (6) ([1949] 2 All E.R. 790—particularly the sentence at letter D, at p. 794, the last word of which should be "desertion", not "adultery"; see *Wood v. Wood* (7) ([1949] W.N. 59)). If it is thought that this situation calls for a remedy, consideration might be given to the advisability of applying to orders registered under s. 1 (1) of the Act of 1920 some procedure similar to the "shuttlecock procedure" which applies to orders confirmed under s. 3 or s. 4 of the Act, or under s. 22 of the Maintenance Orders Act, 1950, to orders registered under that Act, with or without an amendment of the rules so as to enable process or notice of process to be served out of England and Wales by registered post (see Magistrates' Courts Rules, 1952, r. 76 (5)). Recognising as we do that neither registered nor confirmed orders are free from certain anomalies and G H I

- A** difficulties, the essential differences between the scope of the two sections by which they are governed remain. These seem to us to be such that the true conclusion is that s. 1 (1) is limited to enforcement and does not permit of complaints for alteration, variation or discharge of orders registered by virtue of that section. In this respect we agree with the opinion expressed by SIR LAURENCE DUNNE in his first memorandum (exhibit 3). This appears to us to
- B** obviate the necessity of pursuing the interesting question to which much of the argument was directed, whether, assuming that it is possible for a magistrates' court in this country, and particularly a metropolitan magistrates' court, to discharge an order registered under the section, the Chelsea court is a magistrates' court for this purpose, notwithstanding the provisions of s. 9 (3) of the Summary Procedure (Domestic Proceedings) Act, 1937, now replaced by s. 119 (4) of the
- C** Magistrates' Courts Act, 1952, and the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I. 1952 No. 1860), made under the former Act.

In the result, therefore, the three appeals by the wife will be allowed; that is to say, the appeal against the Chelsea order, the appeal against Mr. GUEST's first order of Jan. 26 and Feb. 23, 1954, and the appeal against Mr. GUEST's order of Nov. 30, 1954; and the orders made on those summonses are set aside.

- D** With regard to the last mentioned appeal, we give leave for that appeal to be heard out of time. The husband's complaint, which was heard by the Chelsea court, will be dismissed. The two complaints by or on behalf of the wife for the enforcement of arrears will be remitted to the West London Magistrates' Court for re-hearing. We wish, however, to make it plain that we do not seek to give any indication of the course that should be taken on the re-hearing of those
- E** complaints. It will be a matter entirely for the magistrate's discretion in the light of the evidence before him whether to enforce or to remit as he thinks proper the whole or any part of the sum due under the registered order.

'Appeal allowed.

Solicitors: *Alan, Edmunds & Phillips* (for the wife); *Burton & Son* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

NANA ATTA KARIKARI AND ANOTHER v. NANA OWARE A AGYEKUM II.

[PRIVY COUNCIL (Lord Radcliffe, Lord Somervell of Harrow and Mr. L. M. D. de Silva), May 2, June 7, 1955.]

Privy Council—West Africa—Appeal to Privy Council—Appeal as of right where “matter in dispute” amounts to or is of the value of £500 sterling or upwards—Costs amounting to over £500—West African (Appeal to Privy Council) Order in Council, 1949, art. 3 (a).

By the West African (Appeal to Privy Council) Order in Council, 1949, art. 3, an appeal to the Privy Council lies “(a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards . . .”

The petitioner, as plaintiff, succeeded in proceedings against the respondents to the petition for trespass and recovery of possession of certain lands, and an appeal by the respondents to the petition was dismissed. The petitioner submitted his bill of costs for taxation which included two items, amounting to some £870, incurred in the preparation of a plan. The taxing officer reduced this sum to £9 and the judge on review refused to interfere. The petitioner appealed to the West African Court of Appeal, who allowed some £736 in respect of the two items of costs. Leave to appeal to the Privy Council from the order was granted to the respondents to the petition as of right under art. 3 (a) of the West African (Appeal to Privy Council) Order in Council by a judge of appeal of the West African Court of Appeal. The petitioner now sought to dismiss this appeal.

Held: the appeal would be dismissed since, having regard to the general rule of practice as to appeals on costs, the words “matter in dispute” in art. 3 (a) of the order meant matter in dispute in the proceedings other than costs, and, although in theory appeals as to the incidence and quantum of costs might come within art. 3 (b) of the order or be the subject of special leave by the Board, there were no such facts in the present case as would justify the granting of leave.

Per CURIAM: the phrase “as to costs only” normally refers to the incidence of costs, but it would seem to cover disputes as to quantum on taxation unless there is some special provision dealing with the latter (see p. 655, letter E, post).

Appeal dismissed.

[As to appeals to the Privy Council on questions of costs, see 9 HALSBURY'S LAWS (3rd Edn.) 380, para. 886; and for cases on the subject, see 16 DIGEST 135, 136, 339-346.]

Cases referred to:

- (1) *Inglis v. Mansfield*, (1835), 3 Cl. & Fin. 362; 6 E.R. 1472; 16 Digest 135, 339.
- (2) *Crédit Foncier of Mauritius v. Paturau*, (1876), 35 L.T. 869; 16 Digest 136, 344.
- (3) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1093; 137 L.T. 656; 36 Digest (Repl.) 366, 42.
- (4) *Sauvageau v. Gauthier*, (1874), L.R. 5 P.C. 494; 30 L.T. 510; 16 Digest 158, 597.

Petition.

This was a petition by the respondent to this appeal, Nana Oware Agyekum II, Omanhene of Akim Busumme, for and on behalf of Akim Busumme Stool, to dismiss the appeal, on the ground that leave to appeal granted to the appellants, Nana Atta Karikari, Odikro of Awisa, and Nana Frempong Manso III, Omanhene of Akim Kotoku State, on Apr. 26, 1954, by the West African Court of Appeal pursuant to art. 3 (a) of the West African (Appeal to Privy Council) Order in Council, 1949, was incompetent. The facts appear in the judgment.

- A *Phineas Quass, Q.C., and K. Narayan for the petitioner.*
S. P. Khambatta, Q.C., and L. S. Fletcher for the respondents to the petition.

June 7. **LORD SOMERVELL OF HARROW:** This is a petition to dismiss this appeal on the ground that the leave granted by the West African Court of Appeal pursuant to art. 3 (a) of the West African (Appeal to Privy Council) Order in Council, 1949, was incompetent. Article 3 is as follows:

B "Subject to the provisions of this order, an appeal shall lie—(a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and (b) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision."

D The petitioner, as plaintiff, in 1950 instituted proceedings for trespass and recovery of possession of certain lands. The plaintiff succeeded. The defendants appealed and the appeal was dismissed. The present question arises on taxation of costs. The petitioner submitted his bill of costs for taxation. Under the Gold Coast Courts Ordinance, s. 13 and ord. 7 of Sch. 1, the registrar acts as taxing master, subject to review by the court. The West African Court of Appeal Ordinance, s. 3, provides that an appeal to the Court of Appeal as to costs only
 E shall not lie except by special leave. The phrase "as to costs only" normally refers to the incidence of costs, but it would seem to cover disputes as to quantum on taxation unless there is some special provision dealing with the latter.

This petition is concerned with two items of costs for a surveyor's fees and labourers' wages, amounting in all to some £870 incurred in the preparation of a plan. There had been an order by consent for the preparation of a plan, and the
 F taxing officer took the view that, having regard to the terms of that order, a much smaller and less expensive plan was all for which the petitioner could claim. He reduced this sum to £9. The judge on review held that the taxing officer's discretion had not been exercised improperly and he refused to interfere. The petitioner appealed to the Court of Appeal, who allowed some £736 in respect of the two items of costs. It was from this order that leave to appeal to the Privy
 G Council was granted as of right under art. 3 (a) of the Order in Council. The first question is whether an appeal is within that paragraph when the matter in dispute is as to costs only.

This is an appeal as to quantum on taxation. If, however, such an appeal is within the paragraph, it would seem impossible to contend that an appeal as to liability for the whole costs would not also be within it.

H Appeals as to costs are in a special category. In 1835, LORD BROUGHAM said in *Ingliš v. Mansfield* (1) (3 Cl. & Fin. at p. 371):

"The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone . . ."

I In *Crédit Foncier of Mauritius v. Paturau* (2), SIR BARNES PEACOCK said (35 L.T. at p. 870):

"But appeals are not allowed to Her Majesty in Council merely for the sake of costs . . ."

These statements require qualification. In a judgment of the Board delivered by TURNER, L.J., in an appeal from the Court of Arches* it is said that an appeal

* *Attenborough v. Kemp* (1861) 14 Moo. P.C. at p. 353).

might lie if the discretion had not been fairly exercised or there had been mistake. In *Donald Campbell & Co. v. Pollak* (3), the House of Lords decided that, notwithstanding the general rule of practice of the House of Lords that no appeal lies for costs only, an appeal would be entertained if an error of law was alleged. A

It is, however, sufficient for the question of construction that such appeals would only be entertained in very exceptional circumstances. It has long been held that costs cannot be added to the sum in dispute in the proceedings in order to make up the minimum sum in such a provision as is contained in art. 3 (a). B This is because costs, although in dispute and finally dealt with in the judgment, are outside the scope of the article. The article is one conferring an appeal as of right based on quantum. It cannot, in their Lordships' opinion, be construed as conferring such a right in cases where, *prima facie*, no appeal would be entertained whatever the amount in issue. Having regard to the general position of appeals on costs as stated above, it is natural to construe the words "matter in dispute" C as meaning matter in dispute in the proceedings other than costs. Their Lordships are, therefore, of opinion that the West African Court of Appeal were wrong in treating the application as one falling under art. 3 (a).

The procedure adopted by the petitioner is that stated to be correct in *Sauvageau v. Gauthier* (4). In that case, the question was also whether the appeal was within the words of a provision similar to art. 3 (a). The appeal came on and the respondent took as a preliminary objection the point that the case did not fall within the provision dealing with appeals as of right under which leave had been granted. In the course of the judgment, SIR JAMES W. COLVILLE said (L.R. 5 P.C. at p. 500): D

"the proper course, when such a question as this arises, is to come here by petition as early as possible, and before the cases are lodged, and the expense of preparing those cases is incurred, in order to bring the point before their Lordships, and to get the appeal dismissed. It is then open to their Lordships to recommend Her Majesty either to dismiss the appeal, in which case the parties are not put to the expense of preparing for the hearing; or to grant special leave to appeal." E F

It seems clear to their Lordships that, in theory at any rate, appeals as to the incidence and quantum of costs might come within the provisions of art. 3 (b), or be the subject of special leave by the Board. Their Lordships are clear that, in the present case, there are no facts which would justify the granting of special leave.

For the above reasons, their Lordships will humbly advise Her Majesty that the appeal be dismissed. The respondents to the petition must pay the costs of the present hearing and of the appeal. G

Petition allowed.

Solicitors: *A. L. Bryden & Williams* (for the petitioner); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondents to the petition).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

TOOL METAL MANUFACTURING CO., LTD. v. TUNGSTEN
ELECTRIC CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Tucker and Lord Cohen), April 20, 21, 25, 26, 27, 28, May 2, 3, June 16, 1955.]

B

Contract—Variation—Temporary suspension of payments—Notice required before resumption of payments—Counterclaim in previous action denying suspension—Counterclaim constituting notice.

Patent—Licence—Condition in licence that compensation payable to licensors if quantity of contract material sold or used by licensees exceeds certain quota in any month—Whether condition void—Patents and Designs Act, 1907 (7 Edw. 7 c. 29), s. 38 (1).

C

Contract—Penalty—Licence to make and use patented material—Compensation payable to licensor on sale or use of more than quota—Expiration of patents—Compensation remaining payable.

Trade—Covenant in restraint of trade—Reasonableness as between parties—Public interest—Licence to make and use patented material—Compensation payable to licensors on licensees using or selling more than stated amount—Continued operation of provision after expiration of patents.

D

By a licence and a deed, both dated Apr. 2, 1938, the appellants granted the respondents a non-exclusive licence under British letters patent to import, make, use and sell certain "contract material", viz., hard metal alloys made in accordance with the inventions which were the subject of the patents. The licence was to commence on June 1, 1937, and to continue until Sept. 18, 1947, and thereafter until determined by either party on six months' notice in writing, and the respondents were to pay a royalty on the sale or use of contract material made in accordance with any patent in force. In addition, by cl. 5 of the deed, the respondents were to pay a sum called "compensation" if, in any one month during the continuance of the licence, the aggregate quantity of contract material sold or used by them (other than contract material supplied to them by the appellants or any licensees under the said patents) exceeded a named quota. After the out-

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break of war in 1939, the payment of compensation was suspended, the appellants voluntarily forgoing the payment, it being contemplated that some new agreement, possibly not including provision for compensation, should be entered into after the war. No compensation was paid after Dec. 31, 1939. The patents with regard to one of the grades of contract material (the iron grade) expired in 1941, so that the respondents could thereafter purchase the iron grade material from any manufacturers, although cl. 5 would still operate in respect of their sale or use of such material so purchased. In September, 1944, the appellants submitted to the respondents the draft of the proposed new agreement which, however, the respondents did not accept. In July, 1945, the respondents commenced an action against the appellants claiming damages for fraudulent misrepresentation and breach of contract. In that action, the appellants, on Mar. 26, 1946, delivered a counterclaim by which they claimed, among other claims, payment of compensation as from June 1, 1945. The counterclaim failed on the ground that it was premature, in that there had been no notice determining the suspension of compensation until the counterclaim itself. In the present action, the appellants claimed compensation from Jan. 1, 1947.

Held: (i) although in view of the agreed suspension of payment of compensation under cl. 5 of the deed of Apr. 2, 1938, equity required that any resumption by the appellants of their legal right to compensation should

be effective only after reasonable notice to the respondents, yet the delivery of the counterclaim in March, 1946, constituted notice of the appellants' intention to stand on their legal rights under the deed in this respect, and the period of nine months which elapsed before Jan. 1, 1947, from which date compensation was claimed, was a sufficient period of notice, and accordingly the appellants were entitled to compensation.

Hughes v. Metropolitan Ry. Co. (1877) (2 App. Cas. 439) considered.

Canadian Pacific Ry. Co. v. Regem ([1931] A.C. 414) explained and distinguished.

(ii) clause 5 was not void as being in unreasonable restraint of trade by reason of its continued application after the expiration of the patents relating to iron grade material, notwithstanding that its effect was to diminish the amount of iron grade material which the respondents could profitably sell in competition with the appellants, because the clause did not constitute an unreasonable protection of the appellants' interests, and, as there was nothing to show that the clause was likely to limit the total supply of the material available for sale or to have a substantial effect on the price that the consumer would have to pay, the clause was not contrary to the public interest.

(iii) clause 5 did not impose, or purport to impose, a penalty on the respondents.

(iv) (VISCOUNT SIMONDS dissenting) clause 5 was not rendered void by the Patents and Designs Act, 1907, s. 38 (1), because, although cl. 5 offered an inducement to the respondents to purchase contract material from the appellants or their licensees after the expiration of the patents, the clause did not constitute a condition the effect of which would be either to "prohibit or restrict" (within the meaning of the enactment) the respondents from using any article supplied by any person other than the appellants, or to "require" (within the meaning of the enactment) the respondents to acquire from the appellants any article not protected by the patents.

Per VISCOUNT SIMONDS: I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of principle which is to be found in *Combe v. Combe* ([1951] 1 All E.R. at p. 770) and may well be far too widely stated (see p. 660, letter D, post).

Decision of the COURT OF APPEAL ([1954] 2 All E.R. 28) reversed.

[**Editorial Note.** Section 38 of the Patents and Designs Act, 1907, the terms of the relevant part of which section are printed at p. 668, letter I, post, was repealed by the Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), and is replaced by s. 57 of that Act, 17 HALSBURY'S STATUTES (2nd Edn.) 691. The replacing section embodies amendments but the words "prohibit", "restrict" and "require" which are stressed in the opinion read by LORD OAKSEY at p. 670, letter F, post, remain in s. 57 (1).]

As to the revocation of a licence, see 20 HALSBURY'S LAWS (2nd Edn.) 10, para. 6; and for cases on the subject, see 30 DIGEST (Repl.) 539-542, 1725-1763.

As to unlawful conditions in a licence to sell or use patented material, see 24 HALSBURY'S LAWS (2nd Edn.) 723, para. 1343.

As to covenants in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 403-406, paras. 674-680; and for cases on the subject, see 43 DIGEST 31-33, 250-268.]

Cases referred to:

(1) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 31 Digest (Repl.) 556, 6757.

(2) *Birmingham & District Land Co. v. London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 31 Digest (Repl.) 565, 6856.

- A (3) *Combe v. Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215; 3rd Digest Supp.
- (4) *Canadian Pacific Ry. Co. v. Regem*, [1931] A.C. 414; 100 L.J.P.C. 129; 145 L.T. 129; Digest Supp.
- (5) *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528; 99 L.J.Ch. 321; 143 L.T. 165; 47 R.P.C. 403; *subsequent proceedings*, 48 R.P.C. 98; Digest Supp.
- B (6) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (7) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- C (8) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 31 Digest (Repl.) 247, 3823.
- (9) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 30 Digest (Repl.) 540, 1747.

D Appeal.

Appeal by Tool Metal Manufacturing Co., Ltd., registered proprietors of British letters patent, from an order of the Court of Appeal dated Mar. 29, 1954, and reported [1954] 2 All E.R. 28, reversing an order of PEARSON, J., dated Nov. 16, 1953. The facts appear in the opinion of LORD COHEN at p. 677, post.

E *F. W. Beney, Q.C., T. G. Roche, Q.C., and A. J. Bateson* for the appellants, T.M.M.C.

Gilbert Beyfus, Q.C., Kenneth Johnston, Q.C., and A. C. Warshaw for the respondents, TECO.

The House took time for consideration.

F June 16. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts in this complicated case are fully stated in the speech of my noble and learned friend, LORD COHEN, which I have had the privilege of reading, and I do not think it necessary to trouble your Lordships by referring, except incidentally, to the events which preceded the issue of the writ in the action in which this appeal is brought.

G It was in the circumstances stated by my noble friend that the appellants (hereinafter called "T.M.M.C."), by writ issued on Sept. 11, 1950, claimed from the respondents (hereinafter called "TECO"), as compensation under cl. 5 of the deed as from Jan. 1, 1947, to Jan. 26, 1950, a quantified sum of £84,050, and an account of compensation payable under the same clause from Jan. 26, 1950, to July 27, 1950, when the licence terminated. To this claim TECO put in a number of defences. They pleaded that the provisions of cl. 5 were void on three separate grounds: (a) because they imposed a penalty; (b) because they were an unreasonable restraint of trade; and (c) because they contravened s. 38 of the Patents and Designs Act, 1907. They also pleaded that the delivery of the counterclaim in the first action did not operate as notice to terminate the equitable arrangement which, as was held in that action, existed at any rate until such delivery, and that it was a condition of its termination that the notice determining it (a) should be unequivocal, and (b) should specify the date of termination, and, further, that that date should give them a reasonable time to adjust their business affairs to meet the altered circumstances. To this, in effect, T.M.M.C. replied that the delivery of the counterclaim was a sufficient intimation of their intention to reassert their legal rights and that, that intimation having been given, equity demanded nothing more than that a reasonable time should be allowed before they sought to enforce them. And they further said (nor was this

denied by TECO) that, on this footing, a reasonable time was given, since the counterclaim was delivered in March, 1946, and compensation claimed from January, 1947. A

On this part of the case I will be as brief as I can, for, having read the opinion of LORD COHEN in which the facts of the case are set out at greater length, I am not prepared to dissent from his conclusion. It would not, however, be right in a case in which I find myself unable to agree with the decision of the Court of Appeal to say nothing on the far-reaching conclusion to which they have come. My Lords, the decision of the Court of Appeal in the first action was based on nothing else than the principle of equity stated in this House in *Hughes v. Metropolitan Ry. Co.* (1) (1877) (2 App. Cas. at p. 448) and interpreted by BOWEN, L.J., in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2) (1888) (40 Ch.D. at p. 286) in these terms: B

"It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before." C

These last words are important, for they emphasise that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in *Combe v. Combe* (3) ([1951] 1 All E.R. at p. 770) and may well be far too widely stated. E

The difficulty in the present case lies in the fact that, in the first action, in which it was held that between these parties the principle applies, neither of them in any pleading or other statement between the delivery of the counterclaim in March, 1946, and judgment in April, 1950, took their stand on its existence. TECO asserted a binding agreement for the complete and final abrogation of any compensation: T.M.M.C., though willing to make some concession in regard to the past, denied any agreement in respect of any period at all. The position of neither of them was compatible with the existence of an equitable arrangement by which the right to receive, and the obligation to pay, compensation were suspended for a period which lasted at least until March, 1946, and for a debatable period thereafter. F

My Lords, I think that, at this point, the issue is a very narrow one. On the one hand, it is said that a plea resting on the denial of an agreement cannot be a notice determining that agreement. This is the view taken by ROMER, L.J., in which the other members of the Court of Appeal concurred. On the other hand, it is urged that, since the suspensory period is due to the gratuitous willingness of the one party to forgo their rights, nothing can be a clearer intimation that they propose no longer to forgo them than a claim which, though it may ask too much, can leave the other party in no doubt that they must not expect further indulgence. The problem may, perhaps, be stated in this way. Did equity require that T.M.M.C. should expressly and unequivocally refer to an equitable arrangement which TECO had not pleaded and they did not recognise? Or was it sufficient for them by a reassertion of their legal rights to proclaim that the period of indulgence was over? In favour of the latter view, it is added that such an attitude on the part of T.M.M.C. could not surprise TECO who had not hesitated to bring against them a serious charge of fraud. G

My Lords, it is not clear to me what conclusion the Court of Appeal would have reached but for the authority of *Canadian Pacific Ry. Co. v. Regem* (4) H I

A ([1931] A.C. 414), to which I must refer later. For my part, I have, after some hesitation, formed the opinion that, as soon as the counterclaim was delivered, TECO must be taken to know that the suspensory period was at an end and were bound to put their house in order. The position is a very artificial one, but it was their own ignorance of a suspensory period, or at least their failure to plead it, which created the difficulty, and I do not think that they can take advantage
 B of their own ignorance or default and say that they were entitled to a further period of grace until a further notice was given. Equity demands that all the circumstances of the case should be regarded, and I think that the fair and reasonable view is that TECO could not, after they had received the counterclaim, regard themselves as entitled to further indulgence.

C It was, however, urged on behalf of TECO that, even if the counterclaim could otherwise be regarded as a sufficient notice that the equitable arrangement was at an end, yet it was defective in that it did not name a certain future date at which it was to take effect. To this the reply was made that equity did not require a future date to be named in the notice, but that what it did require was that a reasonable time should be allowed to elapse before it was sought to enforce it. Here, too, the Court of Appeal favoured the view of TECO, again feeling
 D themselves constrained by the decision in the *Canadian Pacific Railway* case (4). And here, too, I am forced to the opposite conclusion. Equity is not held in a strait-jacket. There is no universal rule that an equitable arrangement must always be determined in one way. It may, in some cases, be right and fair that a dated notice should be given. But in this case, what was the position in January, 1947, which I take to be the critical date? Then for nine months
 E TECO must, in my opinion, be taken to have been aware that T.M.M.C. proposed to stand on their legal rights. It is not denied that those nine months gave them ample time to readjust their position. I cannot regard it as a requirement of equity that, in such circumstances, they should have been expressly notified in March, 1946, that they would have nine months and no more to take such steps as the altered circumstances required. In coming to this conclusion, I
 F do not think I run counter to any authority that was cited to us, unless it be the *Canadian Pacific Railway* case (4) to which I must now refer.

My Lords, in his judgment in the Court of Appeal, ROMER, L.J., introduced that case with these words ([1954] 2 All E.R. at p. 41):

G “In my opinion, although in many cases the equity, to which *Hughes v. Metropolitan Ry. Co.* (1) gave recognition and high authority, is satisfied by merely conforming to the terms in which LORD CAIRNS (and subsequently BOWEN, L.J.) formulated it, there are other cases where justice requires that the resumption of legal rights which have been suspended for a period must be preceded by a notification to the other party concerned specifying a fixed
 H period of grace during which that party can put his house in order, and that in such cases a notification such as that will be a condition precedent to the valid re-assumption of the owner's legal rights. Such a case was *Canadian Pacific Ry. Co. v. Regem* (4).”

My Lords, it is undoubtedly the fact that the *Canadian Pacific Railway* case (4), decided that what I have called a “dated notice” was required in that case to terminate an existing licence, and that the Crown, the licensor, had in that case
 I the duty and the risk of fixing a reasonable period of notice, but I must observe that, not only was the equitable principle, which was recognised in *Hughes’* case (1), not invoked, but LORD RUSSELL OF KILLOWEN, in delivering the opinion of the Board, expressly disclaimed any reference to that or any other equitable principle. The relevant problem there was whether a licence to occupy land by placing telegraph poles thereon had been revoked by the institution of proceedings by the Crown, and the question was what term in regard to revocation should be implied in the licence which the Crown was assumed to have granted.

I have no doubt that the question is analogous to that which we have to decide in this case, for the implication of a term as to revocation, on which the licence is silent, must depend on what is fair and reasonable between the parties. The court will be guided by the same principles in the one case and the other. The passage which I cited from BOWEN, L.J.'s judgment in the *Birmingham* case (2), ended with these words (40 Ch.D. at p. 286):

"That is the principle to be applied. I will not say it is not a principle that was recognised by courts of law as well as of equity. It is not necessary to consider how far it was always a principle of common law."

Nor, my Lords, is it necessary today, but in the House of Justice it would be difficult to distinguish between the equitable principle recognised in *Hughes'* case (1) and the rule well established at common law long before the fusion of law and equity that a licensor must give reasonable notice to determine a licence. It was this rule which was applied in the *Canadian Pacific Railway* case (4), and, in applying it, LORD RUSSELL OF KILLOWEN said ([1931] A.C. at p. 432):

"Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case."

And, as I read the decision, it was the circumstances of that case and nothing else, certainly not any general rule, which led him to say that (*ibid.*, at p. 433):

"it will be for the Crown to determine the licence by service of a notice the sufficiency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice."

The circumstances of that case were very unusual, and I do not doubt that they fully justified the rule being applied in that way. But so, also, in the present case the circumstances are very unusual: it is hardly possible that they should be repeated, and, even if I apply in the amplest way to the termination of the equitable arrangement between the parties in this case the rule applicable to the revocation of licence, I find nothing in the *Canadian Pacific Railway* case (4) which precludes me from reaching the conclusion which I have already stated, viz., that the appellants gave sufficient notice that the suspensory period was at an end and allowed enough time to elapse before seeking to enforce their rights. For these reasons, I think that this defence fails and that the judgment of the Court of Appeal cannot, on this ground, be upheld.

The plea that the provisions of the deed are unenforceable because they impose a penalty clearly cannot be maintained. It is, perhaps, enough to say that they do not impose, or purport to impose, a penalty. No doubt the consequences of certain actions by TECO may be detrimental to them, but that does not involve that a penalty is imposed in the sense in which that word is used in the equitable doctrine that equity relieves against penalties. No case was cited where the doctrine was invoked otherwise than for a penalty payable on the breach of a contractual obligation. The further plea that the provisions of the deed are unenforceable, because they constitute an unreasonable restraint of trade, must also fail. It was conceded that, as between the parties, the restraint was reasonable. But it was contended that it was unreasonable in the public interest. The onus of proof here lay with TECO, and it is a notoriously heavy burden. In my opinion, TECO did not discharge it and I concur so fully in the reasoning and conclusion of ROMER, L.J.,* that I need say no more.

My Lords, having come to the conclusion that it has not been established that cl. 5 of the deed of Apr. 2, 1938, is, under the general law, void as in restraint of trade, it is necessary now to consider whether it is avoided by s. 38 of the

* See p. 686, post.

- A Patents and Designs Act, 1907. The Patents Act, 1949, has substituted a new section [s. 57] for that section but it is with the earlier Act that we are here concerned. It had, by 1907, become notorious that patentees were seeking, by virtue of their patents, to obtain a collateral advantage by imposing conditions on licensees, such as that the patented article should not be used save in conjunction with some other article produced by the patentee, or that the patented article alone
- B should be used, or that the user should purchase his raw materials from the patentee: see TERRELL AND SHELLEY ON PATENTS (9th Edn.), p. 262, and cases there cited. And it is, I think, clear that the object of the legislature was to put an end to this grave abuse of monopoly rights. How far it has done so must depend on the true construction of s. 38 of the Act of 1907, but the background is one in which I see first the common law rejection of a monopoly, then the statutory grant under the Statute of Monopolies and the succeeding Patent Acts of limited monopolies hedged about with divers safeguards in the public interest against their abuse, then the attempt by patentees, in spite of such safeguards, to secure for themselves collateral advantages by virtue of their monopoly, and, finally, the attempt to check such attempts by prohibitory legislation with powerful sanctions. ROMER, L.J., in *Huntoon Co. v. Kolynos (Incorporated)* (5),
- C accurately stated the purport of the legislation in one aspect when he said that its language ([1930] 1 Ch. at p. 562)
- D

“ would seem to suggest that the object of the legislature was to prevent persons who had obtained a monopoly in respect of an article or a process by means of a patent, so using that monopoly as to obtain for themselves a virtual monopoly in respect of other articles and processes for which they

E have not obtained any patent.”

- His statement would be equally applicable to articles which had been patented but the patents had expired. Nothing, I suppose, could be in more direct conflict with the law relating to patents than a contractual provision which indirectly secured for a patentee a monopoly extending beyond the statutory
- F period of his patent.

I now turn to s. 38, and, for the sake of clarity, state the first sub-section, with the omission of words not relevant to the present case:

- “ It shall not be lawful in any contract . . . in relation to the . . . licence to use . . . any article . . . protected by a patent to insert a condition the effect of which will be—(a) to prohibit or restrict the . . . licensee from using any article or class of articles, whether patented or not, . . . supplied . . . by any person other than the . . . licensor or his nominees; or (b) to require the . . . licensee to acquire from the . . . licensor, or his nominees, any article or class of articles not protected by the patent . . . ”
- G

- H I need not at the present stage refer to the provisos to this sub-section nor to the other sub-sections.

- On the meaning and effect of the words that I have cited numerous questions have arisen, but the controversy has chiefly centred round the words “ the effect of which will be ” and the words “ prohibit or restrict ”. I think that it is clear that the words “ the effect of which will be ” have a wider scope than the words “ which will ”, and I cannot find a more accurate way of stating the difference than by saying that the former phrase emphasises that the result may be directly or indirectly achieved. It is the word “ will ” which has caused the greater difficulty. It was pointed out truly enough that the word is “ will ” not “ may ”, and from this the short step was taken of saying that it must be shown by evidence that the condition necessarily will or, in other words, must, have a certain effect. But, in my opinion, too much stress is laid on the use of the future tense. The sub-section looks forward to the future; it opens with the words “ It shall not be lawful in any contract ”, and in describing what
- I

could only be a future condition in a future contract it was, I think, good grammar to use the words "the effect of which will be". The problem is precisely the same as if the present tense had been used, or as if (leaving out the words "the effect of which will be") the sub-section had run "condition prohibiting or restricting, etc.", or (giving their proper meaning to the words I have for the moment omitted) "condition directly or indirectly prohibiting or restricting". It is common ground that the matter must be examined as at the date of the execution of the contract. That is a date at which the surrounding circumstances are known but the future cannot be foreseen, and nobody can predict that such and such a result will inevitably ensue. The court then, in my opinion, in considering whether s. 38 operates to avoid a condition, has the task of determining whether its essential quality is (I will not repeat "directly" or "indirectly") prohibitive or restrictive of a certain course of conduct. This cannot as a rule, I think, be a difficult task. A

Obviously, no condition will have the effect of prohibiting or restricting me from following a certain course if I have never wanted, and never shall want, to follow that course. The fundamental supposition is that, if I do want to follow it, I shall be faced with the condition, and it is fair to assume that it is just because I may want to follow it, that the condition is imposed. If I find such a condition in a contract, it is, in my view, idle to speculate (as was done at great length in this case) whether and when I shall want to do a certain thing; the question is whether, when I want to do it, I shall find myself prohibited or restricted. B

What, then, is the meaning of "prohibit" and "restrict"? It has been urged by T.M.M.C. and was, I think, held by PEARSON, J., that both these words cover only a direct contractual provision, e.g.: C

"the licensee will not use any hard alloys except those supplied by the licensor"

or

"the licensee will not use more than twenty-five per cent. of hard alloys supplied by any other supplier than the licensor" D

the former taken as an example of a prohibiting, the latter of a restricting, condition. And, if I understood the argument, it proceeded on the footing that "prohibit" meant "forbid", that "forbid" connoted such a contractual provision as I have stated and that "restrict", being found in immediate conjunction with "prohibit", must be given a similar meaning. I cannot accept this argument. In the first place, it wholly ignores the words "the effect of which will be". Secondly, I see no reason in the context for so limiting the meaning of the word "prohibit" or, if indeed that word has a limited meaning, for saying that "restrict" must be similarly limited. I put to learned counsel the hypothesis of a penalty which must, in fact, effectually deter the licensee from purchasing in the market and he admitted candidly that his construction required him to deny that that operated to prohibit the licensee. It appears to me that, while one meaning of "prohibit" is "forbid", it has another meaning, which I would by no means call a secondary meaning, and that is "prevent". If a modest tourist says that the prices of a certain hotel are prohibitive, he is not thinking in terms of contractual provision. The prices are so high that he is prevented from entering that hotel. It is interesting to note that he might say that the condition of his purse forbade it. I would say, then, that a man may be prohibited from a course of action equally by the express terms of his contract, by the law of the land, or by economic circumstance. Nor do I see any reason for giving the word in the context of s. 38 a narrower meaning than it fairly bears. True enough it is, in a sense, a penal provision. But I do not detract one jot from what I said in *London & North Eastern Ry. Co. v. Berriman* (6) ([1946] 1 All E.R. at p. 270) if I insist that, it being the plain purpose of the section to prohibit E

A (or prevent) the licensor from using his monopoly to obtain a collateral advantage, nothing less than its fair meaning should be given to the clause. It would be a strange piece of legislation which disallowed a direct contractual provision but allowed a condition which, indirectly, had the same effect. It was, perhaps, in order to avoid the possibility of such a conclusion that the words "the effect of which will be" were introduced.

B To "prohibit" must be added "restrict". If I am wrong in thinking that prohibition covers prevention as well by economic circumstance as by direct contractual provision, why should "restrict" be so limited? I see no reason for saying that it follows from an application or misapplication of the *ejusdem generis* rule. The argument, I think, involves that "prohibit" means "totally prohibit" and "restrict" means "partially prohibit", and in either case by means of an express contractual provision; for, otherwise, I do not know what meaning can, on this footing, be given to "restrict". But this would be surplusage; for it could not be maintained that a condition was not prohibitive, if it forbade the user of material supplied by outsiders to the extent of (say) seventy-five per cent. In truth, however, there is no valid reason in the context or otherwise for giving a limited meaning to this word. A word of command, the fear of penal consequences, or barbed wire may equally restrict my movement. I do not know why the means by which I am restricted should affect the fact that I am restricted in a real sense of that word. And I would say that, in the sphere of commerce, nothing could more truly restrict a trader than the fact that, wishing to purchase the goods of A rather than the goods of B, he finds that he can only do so at the cost of paying a heavy penalty to B. That is the effect which the penalty is intended to have and it will probably have it.

E I do not find anything contained in the other sub-sections which throws any light on the meaning of the relevant words. The proviso to sub-s. (1) offers some mitigation to its stringency, and sub-s. (4) gives cogent evidence of the importance attached by the legislature to sub-s. (1). Some comment was made on the fact that the section does not preclude a condition prohibiting sale by the licensee of goods supplied by outsiders, but I do not see why this omission should lead to a narrow construction of "prohibit" and "restrict" in relation to user. There may be good reason for thinking that a selling agent may fairly be restrained by the licensor from selling the goods of an outsider. This seems to be the motive of sub-s. (5) (a).

G After this too long exposition of the section, I return to the present case and ask whether, on Apr. 2, 1938, it could fairly be said of cl. 5 that it was a condition which will have the effect of prohibiting or restricting TECO from using contract material supplied by suppliers other than T.M.M.C. As I have already indicated, it must have been an idle and irrelevant speculation at that date whether, at any time in the next ten years, TECO would want to do so. The penal clause is inserted on the assumption that they may or will want to do so, and to meet just that eventuality. Assuming, then, that the time comes when TECO wants to use contract material obtained from an outsider, will this clause have a prohibitive or restrictive effect? I do not see how it can fail to do so. The assumption is that TECO want to obtain their material from an outsider either because they can get it cheaper, or because they think it better material, or for some other good commercial reason. If there was no clause, they would do so. But the clause is there, and at once the position is changed. They can pursue their chosen course only at the expense of a penalty which will not be borne by their own competitors in the market, and so they are compelled to buy from their licensors. I repeat that the compulsion of economic conditions is as truly prohibitive or restrictive as a direct contractual obligation. Its intention and its effect are to confine them to purchase from their licensor, when unhampered by the clause they would be free to purchase from another. That is, in my opinion, a restrictive condition which s. 38 (1) of the Act avoids.

On this ground, and this ground only, I would dismiss this appeal:

LORD OAKSEY: My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend, **LORD REID**, who has not yet taken the Oath in your Lordships' House on account of his absence from the country, and, as I entirely agree with his opinion, I propose to read it as my own and to vote accordingly. A

Krupps of Essen had been developing processes for the manufacture of hard metal alloys and in 1931 they formed the appellant company, whom I shall call "T.M.M.C.", to operate in Britain. T.M.M.C. owned a number of British patents and they sought to stop what they alleged to be infringements by certain British companies, including the respondents, **TECO**, who had been making hard tips for machine tools and other articles from tungsten carbide powder. After much negotiation, on Apr. 2, 1938, two deeds were executed by which T.M.M.C. granted a licence to **TECO** to import, make, use and sell under certain conditions hard alloys made in accordance with the inventions the subjects of their patents (called "contract material") and **TECO** agreed to pay a royalty of ten per cent. and, in addition, "compensation" at the rate of thirty per cent. of the value of contract material sold or used by them in excess of fifty kilograms per month. This was a very heavy burden on **TECO**, and they only agreed to it because the alternatives were either to defend an action for infringement, which would have been disastrous for them if they were unsuccessful, or to go out of business and perhaps also pay damages for past infringements. Before the war **TECO** paid about £16,000 to T.M.M.C. as "compensation". B

Shortly before the war, Krupps sold their interest in T.M.M.C. to British buyers, and early in the war **TECO** settled their liability for compensation down to the date of settlement by paying a further sum of over £3,000. Thereafter, no demand for further payment of compensation was made until after the end of hostilities. In July, 1945, **TECO** sued T.M.M.C. for repayment of those sums amounting in all to £19,521, alleging that the deeds of 1938 had been obtained by fraudulent misrepresentation, and they also pleaded that T.M.M.C. had agreed that no further compensation should be payable. On Mar. 26, 1946, T.M.M.C. lodged a defence and counterclaim denying fraud and claiming payment of royalties and also of compensation as from June 1, 1945. The case was finally decided by the Court of Appeal on Apr. 4, 1950. Fraud was not proved and the counterclaim for compensation failed. In that action there was no plea or suggestion by **TECO** that their agreement to pay compensation was void or voidable on any other ground than fraud. C

On Sept. 11, 1950, T.M.M.C. raised the present action claiming compensation as from Jan. 1, 1947, and **TECO**'s defence was delivered on Nov. 10, 1950. Four defences were pleaded; first, that no notice had been given by T.M.M.C. which entitled them to demand compensation, secondly, that the clause in the 1938 agreement imposing liability to pay compensation was in restraint of trade and illegal, thirdly, that this clause provided for the imposition of a penalty which was irrecoverable at law, and fourthly, that the clause was null and void in that it offended against s. 38 (1) (a) of the Patents and Designs Act, 1907. I agree with your Lordships that the first and third defences fail and I propose only to deal with the other two. D

If these defences, or either of them, are valid it is somewhat remarkable that nothing was said about them in the earlier action, but it is admitted that it is competent to raise them now for the first time. In order to deal with them I must first consider the terms of the clause against which they are directed. It is cl. 5 of the agreement of 1938, which is in these terms: E

"If in any month during the continuance of the said licence the aggregate quantity of contract material sold or used by **TECO** and Industrial* (other

* "Industrial" was the description given to Tungsten Industrial Products, Ltd., see p. 677, letter D, post. F

- A than contract material supplied to TECO by the grantors or any licensees under the said patents) shall exceed a quota of fifty kilograms (50 Kg.) TECO shall, whether all or any of such material shall be subject to royalty hereunder or not pay to the grantors compensation equal to thirty per cent. (30%) of the sum which represents the excess net value that is to say the average net value per kilogram of all contract material sold or used by
- B TECO and Industrial in the said month multiplied by the weight in kilograms of all such contract material as aforesaid sold or used by TECO and Industrial during such month in excess of fifty kilograms. Provided that contract material sold by TECO to Industrial shall only be taken into account for the purposes of this clause on the occasion of its sale or use by Industrial."
- C Before considering this clause in detail it is necessary to have in mind something about the nature of contract material. TECO'S process begins by taking tungsten carbide and any other desired ingredient in finely powdered form, and the object of the process is to get the grains or particles to adhere to each other so that the finished product is an extremely hard object of the required shape. This is done by sintering in two stages. After the first stage the powder has been compacted into an object which can be fairly easily worked to approximately the right size and shape. The second stage then makes the object so hard that it is difficult to grind away any of it. It is only when this second stage is completed that the object becomes contract material within the meaning of the agreement. The manufacturer can then sell the object in this state, or he can grind it after the second stage is completed so as to sharpen its edge, or bring it to the exact shape which his customer wants. It is admitted that any such
- E operation after the second stage is use of contract material by the manufacturer within the meaning of the agreement.

It appears that there are two grades of contract material, the iron grade and the steel grade. They are made by somewhat different processes and both were within the scope of the patents in force in 1938. But the patents with regard to the iron grade expired in 1941: thereafter only the patents with regard to the steel grade remained. So the clause operated in this way. Down to 1941, the only possible ways in which TECO could get contract material which they could sell or use were by making it themselves or by buying it from T.M.M.C. or their other licensees. If, in any month, TECO sold or used more than fifty kilograms of contract material made by themselves, they had to pay compensation on the excess, but they would pay no compensation in respect of selling or using any contract material which they had acquired from T.M.M.C. or their licensees. This was not, in my view, calculated to confer any preference on T.M.M.C., or to induce TECO to buy from T.M.M.C. rather than make the material themselves. There were price fixing arrangements in the deeds which, if I understand them rightly, would give little encouragement to TECO to buy from T.M.M.C. even though they could do so without compensation affecting material so bought, and I can find nothing to indicate that TECO did buy from T.M.M.C., or that it was contemplated that they would make a practice of doing so. But the inclusion of this exemption in cl. 5, and of a similar exemption from royalty in cl. 3, shows that the parties thought that such purchases might occur, and the most likely reason for the exemption would seem to be that, if TECO bought direct from T.M.M.C., T.M.M.C. would get their full profit on what they sold to TECO in the same way as if they had sold to anyone else, and that, if TECO bought from another licensee of T.M.M.C., the material sold by that licensee would be taken into account in assessing the compensation payable by that licensee. So, if material acquired by TECO from T.M.M.C. or their licensees were taken into account to increase the compensation payable by TECO, the effect would be that T.M.M.C. would get a double profit from the same material and that, no doubt, was thought to be unfair, and to require the insertion of the exemption.

After the iron grade patents had expired, the situation with regard to iron grade contract material might be different. It was then open to anyone to make that material and, if that material was then made by some manufacturer independent of T.M.M.C., it was open to TECO to buy it and use it or resell it. In 1938, no one could say whether, after 1941, independent manufacturers would manufacture this material or whether, if they did, the price and quality of their product would offer any inducement to TECO to buy from them rather than make the material themselves or buy it from T.M.M.C. But the terms of cl. 5 are certainly wide enough to require TECO to bring into computation for the purpose of compensation any material which they might then buy from independent manufacturers and use or resell themselves. And it is also clear that, after the iron grade patents had expired, TECO were still liable to pay compensation in respect of iron grade contract material manufactured by themselves.

TECO now say that, inasmuch as cl. 5 required payment of compensation to T.M.M.C. in respect of iron grade material after T.M.M.C.'s patents relating to that material had expired, it was in restraint of trade. I think that, in the circumstances of this case, it may be presumed that this obligation would tend to have the effect of diminishing the amount of iron grade material which TECO would be able to sell at a profit and putting them at some disadvantage in competing with T.M.M.C. But, even if that were sufficient to show that cl. 5 is objectionable, it is still necessary to consider whether any restraint which it might cause is justifiable as being reasonable in the interests of the parties and in the public interest. As regards the parties, counsel for TECO rightly admitted that, in view of their disadvantageous position, which I have already mentioned, it was reasonable for them to accept the 1938 agreement. T.M.M.C., no doubt, drove a hard bargain, but I cannot hold that they took an unconscionable advantage of their position, or that cl. 5 was commercially unjustifiable or unreasonable for the protection of their trading interests. Counsel argued that a restraint may be reasonable in the interests of the parties and yet against the public interest, and so it may be. But I am unable to hold that this restraint was against the public interest. There is nothing to show that it either limited, or was likely to limit, the total supply of the material available for purchase by the public, or that it had, or was likely to have, any substantial effect on the price which consumers would have to pay. If TECO had refused to make the agreement, it was not argued that there was any provision in the Patents and Designs Act, 1907, which could have been invoked. The most that can be said is that T.M.M.C., instead of trying to drive TECO out of business, which they could probably have done without in any way offending against the law, offered to TECO an agreement which, although it might limit their activities, allowed to them a substantial share of the trade; and I know of no authority for holding that that is against the public interest. To hold that that is against the public interest would only encourage a trader in an advantageous position to act more ruthlessly against his rival than he might be inclined to do.

TECO'S last defence is that cl. 5 of the agreement of 1938 offends against s. 38 (1) (a) of the Patents and Designs Act, 1907, and is, therefore, null and void. Section 38 (1) is in these terms:

"It shall not be lawful in any contract made after the passing of this Act in relation to the sale or lease of, or licence to use or work, any article or process protected by a patent to insert a condition the effect of which will be—(a) to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor or his nominees; or (b) to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees, any article or class of articles not protected by the patent; and any such condition shall

A be null and void, as being in restraint of trade and contrary to public policy."

This is not an easy sub-section to interpret. Let me, therefore, first take a case to which it clearly applies. Before the section was enacted, the owner of a patented process might, and sometimes did, attach to a licence to use the process
 B a condition that the licensee must buy raw material used in the process from him and from no one else. Such a condition was prohibited by the section, no doubt because it was regarded as an abuse of the patentee's monopoly in that it imposed on the licensee a restraint beyond the scope of the patent. The condition might be a positive obligation to buy the raw material from the licensor—that is made unlawful by sub-s. (1) (b)—or it might be a negative obligation prohibiting the
 C licensee from buying it from any person other than the licensor, and that is prohibited by sub-s. (1) (a). In the same way, the seller of a machine protected by a patent might require the buyer to purchase raw material from him, or prohibit the buyer from purchasing it from any other person, and that is also made illegal.

Obviously, a condition restricting the right of the licensee to choose from whom
 D he would buy articles not protected by the licensor's patents need not be drafted in such direct terms. It is not difficult to imagine circumstances where a condition which did not expressly require the licensee to buy from the licensor or prohibit him from buying elsewhere would, in fact, operate to deprive the licensee of the right to buy in the open market, and the section is drafted in terms wide enough to nullify such a condition. It is not limited to conditions which,
 E in terms, prohibit or restrict or require; it makes unlawful any condition the effect of which will be to prohibit or restrict the licensee from buying from others or to require him to buy from the licensor.

In trying to simplify my explanation, I have stated the effect of sub-s. (1) (a) rather too widely. For some reason that is not apparent to me, this sub-section does not nullify a condition prohibiting or restricting the licensee from purchasing
 F articles from any person other than the licensor; it only affects conditions the effect of which will be to prohibit or restrict the licensee from using such articles. No doubt, the effect would generally be the same because generally the licensee would purchase with a view to using the articles, but it is worth noting, in connection with the present case, that, if the licensee desired to buy for resale and not for use, a condition might have the effect of restricting his right to buy in the
 G open market and yet be unobjectionable, provided that its effect was not to require him to buy from the licensor.

Before turning to the question at issue in the present case I should, perhaps, deal rather more fully with the phraseology of sub-s. (1) (a). I read it as affecting, first, any article or class of articles, whether patented or not, supplied by any person other than the licensor, and, secondly, any patented process owned by any
 H person other than the licensor; and the patented articles or patented processes must, I think, be articles or processes protected by other patents than those under which the licence is granted. I have tried to explain the sub-section using only the words "licensee" and "licensor"; I do not think that it is necessary to elaborate my explanation to include all the words "purchaser, lessee, or licensee" on the one hand and "seller, lessor, or licensor, or his
 I nominees" on the other. And I must further note that it is admitted that s. 38 does not apply to a condition, the effect of which is merely to restrict the volume of the licensee's trade, or the amount of unpatented raw material which he can use in his manufacture, while leaving him free to buy the restricted amount where he chooses. Such a condition is left to the ordinary law of restraint of trade. The purpose and effect of s. 38 is to prevent the licensor from limiting the right of the licensee to trade with others so as, in effect, to compel the licensee to trade with him.

I now turn back to the facts of the present case. I have already said that the terms of cl. 5 show that the parties contemplated at least the possibility that TECO would want to buy contract material as well as make it themselves, and that, after the expiry of the iron grade patents, they might be able to buy iron grade material from other manufacturers than T.M.M.C. and their licensees. If, then, they wanted to buy iron grade material, and if supplies from such outside manufacturers were available, they would not be prevented by cl. 5 from buying from outsiders, but there would be an inducement to buy from T.M.M.C. and not from outsiders because purchases from outsiders would come into the computation for paying compensation, whereas purchases from T.M.M.C. would not. It is said that the effect of this inducement would be to restrict TECO from buying material from persons other than T.M.M.C. or their other licensees, and if TECO were not buying to resell, but were buying to use the material themselves, then the effect of this inducement would be to restrict TECO from using material bought from persons other than T.M.M.C. or their other licensees. That, and that alone, is said to bring cl. 5 within the scope of s. 38 and to make it null and void.

It will be seen that a number of contingencies were involved before this inducement could operate. TECO must want to buy iron grade material instead of making it, and they must want to buy it for use and not for immediate resale; some independent manufacturer must have started making the material; and the material must be of suitable quality and must be available at a competitive price. If, then, the independent manufacturer's price were more than thirty per cent. below T.M.M.C.'s price, the thirty per cent. compensation would not matter, as it would still pay TECO to buy from the independent manufacturer, and if that manufacturer's price were above T.M.M.C.'s price, the compensation would not matter as TECO would, in any case, buy from T.M.M.C. But, if that manufacturer's price were below, but less than thirty per cent. below, T.M.M.C.'s price, then the liability to pay compensation would probably induce TECO to buy from T.M.M.C. whereas, in the absence of cl. 5, they would probably have bought from the independent manufacturer. It is the possibility of that happening which, on the argument of TECO, makes it necessary to hold that the effect of cl. 5 "will be" to restrict TECO from using iron grade material supplied by any person other than T.M.M.C. and their licensees.

There appear to me to be four key words in the sub-section—

"the effect of which will be—(a) to *prohibit* or *restrict* . . . or (b) to *require* . . ."

To my mind, the natural meaning of the sub-section is that the effect of the condition must be to limit the right of the licensee to make a choice, and I do not think that these words are appropriate to cover a case such as the present, where the licensee remains free to choose but the presence of the condition will, in some circumstances, create an inducement to choose to buy from the licensor. I take first the word "require" in sub-s. (1) (b). The effect of a particular condition may be to offer so great an advantage to the licensee if he buys from the licensor that it would be extremely foolish of him not to do that, but I do not think that, in the ordinary use of language, it could properly be said that the effect of such a condition will be to "require" the licensee to do it. I feel bound to hold that sub-s. (1) (b) only applies if the effect of the condition is that, whenever certain circumstances occur, the licensee, if he wishes to buy the article, is obliged to buy it from the licensor. Then I take the word "prohibit" in sub-s. (1) (a). It is true that the adjective "prohibitive" is frequently used when there is no legal prohibition, as in the phrase "a prohibitive price", and it may be that the verb "prohibit" is sometimes used in that way; but I would not expect the word "prohibit" to be used in this context to denote a state of affairs where the inducement not to buy the other person's goods is so great that no reasonable person would choose to do so, and I see nothing in the context pointing to such a

A meaning. I think that the meaning is that the effect of the condition will be such as to oblige the licensee in certain circumstances not to use the other person's goods. Then I come to the word "restrict". A person, though not prohibited, is restricted from using something if he is permitted to use it to a certain extent or subject to certain conditions, but otherwise obliged not to use it, but I do not think that a person is properly said to be restricted from using something by a condition the effect of which is to offer him some inducement not to use it, or in some other way to influence his choice. To my mind, the more natural meaning here is restriction of the licensee's right to use the article, and I am fortified in that opinion by two considerations.

If I am right in thinking that "require" and "prohibit" refer to legal obligations to buy or not to use, I see nothing to suggest that "restrict" is used in quite a different sense which has nothing to do with legal obligation but which relates to financial disadvantage. And, secondly, to say that the effect *will* be to restrict seems to me much more appropriate if restriction refers to restriction of the licensee's right to use than it would be if restriction refers to an inducement not to use. The legality of the condition has to be determined at the time when the licence is granted, and, if the terms of the condition are such as to restrict the licensee's right to use an article in certain circumstances, then it can properly be said that its effect will be to restrict him from using it. But if, as in the present case, all that can be said is that the effect of the condition in some circumstances will be to offer a financial advantage, which may be considerable or may be small, if the licensee uses the licensor's goods, I do not see how it can be said that its effect *will* be to restrict the licensee from using other goods. The licensee may be influenced by this financial advantage or he may, perhaps for good reason, choose to disregard it; it is impossible to say in advance what the effect will be.

I recognise that to give this meaning to the section leaves room for evasion. I do not think that the primary purpose of cl. 5 was to evade this section, and the absence of any reported case in a period of forty-eight years since the section was enacted would seem to show that evasion of this kind has not been common. But, undoubtedly, it would often be possible to achieve a preference for the licensor by coupling the licence with a condition which, though not having the effect of limiting the licensee's freedom of choice, imposed some burden on the licensee if he bought certain articles in the open market. The question is whether it is legitimate to stretch the words of s. 38 to make them apply to such a case. Section 38 (1) is a highly penal provision. It not only makes the whole condition void, although the circumstances in which it would have the effect of restricting the licensee may be very unlikely to occur, but, by sub-s. (4), it also makes the existence of the condition a defence to an action for infringement of the patent. At best, the section is ambiguous, and, if a penal provision is ambiguous, it ought not, in my view, to be construed in a wider sense than the ordinary meaning of its terms requires. This section appears to have been enacted to deal with a definite and limited abuse, and, if Parliament has failed to take the opportunity to deal with the whole matter sufficiently comprehensively, then the remedy is an amending Act of Parliament.

I would allow this appeal, and restore the order of PEARSON, J. TECO must pay the costs in your Lordships' House and in the Court of Appeal.

I LORD TUCKER: My Lords, the Court of Appeal allowed the appeal of the present respondents (hereinafter referred to as "TECO") on the ground that the appellants (hereinafter referred to as "T.M.M.C.") were not entitled to recover sums called "compensation" under cl. 5 of a deed dated Apr. 2, 1938, to which T.M.M.C. and TECO were parties, because they had not before action brought given a sufficient notice to terminate a period of suspension during the currency of which payment of compensation money could not be enforced by reason of the equitable principle enunciated in *Hughes v. Metropolitan Ry. Co.* (1). It may

be convenient at this stage to quote the language used by LORD CAIRNS, L.C., in A that case. He said (2 App. Cas. at p. 448):

"It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a court of equity, or any practice of a court of equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

The present is the second of two actions between these parties arising out of the deed of Apr. 2, 1938, which contained the terms and conditions under which a licence under certain letters patent was granted by T.M.M.C. to TECO. In the first action, TECO claimed damages for fraud against T.M.M.C. They alleged that, as a result of certain fraudulent misrepresentations, they had paid sums for compensation under cl. 5, and in para. 10 of their statement of claim they said:

"... Thereafter [TECO] and [T.M.M.C.] agreed that no sums should be payable in respect of compensation after Dec. 31, 1939, or alternatively that [T.M.M.C.] would accept the amount of the royalties in full satisfaction of all sums payable under the said deeds as from Dec. 31, 1939."

By their defence, T.M.M.C., in para. 8, denied the agreement alleged and alternatively relied on the Statute of Frauds and lack of consideration. In para. 17 of their counterclaim, T.M.M.C. said:

"... In breach of their obligations under cl. 3, cl. 5, cl. 7 and cl. 8 of the deed of agreement [TECO] have not since Mar. 31, 1942, rendered any accounts or paid the sums due for 'royalties' or compensation. [T.M.M.C.] do not desire to enforce payment of compensation in respect of deliveries made after Dec. 31, 1939, but before the end of hostilities with Germany."

In their claim for relief, they asked for delivery of accounts in the form specified in cl. 7 of the deed of all material sold or used since Mar. 31, 1942, and for an inquiry into the sum due from TECO for compensation since June 1, 1945. In their reply, TECO admitted that they had not rendered accounts or paid any sum to T.M.M.C., but otherwise did not admit para. 17 of the counterclaim. It is, perhaps, relevant to refer also to para. 3 of the reply in which, *inter alia*, TECO relied on part performance in answer to the plea of the Statute of Frauds. The particulars thereunder are as follows:

"Subsequent to the date of the said oral agreement [TECO] have not paid any compensation and have received no complaint from [T.M.M.C.] in respect of such non-payment. Subsequent to the said date [T.M.M.C.] have never made any demand upon [TECO] for the payment of compensation but have confined their requests for payment to payments due in respect of royalty, and in particular [TECO] will rely upon letters passing between [TECO] and [T.M.M.C.] "

(the dates of which are then set out).

It will be observed that nowhere in the pleadings is there any statement of facts relied on as giving rise to the application of the principle in *Hughes v. Metropolitan Ry. Co.* (1), whereby T.M.M.C. would be precluded from recovering

A compensation for a limited period, or for a period which would continue until terminated by notice. Nor are any facts set out showing in what manner and to what extent TECO altered their position in reliance on any promise or forbearance on the part of T.M.M.C.

B At the trial before DEVLIN, J., no amendments were made to the pleadings with respect to these matters, although other amendments were made. DEVLIN, J., found against TECO both on the issue of fraud and with regard to the agreement alleged in para. 10 of the statement of claim. After referring to the extremely vague and unsatisfactory evidence of Mr. McLeod on behalf of TECO with regard to the alleged agreement he said:

C “Accordingly, the plaintiff has been forced to rely mainly upon the evidence of a Mr. Bateman, a witness called for the defendants, and Mr. Bateman’s evidence was in these terms on day 5, p. 46, that on an occasion in 1942, he heard Mr. Wickman say to Mr. McLeod when this topic was being discussed words to this effect—he cannot, of course, remember the precise words—‘I have already told you that you will not be charged compensation and you will get a new agreement in which we hope there will not be a quota’. That evidence, taken in conjunction with the evidence of the plaintiff, D vague though it is, satisfies me that some agreement of some sort was made. When I use the word ‘agreement’ I am using it now in a very broad sense; I am not attempting to consider the question of whether it is an agreement that is binding in law. But it is quite plain that something was said by Mr. Wickman to these licensees, something which resulted in their not E paying compensation, at any rate, for the duration of the war, and I have no doubt that the sort of thing that was said—and indeed it is the best evidence the plaintiff could produce—is the sort of thing that Mr. Bateman heard said. That being so, what I have to consider is whether those words support the plaintiff’s contention. The plaintiff says that an agreement was made which relieved him from the obligation of ever paying compensation again, and thus to that extent varied the deed which he had F entered into in 1938, by striking out from it the compensation provisions. I think that is putting far too great a weight on the words used by Mr. Wickman as Mr. Bateman heard them. One has to have regard to the circumstances in which they were used. They were used in relation to a plan (if I may so put it) that a new agreement was in course of preparation, and that in this new agreement there was going to be some sort of redrawing of G quotas. It seems to me extremely unlikely, since the idea was then in the minds of the parties that a new agreement was to be drawn up, that Mr. Wickman should have intended or should have been understood to be striking something for ever out of the old agreement.”

H After stating that that view is borne out by some further considerations, to which he refers, he went on:

“He is less likely to have taken either of those courses if he treated it as being merely a temporary remission of the obligation to pay compensation, a remission that was to last only during certain circumstances, or only until it was recalled by the defendants.”

I Finally he said:

“The result is that I reject the view that there was any agreement that was intended to continue, which was to vary the original agreement. The agreement that was made was, in my view, one of two things. I do not think there was anything in it which could be said to limit its operation for the duration of the war, although that might have been the intention of the defendant company. But I think it fairly emerges from the language which Mr. Wickman was heard to use, that it was intended to be a temporary modification pending the new agreement. Accordingly I think that when

the new agreement was presented to Mr. McLeod and was rejected by him the temporary relief which he had been granted came to an end. I do not mean that it came at once to an end. It is obvious that it would be a reasonable provision that he should have some reasonable notice in order to make the necessary alterations. Compensation is now claimed from June, 1945, which is some nine months after the new agreement was presented to him, and I think that gives him sufficient time."

I have set out these passages at some length as I consider it important to see precisely what the learned judge decided. He uses the word "agreement" more than once, but explains that he is using it in a very broad sense, and when his findings are examined it appears that what he found as a fact was that Mr. Wickman had made a promise not to charge compensation pending the new agreement and that he had carried out his promise by not claiming it. That and nothing more.

On appeal, the Court of Appeal held, with regard to the counterclaim, that the findings of DEVLIN, J., made the principle laid down by LORD CAIRNS, L.C., in *Hughes v. Metropolitan Ry. Co.* (1) (2 App. Cas. at p. 448), and by BOWEN, L.J., in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2) (40 Ch.D. at p. 286) applicable, but they differed from his view that the temporary period of suspension ended with the presentation of the new draft agreement or when the negotiations broke down. SOMERVELL, L.J., said:

"I think, against that background, the plaintiffs were entitled to an express notice if the old terms were to be enforced again according to their literal provisions. If you read the correspondence, the plaintiffs were objecting to the agreement; there was ample opportunity for the defendants to say: 'Well, you know, if you do not like this agreement we shall withdraw our terms of not collecting the thirty per cent. and you will be back on the letter of the old pre-war contract'. They not having done that, I do not think they can rely on anything until we come to the counterclaim. That plainly indicates the view that they were taking."

COHEN, L.J., agreed and said:

"Now, as my Lord has said, the direct evidence that the plaintiffs acted on that invitation may be somewhat scanty, but I respectfully agree with him in accepting the argument of Mr. Beyfus that the matter is really one of *res ipsa loquitur*, and I feel no doubt that the plaintiffs carried on their business during the war on the basis that the compensation would not be demanded until due intimation of the intention so to do was given."

This last sentence sums up the essence of the decision on this point so far as the present action is concerned. T.M.M.C. could not get the relief they claimed in their counterclaim because they had given no previous intimation of their intention to demand payment. That left open for decision in a subsequent action whether or not the counterclaim was a sufficient intimation.

My Lords, the parties to the present action are estopped from disputing the correctness of the decision of the Court of Appeal in the first action to the effect that circumstances existed which gave rise to the application of the equitable principle in *Hughes v. Metropolitan Ry. Co.* (1), and that no sufficient intimation to terminate the period of suspension of payment had been given prior to the counterclaim in that action, but it would be wrong, in my opinion, if the view were to prevail that your Lordships in the present case are tacitly accepting the correctness of that decision. If it were permissible to go into these matters on the present appeal I should—with all respect—have desired to hear argument as to the application of this equitable doctrine to a case where the party who says he has been misled and altered his position has done so in reliance on an agreement which is found never to have been entered into, and which is essentially different

A from the promise which is held to have been made, and who gives no precise evidence with regard to the manner or extent of the alteration of his position. The sole question, therefore, before the courts on this issue in the present action has been throughout: Was the counterclaim in the first action a sufficient intimation to terminate the period of suspension which has been found to exist? PEARSON, J., held that it was. He said:

B "The result of these cases, in my opinion, is that, where the rule of equity applies, the period of suspension comes to an end when it is in all the circumstances equitable that it should come to an end, and that is, normally at any rate, according to the circumstances, either at or within a reasonable time after the termination of the state of affairs which is the cause or basis of the suspension. It is not necessary that the person whose legal rights C have been suspended should give a notice purporting to terminate the suspension, although of course it would be fair and reasonable and advisable for him to do so. In this case the state of affairs which was the cause or basis of the suspension would have been, according to the view taken in the court of first instance in the former action, the continuance of the negotiations for new licensing arrangements, but according to the view of the Court of Appeal D the state of affairs was, I think, the attitude of T.M.M.C. in not requiring payment of the compensation for the time being. When that attitude was reversed, a reasonable time for resumption of compensation payments began to run. The making of the counterclaim in the first action clearly involved a reversal of the previous attitude, and therefore it started running a reasonable time for resumption of compensation payments."

E In the Court of Appeal, it was argued on behalf of TECO that the counterclaim did not purport to determine any existing agreement and that, in any event, it was deficient in that it specified no date for the termination. These submissions were largely based on a judgment of the Privy Council in *Canadian Pacific Ry. Co. v. Regem* (4) which was cited for the first time in the Court of F Appeal. It was a decision relating to a licence to erect certain telegraph poles and wires on property belonging to the Crown in Canada. I shall return to examine this case at a later stage. Both these submissions prevailed, and the judgment of PEARSON, J., was reversed. Hence the present appeal.

My Lords, it is difficult to keep these two submissions entirely separate as they both involve consideration of what is necessary to terminate a period of suspension and restore the parties to their previous position. It has been said G more than once that every case involving the application of this equitable doctrine must depend on its own particular circumstances. It is, of course, clear, as PEARSON, J., pointed out, that there are some cases where the period of suspension clearly terminates on the happening of a certain event, or the cessation of a previously existing state of affairs, or on the lapse of a reasonable H period thereafter. In such cases, no intimation or notice of any kind may be necessary. But in other cases, where there is nothing to fix the end of the period which may be dependent on the will of the person who has given or made the concession, equity will, no doubt, require some notice or intimation together with a reasonable period for re-adjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold I that, in all such cases, the notice must take any particular form or specify a date for the termination of the suspensory period. This is not surprising having regard to the infinite variety of circumstances which may give rise to this principle which was stated in broad terms and must now be regarded as of general application. It should, I think, be applied with great caution to purely creditor and debtor relationships which involve no question of forfeiture or cancellation, and it would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalise or discourage the making of reasonable concessions.

My Lords, in the present case I can find nothing which persuades me that equity could require anything further than that which is contained in the counterclaim in the first action. It is true that it does not purport to be putting an end to an existing "agreement" for a temporary suspension. No such agreement had been pleaded. It does, however, contain a clear intimation of a reversal by T.M.M.C. of their previous attitude with regard to the payment of compensation and of their intention to enforce compliance with cl. 5 of the agreement and for an account thereunder. It does not, I think, lie in the mouth of TECO, who had consistently failed to comply with their obligations to render the returns required by the deed, now to complain that the notice should have specified a named future date on which the suspensory period was to come to an end.

I turn now to *Canadian Pacific Ry. Co. v. Regem* (4), which was so much relied on by ROMER, L.J., in the Court of Appeal. It dealt with the withdrawal of a licence to erect telegraph poles. Licence cases are sometimes somewhat similar to the present class of case, but I do not consider that they are safe guides to the solution of the application of the equitable principle with which alone your Lordships are now concerned. Even licence cases are, however, largely dependent on their special facts, as was pointed out by LORD RUSSELL OF KILLOWEN in delivering the judgment of the Board in the *Canadian Pacific* case (4) ([1931] A.C. at p. 432). Furthermore, in that case it was expressly stated that it was not decided on equitable grounds. LORD RUSSELL says (*ibid.*, at p. 430):

"Upon the facts of the present case their Lordships can find no foundation for the application of any equitable doctrine in favour of the appellant. There was no mistaken belief by the appellant as to the ownership of or the rights over the intercolonial property, still less was there any such mistaken belief, which was known to the Crown. There was no conduct on the part of the Crown which induced the appellant to build in the belief that rights in perpetuity would be acquired. There was nothing upon which to ground any estoppel. The facts are all the other way."

There was, moreover, one feature in that case which is alone sufficient to explain the decision requiring the Crown to specify a date in its notice, namely, that a letter had been written indicating that, unless the poles were removed at once, it would be necessary for the Crown to fix a date for their removal. No such date was ever fixed or notified to the company before the proceedings were commenced. In similar circumstances, it might well be held inequitable to allow T.M.M.C. to enforce cl. 5 of the deed by issuing a writ without first giving notice specifying a date. I do not, however, think it is profitable to examine the circumstances in which notices may have been required in other cases, or the precise form of such notices, unless some principle of general application is to be found therein. I can find no such general principle in the *Canadian Pacific* case (4), nor in any other of the cases referred to in argument on this appeal.

I should, perhaps, add that those cases where a licence has been given contractually, in my view afford no assistance since, in such cases, the requirements with regard to notice must necessarily be dependent on the construction of the contract by virtue of which the licence was obtained. I have not, therefore, thought it necessary to refer to the views expressed on that subject by the noble Lords who took part in *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (7) ([1947] 2 All E.R. 331).

Where I respectfully differ from the views expressed by ROMER, L.J., in the Court of Appeal in the present case is that I am unable to obtain the same help from the *Canadian Pacific* case (4), and I feel that he has laid undue emphasis on the word "agreement" as constituting the basis for the application of the equitable doctrine and consequently imposing on T.M.M.C. steps which would normally be required from a party to a contract who desires to determine a

A contractual relationship. In my view, the counterclaim of Mar. 26, 1946, followed by a period of nine months to Jan. 1, 1947, from which date compensation in the present action is claimed, is sufficient to satisfy the requirements of equity and entitle T.M.M.C. to recover compensation under cl. 5 of the deed as from the latter date. In the somewhat peculiar circumstances of the present case any other result would, I think, be highly inequitable.

B My Lords, with regard to the other defences relied on by TECO, I agree that those of restraint of trade and penalty fail. As to the remaining defence of s. 38 of the Patents and Designs Act, 1907, which involves a question of construction which, I confess, has caused me considerable difficulty, I have reached the conclusion, for the reasons which have been stated by my noble and learned friend, LORD OAKSEY, that the courts below were right in holding that this defence did not avail TECO in the present case.

C In the result, therefore, I would allow the appeal.

LORD COHEN : My Lords, the dispute between the parties is as to the right of the appellants to what was called compensation and arose out of two deeds, one a deed of agreement and the other a licence, both executed on Apr. 2, 1938, and made between the appellants (to whom I shall refer hereafter as "T.M.M.C.") of the first part, the respondents (to whom I shall refer hereafter as "TECO") of the second part, and Tungsten Industrial Products, Ltd. (therein defined as "Industrial") of the third part. Industrial were the distributors of the products of TECO and played no part in the disputes with which your Lordships are concerned.

E These deeds have given rise to two actions between the parties. The facts leading to the first action were carefully and elaborately marshalled in the judgment of DEVLIN, J., therein and the events which subsequently occurred are stated with sufficiency and accuracy in the judgment of PEARSON, J., whose order, dated Nov. 16, 1953, directing the payment by TECO to T.M.M.C. of the sum of £84,050 4s. 4d. with interest at the rate of four per cent. from Sept. 11, 1950, to the date of judgment, was reversed by the Court of Appeal. It is from that order that the appeal now before your Lordships has been brought. Like ROMER, L.J., in the Court of Appeal, I shall confine myself to stating as briefly as I can the matters which appear to me to be relevant to the points argued before your Lordships.

G In 1931, T.M.M.C. was incorporated in England by Krupps of Essen, the well-known German firm, for the purpose of developing as their subsidiary certain patents which Krupps had acquired in relation to tungsten carbide. Under these patents, T.M.M.C. manufactured articles which were, in the main, machine tool tips, and they marketed them under the name of "Wimet". In or about 1934, T.M.M.C. brought proceedings against the British Thomson-Houston Co., Ltd. (hereinafter referred to as "B.T.H.") for infringement of the said patents, but H those proceedings were settled on the terms of an agreement made on Jan. 1, 1936, under which B.T.H. acknowledged the validity of T.M.M.C.'s patents and were granted an exclusive licence to manufacture under such patents in territory which included the United Kingdom. One result of this agreement was that T.M.M.C. could only grant subsequent licences with the consent of B.T.H., but I they were entitled to, and did, continue to manufacture themselves under the patents.

Some time later, the activities of TECO came to the notice of T.M.M.C., who took the view that TECO were infringing T.M.M.C.'s patents. Negotiations took place and ultimately, with the consent of B.T.H., heads of agreement were signed on June 1, 1937, under which TECO received a licence under the said patents. I need not refer to the terms of the heads of agreement as they were superseded by two deeds of Apr. 2, 1938, which, in substance, incorporated the terms of the heads of agreement. The licence was a non-exclusive licence under

the patents to import, make, use, and, subject as thereafter mentioned, to sell contract material as therein defined in Territory A as therein defined, and to sell contract material in, and for export to, Territory B as therein defined, on and subject to the conditions therein and in the deed of even date contained. The licence was to commence from June 1, 1937, and to continue until Sept. 18, 1947, and thereafter until determined by either T.M.M.C. or TECO on six months' notice in writing. A
B

Contract material was defined as

“Hard metal alloys made in accordance with the inventions the subjects of the said patents or any of them whether made before or after the expiry of such patent or patents.”

The hard metal alloys mentioned in the said definition fell into two classes, “iron grade” and “steel grade”. The last of the patents relating to iron grade expired in December, 1941. Broadly speaking, Territory A consisted of the United Kingdom, and Territory B included the British Commonwealth and Empire, but not Canada. C

The agreement of even date with the licence contained a recital that TECO had made and sold hard metal alloys of a composition and by a process which fell within one of the said patents. Under cl. 2, T.M.M.C. waived all claims against TECO and Industrial and TECO'S customers in respect of any infringement of the patents. Under cl. 3, TECO had to pay to T.M.M.C. a royalty of ten per cent. on the net value of all contract material sold or used by TECO and/or Industrial (other than contract material supplied to TECO by the grantors or any licensees under the said patents) during the continuance of the said licence and made in accordance with one or more of the said patents (other than or in addition to letters patent No. 262,723) which should be in force at the date of sale or use thereof by TECO and/or Industrial, such royalty being payable in the case of contract material sold by TECO to Industrial only on its use or sale by Industrial. Clause 4 contained price regulation provisions which I need not set out in detail but which were said to throw light on the question of unlawful restraint of trade. Clause 5 provided for the payment of what was called “compensation” and so far as material is in the following terms: D
E
F

“If in any month during the continuance of the said licence the aggregate quantity of contract material sold or used by TECO and Industrial (other than contract material supplied to TECO by the grantors or any licensees under the said patents) shall exceed a quota of fifty kilograms (50 Kg.) TECO shall, whether all or any of such material shall be subject to royalty hereunder or not pay to the grantors compensation equal to thirty per cent. (30%) of the sum which represents the excess net value . . .” G

The clause then proceeded to define “excess net value”. Clause 7 provided for monthly returns of contract material sold or used by TECO and Industrial in the preceding month, and cl. 8 provided for the monthly payment of royalty and compensation. Clause 12 gave TECO certain rights in respect to improvements on, or modifications of, the inventions the subject of the said patents. I need not refer to any other provision of the deed of agreement. H

The effect of cl. 5 having regard to the division into iron grades and steel grades and to the dates of the relevant patents is accurately summarised by PEARSON, J., as follows: I

“The effect of the compensation or penalty provisions over the period of the licence can be worked out in this way: ‘June 1, 1937, to March, 1939: Both the iron grades and the steel grades are protected by patents, and bear royalty, and also bear compensation on the excess over the quota. For the period March, 1939, to December, 1941, the iron grades are still protected by the patent No. 4 in the schedule, they do not bear royalty,

A but they bear compensation on the excess over quota. The steel grades are still protected by patents and still bear royalty and compensation on the excess over the quota. In the third period, December, 1941, to July, 1947, the iron grades are not protected by any patent (unless possibly there might be some later patents under cl. 12), they do not bear royalty, but they do bear compensation on the excess over the quota. The steel grades

B are protected by patents, or at least one patent, and bear royalty and bear compensation on the excess over the quota. Then there is the fourth short period, July to September, 1947, and both the iron grades and the steel grades are unprotected by patents (unless conceivably there might be some later patents under cl. 12) and they do not bear royalty but they do bear compensation on the excess over quota'."

C It is convenient here to observe that, between June 1, 1937, the date of the heads of agreement, and Apr. 2, 1938, the output of TECO was in every month in excess of fifty kilograms and in March, 1938, amounted to one hundred and sixty-eight kilograms.

D At the time of the execution of the agreements, Mr. McLeod, who was the managing director of TECO, raised no objection to the compensation provisions of the agreement, but, finding that he could not pass the burden thereof on to his customers, he was, even before the outbreak of war, protesting against them. Shortly before the outbreak of war, the control of T.M.M.C. had passed from German to British hands, and Mr. McLeod, who had been making his complaints to a Dr. Louis, an agent of Krupps, renewed them to Mr. Wickman, who was connected with the persons then in control of T.M.M.C.

E TECO, however, continued to make returns and to pay royalty and compensation down to the outbreak of war. TECO then defaulted, but, in May, 1940, paid a sum in satisfaction of royalty and compensation due down to Dec. 31, 1939. TECO continued to make returns and pay royalties, but not compensation, up to Mar. 31, 1942. After that date, returns were made up to some date which I

F am unable to specify in 1943, but nothing further was paid for royalty or compensation prior to the commencement of the first action. Discussions appear to have gone on between Mr. McLeod for TECO and Mr. Wickman or other representatives of T.M.M.C. in regard to compensation. It seems clear that, prior to the commencement of the first action, T.M.M.C. did not make any claim for compensation in respect of any period after Dec. 31, 1939, and, in the first action, TECO alleged a binding agreement for cancellation of the obligation to pay such

G compensation. The evidence as to what transpired is very sketchy. It is conveniently summarised by DEVLIN, J., in his judgment in the first action as follows:

H "The plaintiff has set up by way of defence to that that there was an agreement between him and Mr. Wickman made on behalf of their respective companies that compensation should be washed out altogether. The evidence which he has given about it is so vague that Mr. Beyfus has said that if the matter was left there he could hardly rely upon it. Mr. McLeod first stated that it was said by Mr. Wickman on Feb. 19, 1941, but Mr. Wickman was not in the country, he was in America on Feb. 19, 1941. Mr. McLeod then said that though he might have been mistaken about the date, at any rate it was said by Mr. Wickman on some occasion in 1943. All he could remember about it was that Mr. Wickman had said that compensation was washed out and all that was wanted was a flat ten per cent. royalty. He had no recollection really of the circumstances in which it was said, and he really accepted that he had no real recollection of the interview

I at all. Accordingly, the plaintiff had been forced to rely mainly upon the evidence of a Mr. Bateman, a witness called for the defendants, and Mr. Bateman's evidence was in these terms on day 5, p. 46, that on an occasion

in 1942 he heard Mr. Wickman say to Mr. McLeod when this topic was being discussed words to this effect—he cannot of course remember the precise words—‘I have already told you that you will not be charged compensation and you will get a new agreement in which we hope there will not be a quota’. That evidence, taken in conjunction with the evidence of the plaintiff, vague though it is, satisfies me that some agreement of some sort was made. When I use the word ‘agreement’ I am using it now in a very broad sense; I am not attempting to consider the question of whether it is an agreement that is binding in law. But it is quite plain that something was said by Mr. Wickman to these licensees, something which resulted in their not paying compensation, at any rate for the duration of the war, and I have no doubt that the sort of thing that was said—and indeed it is the best evidence the plaintiff could produce—is the sort of thing that Mr. Bateman heard said.”

On Sept. 21, 1944, T.M.M.C. submitted to TECO the draft of the proposed new agreement. It did not abolish quotas, but it provided for the distribution of any compensation payable by any of the licensees who exceeded their quotas amongst those licensees who failed to achieve their quota. TECO did not accept the proposed new agreement and, on Jan. 17, 1945, issued the writ in the first action claiming damages for fraud, or alternatively breach of warranty and damages for breaches of the contracts contained in the two deeds of Apr. 2, 1938. In formulating their claim for damages in para. 10 of the statement of claim, they alleged that they had paid as compensation £19,521 12s. 7d., and that thereafter it had been agreed that no sums should be payable in respect of compensation after Dec. 31, 1939. By para. 8 of their defence, T.M.M.C. denied any such agreement, and in the alternative relied on the Statute of Frauds. In the further alternative, they alleged that if (which was denied) any such agreement was made there was no consideration for it. By their counterclaim, they alleged breaches by TECO of their obligation to pay royalties and compensation, but stated that they did not desire to enforce payment of compensation in respect of deliveries after Dec. 31, 1939, but before the termination of hostilities.

It is to be observed that, neither in their statement of claim nor in their reply, did TECO allege any equitable bar to the enforcement of the relief claimed by T.M.M.C. in their counterclaim, though it must have been clear to TECO that T.M.M.C. were claiming to be entitled as from the termination of hostilities to enforce their strict legal rights under the two deeds of Apr. 2, 1938.

On Jan. 26, 1950, DEVLIN, J., dismissed TECO'S claim except in respect of a minor breach of the agreement of Apr. 2, 1938, for which he awarded nominal damages of 40s. That part of his decision is irrelevant to the matter now before your Lordships. As regards the counterclaim, he negatived the assistance of any agreement binding in law for the final termination of the payment of compensation. I have already read one passage of his judgment dealing with this point. He concluded his judgment on this point of the case by saying:

“The result is that I reject the view that there was any agreement that was intended to continue, which was to vary the original agreement. The agreement that was made was, in my view, one of two things. I do not think there was anything in it which could be said to limit its operation for the duration of the war, although that may have been the intention of the defendant company. But I think it fairly emerges, from the language which Mr. Wickman was heard to use, that it was intended to be a temporary modification pending the new agreement. Accordingly I think that when the new agreement was presented to Mr. McLeod and was rejected by him the temporary relief which he had been granted came to an end. I do not mean that it came at once to an end. It is obvious that it would be a reasonable provision that he should have some reasonable notice in order

A to make the necessary alterations. Compensation is now claimed from June, 1945, which is some nine months after the new agreement was presented to him, and I think that gives him sufficient time. If I should be wrong about that view then I should hold that it was a temporary arrangement which was made subject to the right of the defendant company to terminate by giving reasonable notice. I should regard the presentation of a new agreement in such circumstances as amounting to a reasonable notice. I do not think that in this type of case it is necessary that the notice should be express. The rule that protects a party in circumstances such as these is a broad rule of equity and justice. It is not thought right that a man who has indicated that he is not going to insist upon his strict rights as a result of which the other party has altered his position, should be able to turn round at a minute's notice and insist upon his rights, however inconvenient it may be to the party who thought he was temporarily relieved. Equity requires that he should give reasonable notice that he is going to resume his strict rights. But all that is necessary to comply with that broad rule of equity is that the notice should be such as to put an ordinary person clearly in mind that the other party is going to resume his strict rights. I think it is plain that when one man is served with a draft of a new agreement which shows that the compensation provisions are going to be set in force again he should understand from that that he must either accept the new agreement or return to the strict position under the old agreement."

No such arrangement had been pleaded and, had the judge thought that it afforded any defence to the counterclaim, he would, no doubt, have required. E TECO to amend their reply, but, on the view he formed of the matter, any equitable bar to the relief claimed by T.M.M.C. in their counterclaim had been removed before the counterclaim was delivered. In the result T.M.M.C. succeeded on their counterclaim.

TECO appealed to the Court of Appeal, who dismissed the appeal so far as their claim in the action was concerned, but they allowed it as far as that part of the counterclaim was concerned which dealt with compensation. The court, which consisted of SOMERVELL, L.J., SINGLETON, L.J. and myself, took a different view from that formed by DEVLIN, J., as to the result in equity of the conversation between Mr. McLeod and Mr. Wickman and of the conduct of T.M.M.C. in not claiming compensation after Dec. 31, 1939, at any time prior to the delivery of the counterclaim. ROMER, L.J., in the present action, has cited relevant passages from the judgments of SOMERVELL, L.J., and myself in the first action, and I will content myself with three short citations. The first from the judgment of SOMERVELL, L.J.:

"I think, against that background, the plaintiffs were entitled to an express notice if the old terms were to be enforced again according to their literal provisions. If you read the correspondence, the plaintiffs were objecting to the agreement; there was ample opportunity for the defendants to say: 'Well, you know, if you do not like this agreement we shall withdraw our terms of not collecting the thirty per cent. and you will be back on the letter of the old pre-war contract'. They not having done that, I do not think they can rely on anything until we come to the counterclaim. That plainly indicates the view that they were taking. I think the plaintiffs would be entitled to a reasonable time after that."

I say:

"I think that there was the plainest possible indication by the defendants that they did not intend for the time being to claim compensation, and that they conveyed that intimation in terms which amounted to an invitation to the plaintiffs to continue to conduct their business on the basis that until something was done, until notice was given, no compensation would be

demanded. Now, as my Lord has said, the direct evidence that the plaintiffs acted on that invitation may be somewhat scanty, but I respectfully agree with him in accepting the argument of Mr. Beyfus that the matter is really one of *res ipsa loquitur*, and I feel no doubt that the plaintiffs carried on their business during the war on the basis that the compensation would not be demanded until due intimation of the intention so to do was given."

Later, I say:

"I think the plaintiffs were entitled . . . to receive notice if the defendants were proposing to enforce a right of compensation which had been in suspense for five years or thereabouts. So far as I can see, nothing equivalent to such notice was given before, as I have said, the counterclaim was delivered, and in my opinion, therefore, compensation did not become payable until a reasonable time after delivery of the counterclaim."

It is, I think, plain from these judgments that, at that time, the Court of Appeal was of opinion that the counterclaim was a sufficient notice and that, after the lapse of a reasonable time to enable TECO to make the necessary adjustments in the conduct of their business, compensation would be payable without the necessity for further action by T.M.M.C. But our observations on that point must be regarded as obiter since once we came to the conclusion that (i) some positive action by T.M.M.C. determining the temporary arrangement was required and that a reasonable time must be allowed to enable TECO to adjust their position after that action had been taken before T.M.M.C. could enforce their strict legal rights, and (ii) as no such positive action had been taken before the delivery of the counterclaim, the counterclaim so far as compensation was claimed must necessarily fail. Reaching the conclusion that we did, we should, I think, have required TECO to amend their reply so as to raise the equitable defence which they had successfully advanced in their arguments. Unfortunately, we did not do so.

In the course of his judgment, SOMERVELL, L.J., had dropped the hint that nine months might be a reasonable time after which compensation would be payable and, on Sept. 11, 1950, T.M.M.C. issued the writ in the present action claiming compensation from Jan. 1, 1947. By para. 4 of their defence, TECO pleaded as follows:

"In or about March, 1943, and on an occasion prior thereto which [TECO] cannot now more particularly specify, [T.M.M.C.] agreed to forgo the payment of compensation by [TECO] until a reasonable time should elapse after the notice given by [T.M.M.C.] to [TECO] to resume such payment. No such notice has been given to [TECO]. Alternatively, if such notice has been given to [TECO], a reasonable time thereafter had not elapsed by Jan. 1, 1947, or by any date during the currency of the 1938 deeds."

They do not now allege that, if the counterclaim was a sufficient notice, the action was brought prematurely. In para. 6 and para. 7 of the defence, they allege in the alternative that cl. 5 of the agreement of Apr. 2, 1938, was invalid either (a) as being an unreasonable and unnecessary restraint of TECO's trade, or (b) as being a penalty not recoverable at law, or (c) as offending against s. 38 (1) (a) of the Patents and Designs Act, 1907.

On Nov. 16, 1953, PEARSON, J., rejected all these defences and gave the judgment for T.M.M.C., the effect of which I have already indicated. He dealt first with the allegation of unreasonable restraint of trade, and rejected it on the ground that the compensation clause did not contain any restraint of trade but that, even if it did, the provisions of the agreement and licence as a whole were reasonable both as between the parties and in relation to the public interest. He rejected the penalty argument because, as he found, no penalty

A was involved. He also held that cl. 5 did not infringe s. 38 of the Patents and Designs Act, 1907. I shall return to this subject later.

On the question of the sufficiency of the notice to determine the temporary arrangement, he summarised his conclusion as follows:

B “The result of these cases [*Hughes v. Metropolitan Ry. Co.* (1); *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2); *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (8)] in my opinion is that, where the rule of equity applies, the period of suspension comes to an end when it is in all the circumstances equitable that it should come to an end, and that is, normally at any rate, according to the circumstances, either at or within a reasonable time after the termination of the state of affairs which is the cause or basis of the suspension. It is not necessary that the person whose legal rights have been suspended should give a notice purporting to terminate the suspension, although of course it would be fair and reasonable and advisable for him to do so. In this case the state of affairs which was the cause or basis of the suspension would have been, according to the view taken in the court of first instance in the former action, the continuance of the negotiations for new licensing arrangements, but according to the view of the Court of Appeal the state of affairs was, I think, the attitude of T.M.M.C. in not requiring payment of the compensation for the time being. When that attitude was reversed, a reasonable time for resumption of compensation payments began to run. The making of the counterclaim in the first action clearly involved a reversal of the previous attitude, and therefore it started running a reasonable time for resumption of compensation payments.”

TECO appealed to the Court of Appeal, who allowed the appeal. ROMER, L.J., in whose judgment SOMERVELL, L.J., and BIRKETT, L.J., concurred, agreed with PEARSON, J., on the issues of unreasonable restraint of trade and penalty, and agreed provisionally with his conclusion on the issue arising under s. 38 of the Patents and Designs Act, 1907, but stated that he did not necessarily agree with all the reasoning on which that conclusion was founded. On the question of the issue as to sufficiency of the notice to terminate the temporary arrangement for suspension of compensation payment, the Court of Appeal differed from PEARSON, J., and, accordingly, reversed his order and entered judgment for TECO with costs.

G My Lords, ROMER, L.J., based his conclusion on the notice point mainly on the decision of the Privy Council in *Canadian Pacific Ry. Co. v. Regem* (4). He said ([1954] 2 All E.R. at p. 41):

H “In my opinion, although in many cases the equity, to which *Hughes v. Metropolitan Ry. Co.* (1) gave recognition and high authority, is satisfied by merely conforming to the terms in which LORD CAIRNS (and subsequently BOWEN, L.J.) formulated it, there are other cases where justice requires that the resumption of legal rights which have been suspended for a period must be preceded by a notification to the other party concerned specifying a fixed period of grace during which that party can put his house in order, and that in such cases a notification such as that will be a condition precedent to the valid re-assumption of the owner's legal rights. Such a case was *Canadian Pacific Ry. Co. v. Regem* (4).”

I I must, therefore, examine closely what were the facts and what was the reason for the decision in the case last cited. The Canadian Pacific Railway had erected poles carrying telegraph wires on the roadway of a Canadian government railway at various times ranging from 1888 to 1911. There were some negotiations between the parties as to parts of the telegraph line but at no time was any written agreement ever concluded. As to what was called the “main telegraph line”, there was correspondence, in the course of which a representative

of the Department of Justice of Canada wrote on Mar. 20, 1924, withdrawing offers which had been made for settling the dispute between the parties, and saying that wires and poles must be removed. The letter ended ([1931] A.C. at p. 423):

"No time has been fixed within which you must effect this removal, but unless you agree to act at once in the matter, a date will be fixed by the Department of Railways and Canals."

No such date was fixed nor were the wires and poles ever removed from any section of the telegraph line. Accordingly, in 1926, the Crown commenced proceedings against the Canadian Pacific Railway alleging trespass and claiming damages. The trial judge found that, as to the whole line, the telegraph poles were on the Crown land by the leave and licence of the Crown but that the licence was not irrevocable. He gave leave to apply for further directions. On appeal to the Supreme Court of Canada, that court found that the Canadian Pacific Railway were trespassers except as to a small section as to which they had an irrevocable licence. The Privy Council agreed with the trial judge that, as to the whole line, the Canadian Pacific Railway had a revocable licence, and held that it had not been determined before the commencement of the proceedings. The Board then proceeded to consider how that irrevocable licence could be determined. On the facts of the case, their Lordships were unable to find any foundation for the application of any equitable doctrine in favour of the Canadian Pacific Railway, nor were they able to see anything on which to found an estoppel ([1931] A.C. at p. 430). They went on to say (*ibid.*, at p. 432):

"Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation."

They then proceeded to examine the facts of the particular case, and came to the conclusion that it was (*ibid.*)

"... peculiarly a case in which grave injustice might ensue if the Crown were at liberty by the mere initiation of legal proceedings to determine summarily the rights of the appellant, and turn the appellant's occupancy into trespass. For the appellant is not the only one concerned; the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest."

They accordingly concluded that the case was one in which the licence could only be effectively ended after notice had been served on the Canadian Pacific Railway to determine the licence on such a specified date in the future, as would give the Canadian Pacific Railway an interval of time between the service of the notice and the specified date sufficient not only to allow the removal of the poles and wires but also to make arrangements for the continuance of the telegraph line on another site.

My Lords, I have, I think, sufficiently stated the circumstances to indicate the very considerable differences between this case and the case now before your Lordships. In the *Canadian Pacific Railway* case (4), the Crown had, at any rate as regards one section, expressly stated they would name a date by which the poles and wires must be removed. Moreover, a paramount public interest was involved. In these circumstances, I cannot see that the facts are so analogous that the decision can be safely taken as a sure guide in the present case.

The *Canadian Pacific Railway* case (4) was considered by the Court of Appeal in *Minister of Health v. Bellotti* (9), where LORD GREENE, M.R., said ([1944] 1 All E.R. at p. 242) that the only proposition of general application which he

A could extract from the *Canadian Pacific Railway* case (4) was to be found in the paragraph I have already cited, which reads ([1931] A.C. at p. 432):

“Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case.”

B With that observation of the then Master of the Rolls I respectfully agree.

Before I turn to the circumstances of the present case, I must observe that the *Canadian Pacific Railway* case (4) was not determined on equitable principles. Indeed, LORD RUSSELL OF KILLOWEN, in delivering the judgment of the Board, expressly pointed out that no equitable doctrine was involved. It is no doubt true, as counsel for TECO argued, that any condition or restriction affecting the power to determine a revocable licence which the law would imply would be one which equity would regard as reasonable, but before reaching a conclusion on the matter it seems desirable to look at the two cases relied on by the Court of Appeal in the first action as laying down the principles applicable to the case.

C In *Hughes v. Metropolitan Ry. Co.* (1), the respondents sought to recover possession of premises for breach of a lessee's covenant to repair within six months after notice calling on him to do so. That notice had been given on Oct. 22, 1874, but in December negotiations started between the parties for the purchase by the appellant of the respondents' interest. These did not break down until Dec. 31, 1874. On Apr. 28, 1875, the writ in the action was issued. The repairs were completed some time in June. The question arose whether, having regard to the negotiations, they had been completed within due time. It was held in this House that the negotiations had the effect of suspending the notice, and that the suspension did not cease to operate until Dec. 31, 1874. In the course of his judgment, LORD CAIRNS, L.C., stated the equitable principle involved in these words (2 App. Cas. at p. 448):

F “It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a court of equity, or any practice of a court of equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.”

G H In *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2), a similar question arose, and the Court of Appeal applied the principle as laid down by LORD CAIRNS in the passage I have quoted. After citing it, BOWEN, L.J., pointed out that it had nothing to do with forfeiture and went on (40 Ch.D. at p. 286):

I “It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied. I will not say it is not a principle that was recognised by courts of law as well as of equity. It is not necessary to consider how far it was always a principle of common law.”

Though he does not, in terms, say so, it is implicit in what he says that, to make the principle applicable, the party setting up the doctrine must show that he has acted on the belief induced by the other party, but this factor is of no importance in the instant case as it has been decided in the first action that the principle is applicable. Does this principle afford a defence to the claim in the present action ?

I have already stated the findings of the Court of Appeal in the first action as to the circumstances which brought the equity into operation. These findings necessarily involve that, in the present case, equity required T.M.M.C. to give some form of notice to TECO before compensation would become payable. But it has never been decided that in every case notice should be given before a temporary concession ceases to operate. It might, for instance, cease automatically on the occurrence of a particular event. Still less has any case decided that, where notice is necessary, it must take a particular form.

ROMER, L.J., seems to have taken the view that the counterclaim could not be a notice, because you cannot terminate an agreement by repudiating it. With all respect, the fallacy of this argument consists in treating the arrangement found to exist by the Court of Appeal in the first action as an agreement binding in law. It was not an agreement, it was a voluntary concession by T.M.M.C. which, for reasons of equity, the court held T.M.M.C. could not cease to allow without plain intimation to TECO of their intention so to do. The counterclaim seems to me a plain intimation of such change of intention operating as from June 1, 1945, and for the future. None the less, the intimation would fall short of what was required if it was the duty of T.M.M.C. to specify in the intimation the reasonable time which they would allow after receipt of the intimation to enable TECO to readjust their business to the altered conditions. I see no reason why equity should impose this burden on T.M.M.C. Having regard to the nature of the concession—a mere cessation of money payments—and to the fact that TECO were the only persons in a position to judge what time would reasonably be required to make such adjustments as were necessary, I think that TECO were sufficiently protected by the fact that, if T.M.M.C. commenced proceedings before what the court should determine to be a reasonable time, the action would fail. I agree, therefore, in substance with PEARSON, J., on this part of the case.

On the questions of unreasonable restraint of trade and penalty, I find myself in complete agreement with ROMER, L.J.,* and I do not desire to add anything to the reasons given by him and by your Lordships for rejecting these defences.

I turn, therefore, to the question whether cl. 5 of the agreement offends against s. 38 of the Patents and Designs Act, 1907. I had written some lengthy observations on this question, but since doing so I have had the opportunity of reading in print the observations of my noble and learned friend, LORD OAKSEY. I find myself so completely in agreement with him that I will add no reasons of my own for rejecting this defence.

For the reasons I have given, I would allow the appeal and restore the order of PEARSON, J.

Appeal allowed.

Solicitors: *Bristows, Cooke & Carpmal* (for the appellants, T.M.M.C.); *Hancock & Willis* (for the respondents, TECO).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* The following is the relevant portion of ROMER, L.J.'s judgment in the Court of Appeal, referred to in the opinions of VISCOUNT SIMONDS, at p. 662, ante, and LORD COHEN.

ROMER, L.J., on the points relied on by TECO that cl. 5 of the deed of April, 1938, (a) constituted an unlawful restraint of trade, and (b) imposed penalties from which the court could and should give relief, said: With regard to the first of these

A points, counsel did not contend that the compensation provisions operated as an unlawful restraint of trade during the life of the patents under which licences were granted to TECO, but said that they did so operate as and when the patents expired. He agreed, however, and rightly, that the relevant date for determining whether these provisions, and also the minimum prices clause, on which he also placed some reliance, were valid or invalid, was that on which the licence and deed were executed, or, possibly, June 1, 1937, when the heads of agreement were signed. For present purposes, it does not matter, I think, which of these two dates should be regarded as the right one.

B Counsel's argument was, in effect, that the compensation provisions were intended by Dr. Louis, an agent of Krupps, to be, and were, in fact, restrictive of TECO's productive activities, that this restriction was unreasonable as between the parties and that it was also against the public interest. That the main object of T.M.M.C., through Dr. Louis, in imposing the provisions for compensation or penalties, was to confine TECO to their allotted quota, rather than to increase the revenue of T.M.M.C. can, on the correspondence alone (and apart from the evidence which Dr. Louis gave in the first action and which we admitted only *de bene esse*) be scarcely open to doubt. It is not, however, the intention of parties who enter into a contract, but the language in which their intention is expressed, that is relevant for the purpose of determining whether the contract is in restraint of trade. I feel considerable doubt whether, if one takes the deed according to its tenor, it can fairly be said to be in restraint of trade at all. Nothing contained in it prevented TECO from selling or using as much "contract material" as they liked, and I find some difficulty in appreciating how a levy of the amount exacted in respect of excess material supplied from sources other than T.M.M.C. can be regarded as restraining TECO in their trade; and it did not, indeed, result in so restraining them on the facts as found by the learned judge.

D Be that as it may, I am satisfied that the restraint (if any) was perfectly reasonable as between the parties themselves at the time when, and in the circumstances in which, the heads of agreement and the deed were entered into. Mr. McLeod, a director of TECO, himself thought then that the compensation provisions would have very little effect on TECO or on their production, and only came to a different conclusion when he found E himself unable to shift the burden in the way that he had expected to do. Further, if TECO had, in fact, been guilty of the patent infringement with which they were charged by T.M.M.C., they would not only have had to pay what might have been enormous damages, but would have been, so far as those patents were concerned, put out of business altogether. Instead of this, T.M.M.C. waived such rights as they had against TECO as infringers, and an all-round arrangement was negotiated and concluded, under which TECO could not only continue to use the patents but became entitled, during the subsistence of the deed, to licences covering any improvement on, or modification of, the inventions which were the subjects of the patents; in other words they were, in a highly important respect, to share in the benefits of the research work of the Krupps F organisation.

In all these circumstances, it appears to me almost impossible to hold that one of the terms of the general arrangement which was arrived at between the parties was so unreasonable from the point of view of TECO as to justify the intervention of the court. VISCOUNT HALDANE, L.C., in *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* G ([1914] A.C. at p. 471) said:

"My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices."

H These observations appear to be of considerable relevance to the present case, and not least the concluding sentence which disposes of the point which counsel for TECO sought to make that T.M.M.C. were a more powerful concern than TECO and were, for that reason, and also because TECO, as infringers, were to some extent in mercy, in a superior bargaining position.

I If, then, the compensation provisions were, in the light of the agreed arrangement as a whole, reasonable as between the parties, as in my opinion they were, they can only be invalidated if they are shown to have been against the public interest and voidable, therefore, on grounds of public policy.

In delivering the judgment of the Privy Council in *A.-G. of the Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, LORD PARKER of WADDINGTON, after pointing

out that their Lordships were not aware of any case in which a restraint, though reasonable in the interests of the parties, had been held unenforceable because it involved some injury to the public, said ([1913] A.C. at p. 796):

"It is, however, in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one."

This statement of the law was cited with approval by LORD HALDANE in the *North Western Salt Co.* case ([1914] A.C. at p. 473), and the Lord Chancellor also pointed out in his speech in that case that an arrangement which is designed to keep up prices (as is suggested in relation to the minimum price provisions in the deed between T.M.M.C. and TECO) is not necessarily disadvantageous to the public, but, on the contrary, may operate to the public benefit.

TECO did not prove, in my judgment, that detriment would result to the public by reason of the price provisions; nor did they prove any other ground on which any part of this arrangement, reasonable as it was as between the parties themselves, should be set aside on grounds of public policy. There was no evidence, nor, indeed, any suggestion, of any sinister political motive, emanating from the German government or its agents, to injure this country by restricting TECO's production at a time when relations between the two powers were admittedly strained. I am quite unable to accept the suggestion that a provision, reasonable as between the parties, which restricts the trade of a British company such as TECO is *prima facie* against public policy, simply because it is imposed at the instance of a foreign business concern.

I am, accordingly, in agreement with the learned judge that no justification has been shown for impeaching the minimum price provisions on grounds of public policy. I would add that it is difficult to see how the arrangements embodied in the licence and deed could survive at all if these vital provisions were to be amputated from them; but on the view which I have expressed it is not necessary to examine this aspect of the matter further.

I can deal very shortly with the further submission of TECO that the compensation provisions should be regarded as penalties against which the court can, and should, give relief. Counsel for TECO conceded that the sums payable under these provisions were not penalties in the strict sense, in that TECO's liability to pay them was not consequent on any breach of contract on their part. He suggested, however, that the payments were sufficiently similar to penalties in character to attract the jurisdiction of the courts to grant relief. He also relied on the fact that Dr. Louis himself frequently referred to the compensation sums as "penalties". So he did, but a sum that is not a penalty in law does not become one because Dr. Louis misdescribed it as such. For my part, I cannot see any remote resemblance between these sums, which became payable in pursuance of TECO'S contractual obligations, and sums which are only payable on a breach of contractual obligations. This point, accordingly, in my opinion, also fails.

A THE STONEDALE NO. 1. RICHARD ABEL & SONS, LTD.
OWNERS OF DUMB BARGE STONEDALE NO. 1 v.
MANCHESTER SHIP CANAL CO., AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), May 23, 24, June 23, 1955.]

B *Shipping—Limitation of liability—Expenses of removing barge sunk in canal—Canal undertakers' statutory right of recovery—Barge sunk through improper navigation of owners' servants—No fault or privity in owners—Manchester Ship Canal Act, 1897 (60 & 61 Vict. c. cviii), s. 9—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1)—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), s. 1, s. 3—Manchester Ship Canal Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. cxxiv), s. 32 (2).*

A barge belonging to the appellants, while in tow in the Manchester Ship Canal, grounded and sank owing to the improper navigation of the appellants' servants, and became an obstruction to vessels navigating in the canal.

D The respondents, having raised the barge at the appellants' request, claimed to recover the expenses of this work under the Manchester Ship Canal Act, 1936, s. 32 (2). The appellants sought a declaration of limitation of their liability under (i) the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1 and s. 3, extending and applying the provisions of s. 503 of the Merchant Shipping Act, 1894*, and (ii) the Manchester Ship Canal Act, 1897, s. 9.†

E **Held:** (i) the appellants could not limit their liability under the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, since the only liability which a shipowner could limit under the Merchant Shipping Act, 1894, s. 503, and under the Act of 1900 was a liability to damages and the respondents, in making their claim under the Manchester Ship Canal Act, 1936, s. 32 (2), were exercising a statutory right to recover the expenses incurred as a debt.

The Millie ([1940] P. 1) approved.

G (ii) the appellants could not limit their liability under the Manchester Ship Canal Act, 1897, s. 9, because that section enabled liability in respect of "injury or damage" to a particular portion of the canal to be limited, but did not extend to the right of the respondents in the present case, viz., a right under the Manchester Ship Canal Act, 1936, s. 32 (2), to recover the expense of work done in raising the barge.

H Per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON concurring: the words "damage done by such vessel . . . to the harbour, dock, or pier" in s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, are confined to damage physically done to the harbour by the vessel, and *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)* ([1950] 2 All E.R. 414) is a decision of this House on the scope of s. 74 to this effect (see p. 694, letters C to E, post).

Decision of the COURT OF APPEAL ([1954] 2 All E.R. 170) affirmed.

I [**Editorial Note.** The sinking of a vessel in a canal may cause an obstruction and may cause physical injury to the canal. In the present case the respondents had a statutory right to recover expenses of raising the sunken vessel and thus of removing the obstruction. A right of action may lie, however, at common law for the cost of removing obstructions caused by negligence, or may lie under statute for damage done to the canal independently of negligence (see p. 693,

* The terms of these enactments are stated at p. 691, letter I, p. 692, letter C, post, respectively.

† The terms of this section are printed at p. 694, letter A, post.

letter A, post). The questions whether the statutory provisions for limitation of liability apply to claims to enforce these rights of action are left open.

As to statutory limitation of liability of shipowners, see 1 HALSBURY'S LAWS (3rd Edn.) 64, para. 126; 30 HALSBURY'S LAWS (2nd Edn.) 943-945, paras. 1305-1308; and for cases on the subject, see 41 DIGEST 920-922, 8104-8120.

For the Merchant Shipping Act, 1894, s. 503 (1), and for the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1 and s. 3, see 23 HALSBURY'S STATUTES (2nd Edn.) 656, 781, 782.]

Cases referred to:

- (1) *The Millie*, [1940] P. 1; 109 L.J.P. 17; 161 L.T. 280; 2nd Digest Supp.
- (2) *Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656; 92 J.P. 54; Digest Supp.
- (3) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403; 92 J.P. 18; Digest Supp.
- (4) *The Countess*, [1921] P. 279; *affd.* C.A., [1922] P. 41; 91 L.J.P. 161; 127 L.T. 313; *reversd.* H.L., sub nom. *Mersey Docks & Harbour Board v. Hay, The Countess*, [1923] A.C. 345, 390; 92 L.J.P. 65; 129 L.T. 325; 41 Digest 943, 8351.
- (5) *The Brabo*, [1947] 2 All E.R. 363; [1948] P. 33; *affd.* H.L., sub nom. *Tyne Improvement Comrs. v. Armement Anversois S/A (The Brabo)*, [1949] 1 All E.R. 294; [1949] A.C. 326; [1949] L.J.R. 435; 2nd Digest Supp.
- (6) *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)*, [1950] 2 All E.R. 414; [1951] A.C. 112; 2nd Digest Supp.
- (7) *The Chr. Knudsen*, [1932] P. 153; 101 L.J.P. 72; 148 L.T. 60; Digest Supp.

Appeal.

Appeal by the owners of the dumb barge Stonedale No. 1, Richard Abel & Sons, Ltd., from an order of the Court of Appeal dated Apr. 13, 1954, and reported [1954] 2 All E.R. 170, affirming an order of WILLMER, J., dated July 31, 1953, dismissing an action by the appellants for a declaration (inter alia) that they were not liable in respect of loss of, or damage to, vessels, goods, merchandise, property or rights of any kind arising out of the sinking of the Stonedale No. 1 in the Manchester Ship Canal on Feb. 14, 1952, beyond the aggregate of £8 per ton of the tonnage of the Stonedale No. 1 and of the Warrendale, the appellants' steam tug towing the Stonedale No. 1 at the time of the accident, i.e., a total sum of £1,681 2s. 6d. The facts appear in the opinion of VISCOUNT SIMONDS.

Kenneth Carpmal, Q.C., and *P. T. Bucknill* for the appellants.

J. V. Naisby, Q.C., and *H. E. G. Browning* for the respondents.

The House took time for consideration.

June 23. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on Feb. 14, 1952, the Stonedale No. 1 was in tow of the appellants' steam tug Warrendale in the Manchester Ship Canal, and in the course of the towage grounded in the vicinity of Hooton Wharf, sank, and became an obstruction in the fairway to vessels navigating therein. It is agreed that the sinking was caused by the improper navigation of the Stonedale No. 1 and of the Warrendale by the servants of the appellants, but without the actual fault or privity of the appellants. The appellants at once got into communication with the respondents, the Manchester Ship Canal Co., as a result of which the respondents undertook to raise the sunken vessel. I do not think it necessary to consider whether the effect of these communications was to create any contractual liability in the appellants, though the respondents rely on this if their other pleas fail.

The respondents, having at their own cost raised the ship, made a claim against the appellants for the expenses they had incurred amounting to

A £7,609 ls. 4d. This they claimed to be entitled to do under s. 32 of the Manchester Ship Canal Act, 1936, which, by sub-s. (1), provides that

B “Whenever any vessel is sunk stranded or abandoned in part of—(a) any river canal waterway navigable channel lock or dock forming part of the harbour and port of Manchester or of the undertaking . . . the company may if they think fit cause the vessel to be raised or removed . . . in such manner as to clear such river canal waterway navigable channel lock dock or area therefrom”

and by sub-s. (2):

C “The company may recover from the owner of any such vessel all expenses incurred by the company under this section in connection with that vessel . . . either summarily as a civil debt or as a debt in any court of competent jurisdiction. Provided always that the company may if they think fit and shall if so required by the owner of the vessel cause such vessel . . . to be sold in such manner as they think fit and out of the proceeds of the sale may . . . reimburse themselves for any such expenses and shall hold the surplus if any of those proceeds in trust for the persons entitled thereto and in case such proceeds shall be insufficient to reimburse the company such expenses the deficiency may be recovered by the company in manner aforesaid.”

E The appellants, faced by this claim which they were not prepared to admit, did not await the proceedings which the respondents might have commenced for recovery of the sum in question as a debt, but themselves commenced an action against the respondents in which the appellants claimed to limit their liability to the respondents and

“all persons claiming to have suffered loss or damage by reason of the sinking of the Stonedale No. 1 in the Manchester Ship Canal and the consequences thereof.”

F They founded their claim on the provisions of s. 1 and s. 3 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, or, alternatively, on those of s. 9 of the Manchester Ship Canal Act, 1897. If the claim is well founded, the amount for which the appellants would be liable, based on the combined tonnage of the Stonedale No. 1 and the Warrendale, is £1,681 2s. 6d. with some interest. The claim has been rejected by WILLMER, J., who felt constrained to follow a decision of LANGTON, J., in *The Millie* (1) ([1940] P. 1), though he clearly doubted its correctness, and by the Court of Appeal who, after a careful review of the relevant law, had no hesitation in affirming it. Your Lordships, I think, will be unanimous in taking the same view.

I will consider in turn the relevant provisions of the Merchant Shipping Acts and the Manchester Ship Canal Act, 1897.

H The Merchant Shipping (Liability of Shipowners and Others) Act, 1900, is entitled:

“An Act to amend the Merchant Shipping Act, 1894, with respect to the liability of shipowners and others,”

I and it is necessary to turn back to the Act of 1894. That Act, by Part 8, dealt with the subject of the liability of shipowners, and I pause to observe that the right of a shipowner to limit his liability forms no part of our common law but is entirely the creature of statute and must be found within its four corners. For our present purpose I need refer only to s. 503 which is, so far as is relevant, in these terms:

“(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) (a) Where any loss of life or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to

any goods, merchandise, or other things whatsoever on board the ship; (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts . . . ”

Then the amounts are set out and I need not recite them here.

My Lords, the vital words in this section to which, as it appears to me, insufficient regard was paid in the argument of the appellants, are “be liable to damages”. The relief given to shipowners is in respect of their liability to damages and nothing else.

Part 8 of the Act of 1894 has been from time to time amended, but the only material amendment is in the Act of 1900 to which I have referred. That Act, by s. 1, provided as follows:

“The limitation of the liability of the owners of any ship set by s. 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.”

Section 3, on which the appellants place some reliance, provided that the limitation of liability under the Act should relate to the whole of any losses and damages which might arise on any one distinct occasion, although such losses and damages might be sustained by more than one person, and should apply whether the liability arose at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act.

My Lords, undoubtedly the Act of 1900 provided a large extension of the relief given to shipowners by the Act of 1894 but, until I heard it argued, I did not think it arguable that the relief extended so far as to enable shipowners to limit their liability except where their liability lay in damages. Nor has the argument of counsel convinced me to the contrary. The Act of 1900 is, as I have pointed out, an amending Act and its effect is to introduce into the body of s. 503 of the earlier Act a new subject-matter, as it were a new para. (e) after paras. (a) to (d), in respect of which the shipowner shall not “be liable to damages beyond the following amounts”. Nor does s. 3 of the Act of 1900 carry the matter any further, for its reference to the “liability under this Act” and to the “liability” arising at common law or under any Act of Parliament can only look back to s. 1 and to the Act of 1894. The only liability which the shipowner can limit is a liability to damages.

I return then to s. 32 of the Manchester Ship Canal Act, 1936, and at once ask the pertinent question whether the respondents, in making their claim for the expenses incurred in raising the sunken vessel and, if necessary, proceeding in a court of competent jurisdiction for recovery of that sum as a debt, seek to make the appellants liable to damages. It appears to me plain that they do not. Your Lordships were pressed by the argument that the Manchester Ship Canal Act should not be construed as taking away from shipowners a right conferred by a public Act. In my opinion, no such question arises. The Merchant Shipping Acts relate to limitation of liability to damages; the Manchester Ship Canal Act confers a statutory right on the company to raise a sunken vessel, and to recover the expenses of raising her from the owner as a debt. The one does not derogate from the other, and your Lordships are not called on to resolve any conflict between the provisions of a public Act and a local or private Act.

So far, my Lords, this seems to me a very plain case, but, before I come to the alternative plea which is based on s. 9 of the Manchester Ship Canal Act,

A 1897, I must notice an argument which has been urged on behalf of the appellants.

My Lords, it has been decided, and for the purposes of this case I will assume that it has been correctly decided, that, where through negligence on the part of the owners a vessel has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, that authority has, in addition to any statutory rights it may have, a common law right to recover

B against the owners, as damages, the reasonable cost of removing the obstruction: see *Dee Conservancy Board v. McConnell* (2) ([1928] 2 K.B. 159). This decision was not called to the attention of LANGTON, J., when he heard *The Millie* (1), and it has been suggested that, had that learned judge been aware of it, he might have come to a different conclusion. I do not see why he should. It may have to be decided some day whether a shipowner faced with such a common law

C claim can successfully limit his liability in respect of it under the Act of 1900; but it appears to me that this affords no argument for saying that a shipowner has a similar right in respect of a claim which is not a common law claim for damages for negligence, but is a claim wholly independent of negligence and founded solely on statute. It may be said that it is anomalous that in the one case relief should be given to shipowners, in the other not; but the existence of

D an anomaly is no reason for giving to a section of an Act of Parliament a meaning which it cannot properly bear. There are, indeed, anomalies enough in this branch of the law: for instance, it may be regarded as an anomaly that, under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, the owner of a vessel is answerable for damage done by her to a dock though there has been no negligence whatever: see *The Mostyn* (3) ([1928] A.C. 57). It may, perhaps, be

E thought an anomaly that, under the very Act we are here considering, the statutory right under s. 32 arises irrespective of any negligence on the part of the owner or his servants. It would be an even greater anomaly if, when the respondents had exercised their statutory right and claimed against the appellants, the latter could limit their liability if they had been negligent, but could not do so if they had not been negligent. In considering this section and its

F implications, my mind has been powerfully affected by that part of the judgment of JENKINS, L.J. ([1954] 2 All E.R. at p. 184, letters A, B), in which he deals with the provision by which the owner is given an option to do the necessary work at his own expense. I respectfully agree with him in thinking that, for the reasons that he gives, limitation is excluded by necessary implication owing to the absurd results which would ensue, and I do not think he goes too far in saying

G that an alternative, which might enable the owner to recover a valuable vessel at the expense of the company to the extent of the difference between the full and limited cost of raising it, should be rejected as repugnant to justice and common sense (see [1954] 2 All E.R. at p. 185, letter H). But, having said so much about anomalies, I think it right to repeat that I found my opinion that the appellants have no right of limitation on the plain words of the statutes.

H This matter has come before this House for argument for the first time in this appeal. But it is not, I think, of negligible importance that, in *The Countess* (4), it was in every court assumed that no question of limitation arose in regard to the expenses of raising a sunken vessel by the Mersey Docks and Harbour Board: see [1921] P. 279, [1922] P. 41, [1923] A.C. 345. There may, as counsel suggested, have been good reasons for not raising the question; but it does not

I appear to have been raised at any time in the half century and more that has elapsed since the Act of 1900 became law except in *The Millie* (1), in which it was rejected. Your Lordships will at least be satisfied that, in rejecting the claim again, you will not be departing from a long course of practice or running counter to an established doctrine, and may derive some support from the opinion of the late SCOTT, L.J., which appears in the report of *The Brabo* (5) ([1947] 2 All E.R. at p. 370). The passage does not occur in the official report of the case in [1948] P. 33, no doubt because it was only a dictum which was

appended by the learned lord justice to a judgment which was, on the face of it, the judgment of the court.

It remains to consider the alternative plea founded on s. 9 of the Manchester Ship Canal Act, 1897, which is as follows:

"The owners of any vessel or any share in such vessel which without actual fault or privity of the owners shall cause any injury or damage to the portion of the canal extending from the entrance at Eastham (including that entrance) up to the westerly end of the pier at the Mode Wheel Locks or to the banks locks or works comprised in such portion shall not be liable in respect of such injury or damage to an amount exceeding £8 for every registered ton of such vessel."

My Lords, in *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)* (6) ([1950] 2 All E.R. 414) the House had to consider s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, the relevant words for this purpose being

"damage done by such vessel . . . to the harbour, dock, or pier", and concluded that the damage was confined to that physically done to the harbour by the stranding of the vessel. Thus, LORD NORMAND ([1950] 2 All E.R. at p. 435) confined it to "physical damage to the opera manufacta of the undertaking", and in these words my noble and learned friend, LORD MORTON OF HENBYTON concurred (*ibid.*, at p. 439), while LORD RADCLIFFE said (*ibid.*, at p. 443):

"I only wish to make it plain that, in my view, the section is confined to damage, not damages. I think that it covers no more than the actual physical damage which a vessel may do to the works which constitute the harbour, dock or pier."

I do not think that these words were, as suggested by counsel, obiter. I think they constitute a decision of this House on the scope of s. 74 of the Act of 1847. It is true that that section differs from s. 9 of the Manchester Ship Canal Act, 1897, in that, in the latter section but not in the former, the word "damage" is preceded by the words "injury or". But I do not think that these words make any real difference. Nor, apart from the authority of the *Workington Harbour* case (6), should I have any doubt about the scope and effect of the section that we have to consider. The whole context points to physical damage to physical things. I do not understand what otherwise is meant by injury or damage to a portion of a canal. It is clearly something widely different from a loss suffered by undertakers in respect of their undertaking in consequence of such damage.

In an argument which was not the less cogent for being short, counsel for the appellants called attention to *The Chr. Knudsen* (7) ([1932] P. 153). In that case, the plaintiffs, as owners of a dock, brought an action in rem against the owners of a foreign vessel to recover the expenses incurred in relation to a barge which was sunk in their harbour, as they alleged, by the negligence of the defendants. The defendants moved to set aside the service of the writ on the ground that the claim was not for

"damage done by a ship within the meaning of s. 22 (1) (a) (iv) of the Supreme Court of Judicature (Consolidation) Act, 1925."

BATESON, J., had no difficulty in determining that the claim of the plaintiffs was for damage done by a ship. I do not think that this decision is of any assistance to the appellants. It is customary to personify the ship and to say that a ship does the damage, as, in fact, physically it does. But that would not, I think, justify your Lordships in saying that "injury or damage to a portion of a canal" are apt words to cover the loss incurred by undertakers in respect of their undertaking.

In my opinion, the appellants' pleas alike under s. 9 of the Manchester Ship Canal Act, 1897, and s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, fail and this appeal should be dismissed with costs.

A **LORD MORTON OF HENRYTON** : My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack.

B **LORD TUCKER** : My Lords, in so far as the appellants' claim is based on s. 1 and s. 3 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, it is governed by the decision of **LANGTON, J.**, in *The Millie* (1). For the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this decision should be upheld, though I am not sure that **LANGTON, J.**, arrived at his decision for quite the same reasons. I do not desire to add any observations on this part of the case.

C With regard to the alternative claim under s. 9 of the Manchester Ship Canal Act, 1897, I think that it fails for substantially the same reason as the claim under the Merchant Shipping Act. The liability envisaged under this section seems to me to be a liability incurred at common law or by statute in respect of injury or damage to the specified portion of the canal, or to the banks, locks or works comprised therein. It is the injury or damage which gives rise to the liability. Under s. 32 of the Manchester Ship Canal Act, 1936, however, the right to recover as a debt the expenses of raising a sunken vessel is given irrespective of any liability based on injury or damage. It is a different cause of action altogether. Assuming, therefore, that a sunken barge lying on the bed of the canal thereby causes physical injury or damage to the canal, and that an action in respect of such injury or damage might be subject to s. 9, none the less the right to recover the expenses of raising the barge conferred by s. 32 of the Act of 1936 remains unimpaired.

E I would prefer to base my rejection of the appellants' claim under s. 9 on the above ground rather than on the ground that no physical injury or damage to the canal can result from the presence of the sunken barge. I do not for a moment question the correctness of the view that the injury or damage referred to in the section means physical injury or damage, and does not cover consequential loss suffered by the undertakers in respect of their undertaking, as distinct from the cost of remedying the actual physical injury or damage.

F I do not think there is anything in the decision of this House in *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)* (6), which binds me to hold that the presence of this sunken barge lying on the bed of the canal cannot constitute injury or damage to the canal. I would, therefore, have preferred to keep this question open.

G For these reasons, I would dismiss the appeal.

LORD KEITH OF AVONHOLM : My Lords, I concur. I do not find it necessary to arrive at any conclusion on whether obstruction caused by the sinking of a vessel may be physical injury or damage to the canal under s. 9 of the Manchester Ship Canal Act, 1897.

H **LORD SOMERVELL OF HARROW** : My Lords, I agree. On the claim under s. 9 of the Manchester Ship Canal Act, 1897, I am content to base my conclusion on the ground stated by my noble and learned friend, **LORD TUCKER**, leaving open the question whether there was any "injury or damage" to the canal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.*, agents for *Batesons & Co.*, Liverpool (for the appellants); *Hill, Dickinson & Co.* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

COBB v. COBB.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), June 7, 8, 1955.]

Husband and Wife—Title to property—Matrimonial home—Both parties contributing to purchase—Husband alone making mortgage repayments—Court order for sale with vacant possession—Sale inappropriate when matrimonial proceedings pending—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

In 1950 a married couple bought a house for their matrimonial home, the husband contributing £170 and £60 legal costs and the wife, a school teacher, £230, towards the total cost of £1,760 of which £1,300 was borrowed. The house was conveyed to the husband and wife as joint tenants and by a mortgage of the same date they both assumed responsibility for repayment of the £1,300, but the mortgage repayments of £3 weekly were by arrangement between them to be made by the husband out of his wages. The husband made no housekeeping allowance to the wife but paid some of the household bills, and the wife paid other household expenses and bought furniture and replaced linen, crockery, etc. It was found as a fact that the intention of the parties at the time of the purchase was that they should own the house in equal shares and that the husband should pay off the mortgage by deduction from his wages. On June 22, 1954, the wife presented a petition for divorce, which was subsequently amended so as to claim only judicial separation. In September, 1954, the husband made an application to the county court judge for an order under s. 17 of the Married Women's Property Act, 1882, that the house belonged to him and that the wife should do everything necessary to vest it in his name. At the time of the hearing £651 had been paid off the mortgage, leaving £649 outstanding, and both parties were still living in the house. The judge decided that the house should be sold with vacant possession, and that the proceeds of sale subject to paying off the mortgage and paying a sum of £300 (viz., the sum of £230+£70 in respect of subsequent contributions to the home) to the wife belonged to the husband. On appeal,

Held: (i) in accordance with the original intention of the parties at the time of the purchase of the house they were entitled beneficially to the proceeds of sale in equal shares (*Rimmer v. Rimmer* ([1952] 2 All E.R. 863) applied); and as from the date when the marriage broke down, which was taken as June 22, 1954, both parties were liable as between themselves in equal shares for sums payable under the mortgage.

(ii) as the wife was a co-owner, and might be the innocent party, in which case the husband would be under a duty to provide her with a roof over her head, an order for sale of the house with vacant possession ought not to be made at the present time but the question could well be considered by the matrimonial court when dealing with alimony or maintenance.

Per ROMER, L.J.: Where original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot under s. 17 of the Married Women's Property Act, 1882, vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair (see p. 700, letter G, post).

[**Editorial Note.** As is indicated by ROMER, L.J., at p. 700, letter G, post, in disputes regarding the ownership of property between husband and wife there is often very little material before the court to guide them in reaching their conclusion. Where the interests concerned are equitable, as were the beneficial interests in the proceeds of sale of the house in the present case, recourse

- A may be had to the principle that equality is equity; indeed it has been said that the highest equity is to make an equality between parties standing in the same relation, though this cannot be done contrary to the plain meaning of a deed (see 13 HALSBURY'S LAWS (2nd Edn.) 84, 85). If, therefore, parties wish to ensure that beneficial interests shall belong between them in particular proportions, it may be expedient that a deed contemporary to the transaction of purchase should declare what the proportions are.

- B As to summary proceedings between husband and wife as to property, see 16 HALSBURY'S LAWS (2nd Edn.) 740, para. 1211; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, 2119-2133.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

- C Cases referred to:

- (1) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.
- (2) *Re Rogers' Question*, [1948] 1 All E.R. 328; 27 Digest (Repl.) 264, 2130.
- (3) *Bull v. Bull*, [1955] 1 All E.R. 253; [1955] 1 Q.B. 234.
- (4) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 27 Digest (Repl.) 647, 6101.

D

Appeal.

Following a quarrel between the parties, the husband applied to the county court for an order under s. 17 of the Married Women's Property Act, 1882, that a house which they had purchased jointly as the matrimonial home belonged to him and that the wife should do everything necessary to vest it in his name. On Mar. 22, 1955, His Honour JUDGE LAWSON CAMPBELL, sitting at Wisbech County Court, made an order in which he treated the house as belonging to the husband, subject to a charge in favour of the wife in respect of the contributions which she had made to its acquisition (viz., £230 initially and a further sum of £70 in respect of her subsequent contributions to the home), and ordered the house to be sold with vacant possession, the proceeds to be dealt with accordingly. The wife appealed. The facts appear in the first judgment.

F

N. Leron for the wife.

M. P. Picard for the husband.

- DENNING, L.J.: The parties married in 1936. The husband is a commercial buyer earning £7 a week and a bonus over and above it. The wife is a school teacher earning over £5 a week. On Sept. 14, 1950, they bought a house, No. 114A Osborne Road, Wisbech, intending it to be their matrimonial home. The purchase price was £1,700 plus legal costs of £60, making £1,760 altogether. In order to meet this sum the husband and the wife each paid in cash £230, making together £460, leaving £1,300 outstanding. They borrowed the remaining £1,300 from the husband's employers on mortgage at four per cent. interest. The advance was made to the husband and wife jointly and they both made themselves responsible for the mortgage, which was repayable at the rate of £3 a week. The husband made arrangements with his employers for the £3 a week to be deducted each week from his wage. The husband made no housekeeping allowance to his wife but he paid some of the household bills. The wife also paid some of the household expenses and bought furniture, replaced linen, crockery, and so forth.

I

The county court judge has found that, at the time when the house was bought, it was the intention of the parties that they should own the property in equal shares and that the husband should pay off the mortgage by deductions from his wages.

In the middle of 1954 the parties fell out, but they have remained living in the same house ever since. On June 22, 1954, the wife launched a petition for divorce on the ground of her husband's adultery and cruelty. Her petition has

been since amended so as to claim only a judicial separation and not a divorce. A The husband is defending the case, but he has made no cross-charges against his wife. The case has not been heard yet but has been certified as fit for a speedy trial.

One of the differences between the parties was because the wife's parents came to the house on Apr. 16, 1954, and stayed for some months. The husband was so annoyed about this that he went to solicitors to get them out. Before B the application was actually issued, however, the parents left on Sept. 7, 1954.

On Sept. 9, 1954, the husband made an application to the county court judge under s. 17 of the Married Women's Property Act, 1882, in which he asked for an order that the house belonged to him, and that the wife should do everything necessary to vest it in his name and that the wife should join in evicting her parents. As the parents had already gone, the last part of the application was not pursued, but the husband went on with the claim that the house was his. C

The case was heard on Mar. 22, 1955. At that time £651 had been paid off the mortgage, leaving £649 still outstanding. It was agreed that the house was of approximately the same value as when it was bought, namely, £1,700. In the result, the judge treated the house as belonging to the husband, subject to a charge in favour of the wife for the money which she had contributed. He D made an order that the house was to be sold with vacant possession and that the proceeds were to be applied in this way: first, in payment off of the balance due on the mortgage; second, in paying £300 to the wife, and thirdly that the balance should be paid to the husband. The wife now appeals to this court.

Under s. 17 of the Act, the court can, on application, decide questions as to the title to or possession of property as between husband and wife. The first question in this case is, To whom does the house belong? The law in cases of this kind E was considered by this court quite recently in *Rimmer v. Rimmer* (1) ([1952] 2 All E.R. 863). I would like to repeat what I said there (*ibid.*, at p. 868):

"In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention; see *Re Rogers' Question* (2), but when it is not clear to whom the F beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity."

I would only add that, in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing G provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. H The legal title is in them both jointly, and the beneficial interest is in them both as equitable tenants in common in equal shares. They hold the house as trustees on the statutory trusts for sale. Until the place is sold, each of them is entitled concurrently with the other to the possession of the house and to the use and enjoyment of it in a proper manner, and neither of them is entitled to turn out the other. The house cannot be sold with vacant possession unless I both consent to it. If one of them unreasonably refuses his or her consent, the other can go to the court and ask for an order for sale, and in aid of a sale the court can order vacant possession to be given; but the court would only make such an order if the court were satisfied that it was right and proper to do so and on such terms as the court thought fit to impose (see the recent case in this court of *Bull v. Bull* (3), [1955] 1 All E.R. 253, and compare *Smith v. Smith* (4), [1945] 1 All E.R. 584).

- A The second question is whether the judge was right in ordering, as he did in this case, a sale with vacant possession, and in aid of it that the wife should be evicted. I do not think so. Apart altogether from the fact that she was co-owner of the house with him, she is his wife. It may be that she is an entirely innocent party; if so, his duty as a husband is to provide a roof over her head, and it would not be right for her to be turned out into the street. As co-owner
- B she is in an even stronger position; she cannot be turned out unless the court thinks it right to order a sale, and this is neither the time nor the occasion for such an order. The matter can best be considered by the matrimonial court when it comes to deal with alimony or maintenance. That court could, on proper application being made, order a sale, but might think it right to let the wife stay in the house with a reduction in the maintenance which would otherwise
- C be payable by the husband.

There remains, however, the difficult question about the sum of £649 which remains outstanding on mortgage repayable at £3 a week. If the house were to be sold, there can be little doubt that this £649 would have to be paid out of the proceeds of sale, and the balance would be divided equally between husband and wife. If the house is not sold, what is to happen to the £3 a week?

- D If the marriage had never broken down and the married life had continued as the parties contemplated, the husband would have paid the £3 a week until the mortgage was paid off, and then the house unencumbered would have belonged to them in equal shares. But a fundamentally different situation has emerged which they did not anticipate and for which they have not provided. The marriage has broken down. The wife no longer performs wifely duties for the husband. In those circumstances, the court must do what is just and reasonable between the parties. They are both liable to the mortgagees for the repayment of the mortgage and, as between the two of them, I think the only reasonable and fair thing is that, as from the time the marriage broke down, each should pay one-half of the outstanding repayments due on the mortgage until the house is sold. We may take it that the marriage broke
- E down on June 22, 1954, when the wife launched her petition. ROMER, L.J., has framed a form of declaration stating the rights of the parties. I have had the benefit of seeing it, and I agree with the form of declaration which he will in due course propose. I think the appeal should be allowed accordingly.

- BIRKETT, L.J.: I entirely agree with the judgment just delivered by my Lord. I feel that I can add nothing to his statement of the law applicable, and, therefore, although we are differing from the view taken by the learned county court judge, that no useful purpose would be served by adding a judgment of my own. On the two major points argued, the rights to the house and the question of sale, I hold very clear views which have been expressed by my Lord. I, too, agree with the declaration framed by ROMER, L.J. The
- G result is that the appeal should be allowed.

- H ROMER, L.J.: I also agree. In cases of this kind one usually has no direct evidence of intention in relation to the ownership of the matrimonial home because the parties to the marriage very seldom form one when they buy it; and the court has to attribute an intention from the course of conduct of husband and wife (including their respective contributions towards the
- I purchase price) at the time when the home was purchased and subsequently. In the present case, the judge has made certain findings as to the intention of the husband and the wife when they bought their present house in 1950, and it seems to me that the rights of the parties in respect of the house have to be determined in the light of those findings. The findings at which the learned judge arrived were expressed by him as follows:

"The parties were married in 1936 and in 1950 the house was conveyed to them as joint tenants; the purchase price was £1,700, and of the deposit

of £400, £230 was paid by the wife and £170 by the husband, who also made himself liable for the legal costs, about £60 . . . It was quite clear at that time the parties contributed in equal shares, and it was the intention of the parties that they should own the property in equal shares. But that was only part of the story. £1,300 was raised on mortgage and the arrangement was that £3 a week should be deducted from the husband's wages and should be put towards the payment of the mortgage. This position continued until the parties fell out, by which time the husband had paid almost half the mortgage. Interest does not affect the position. Question I have to decide is: Who owns what right in the house. Mr. Sessions argues that the parties are joint tenants and own in equal shares, but this does not conclude the matter—*Rimmer v. Rimmer* (1), the dictum the Master of the Rolls read out. The intention was that the husband should wipe off the mortgage, he has done this and I attach considerable importance to that in deciding to what share each party was entitled and the contribution to household expenses."

For myself I was rather puzzled by what the learned judge meant by the second of those findings. I thought he was perhaps intending to say that the second intention, viz., as to the husband "wiping off" the mortgage, was arrived at subsequently to the original arrangement as to equal ownership and as a variation thereof. But, as the original intention, as the judge said, was formed at the time of the conveyance, and as the date of the mortgage was the same as that of the conveyance, it seems to me that the judge was holding that there was only one composite intention, namely, that the husband and wife should own the property in equal shares, and that the husband as between the two of them should assume responsibility for the mortgage payment of £3 a week. Counsel for the husband was content to deal with the case on that footing, but submitted that the court had power under s. 17 of the Married Women's Property Act, 1882, to establish a title to property contrary to the intention of the parties and that it should do so in the present case because the husband contributed so much more towards paying off the mortgage than the wife did. There are two answers to that. The first is that, although the husband's contributions did in fact considerably exceed those of the wife, the payments which he made were precisely those which were originally contemplated and agreed that he should make and no more. The second is that I know of no power that the court has under s. 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s. 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair. On the judge's findings, then, both husband and wife were to have an equal beneficial interest (as they had a joint legal interest) in what they intended to be the matrimonial home. The payments under the mortgage deed amounted to some £3 a week, which the husband promised to pay and which he did pay. For her part, the wife agreed to make certain contributions out of her own money towards the upkeep of the home in various ways. This arrangement was never subsequently varied and it therefore seems to me to be clear that the wife never changed from her original position as part owner of the house to that merely of secured creditor for the £230 which she contributed when the house was purchased. Nevertheless, she has been treated, in effect, as a creditor in the order which the learned judge made, and I am unable to accept the view that that was her position when the marriage broke down, or is her position now. In my opinion, the facts as found by the judge lead directly to the conclusion that she has at all material times been, and is now, entitled to an equal half

A share in the property, and not merely to repayment of the £230, plus the £70 which the judge thought right in all the circumstances to regard as the value of her subsequent contributions to the home. The property is now held by the husband and wife as trustees on trust for sale with power to postpone (see s. 36 of the Law of Property Act, 1925). If and when a sale is effected, either by agreement or by an order under s. 30 of the Law of Property Act, 1925, or by an order made under the divorce jurisdiction, it would not be right that the whole of the outstanding mortgage money, amounting to over £600, should come out of the husband's share of the proceeds of sale in exoneration of the wife's share. The wife is no longer making any contribution to the expenses of the joint home, for there is no longer a joint home, and it is right, therefore, that she should bear one-half of the principal and interest payable under the mortgage deed. I would accordingly suggest an order made in the following form:

"Discharge the order of the learned judge and declare, that subject to the legal charge dated Sept. 14, 1950 (naming the parties thereto), the applicant and the respondent are beneficially entitled in equal shares to 114A Osborne Road, Wisbech, and to the proceeds of sale thereof when sold; and declare that as from June 22, 1954, the applicant and the respondent have been and are liable as between themselves in equal shares for all sums payable under the said legal charge in respect of the principal moneys and interest thereby secured."

DENNING, L.J.: Payments made by the husband under the mortgage since June 22, 1954, will be adjusted, but we take that date as the date when the marriage broke down. From that date the payments on the mortgage are to be borne equally. No order for a sale will be made. That matter must be left over until the proceedings in the Divorce Court and they should be brought on speedily.

Appeal allowed.

Solicitors: *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the wife); *Metcalfe, Copeman & Pettefar* (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

TRATHAN v. TRATHAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), May 12, 13, 1955.]

Justices—Husband and wife—Jurisdiction—Maintenance order in favour of wife—Complaint by wife to increase amount of order—Application by husband for discharge of order after wife's desertion—No complaint by husband—Complaint necessary for application for discharge of order—Discharge of order—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 43, s. 45 (2).

On Nov. 11, 1954, the justices found that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and the child, and ordered the husband to pay her £2 10s. per week. Subsequently the wife applied by complaint for an increase in the amount payable under the order on the ground that she was no longer in employment. At the hearing of this complaint the husband gave evidence to the effect that the wife had deserted him since the making of the order, and that therefore the order should be discharged. The justices found against the husband and increased the maintenance.

Held: on a complaint by the wife for an increase in the amount of the order, the justices had no jurisdiction, in the absence of any complaint laid by the husband to discharge the order, to consider any application by the

husband for the discharge of that order and should not have considered that matter, although they were entitled to consider the conduct of the parties when deciding whether or not to vary the amount.

Rigby v. Rigby ([1944] 1 All E.R. 336) and *Wharton v. Wharton* ([1952] 2 All E.R. 939, n) applied.

Appeal allowed in part.

[**Editorial Note.** There is considerable authority concerning the need for an information on which to found jurisdiction of justices to convict of an offence; see the cases collected in 33 DIGEST 320, 348 et seq. The present case shows the need for a complaint to found jurisdiction of justices to discharge an order for maintenance in a matrimonial cause. The Magistrates' Courts Rules, 1952, r. 4 (13 HALSBURY'S STATUTORY INSTRUMENTS 40) do not require a complaint to be necessarily in writing, although it is contemplated that the complaint is normally a written document, and there are specific provisions which make writing necessary in certain cases (e.g., s. 92 (1) of the Magistrates' Courts Act, 1952). In the present case the order for discharge which the husband sought was an order for which s. 7 of the Summary Jurisdiction (Married Women) Act, 1895 (11 HALSBURY'S STATUTES (2nd Edn.) 852) required cause to be shown "upon fresh evidence", and that requirement did not apply to the order for variation for which the wife had applied (see p. 706, letter H, post).

As to civil proceedings before justices being begun by complaint, see 21 HALSBURY'S LAWS (2nd Edn.) 594, para. 1040.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.

For the Money Payments (Justices Procedure) Act, 1935, s. 9, see 14 HALSBURY'S STATUTES (2nd Edn.) 985.

For the Magistrates' Courts Act, 1952, s. 43, s. 45 (2), see 32 HALSBURY'S STATUTES (2nd Edn.) 456, 458.

For the Magistrates' Courts Rules, 1952, r. 4, r. 75 (2), see 13 HALSBURY'S STATUTORY INSTRUMENTS 40, 73.

For the Magistrates' Courts (Forms) Rules, 1952, schedule, see 13 HALSBURY'S STATUTORY INSTRUMENTS 77-80.]

Cases referred to:

(1) *Rigby v. Rigby*, [1944] 1 All E.R. 336; [1944] P. 33; 113 L.J.P. 33; 170 L.T. 254; 27 Digest (Repl.) 733, 7000.

(2) *Wharton v. Wharton*, [1952] 2 All E.R. 939, n.; 116 J.P. 604; 3rd Digest Supp.

Appeal.

The husband appealed against an order of the Reigate justices dated Jan. 6, 1955. On Nov. 11, 1954, the justices dismissed the wife's complaint that the husband had deserted her, but found that he had been guilty of wilful neglect to provide reasonable maintenance for her and the child of the marriage; and they ordered the husband to pay to the wife the sum of £1 per week for herself and £1 10s. per week for the child. On Jan. 6, 1955, the justices heard a complaint by the wife that the order dated Nov. 11, 1954, be varied by an order increasing the amount payable to her on the ground that she was no longer in employment. At the hearing the husband alleged that he had made a bona fide offer to resume cohabitation which the wife had refused, and that, accordingly, the order should be discharged. The justices found that the husband had not made a genuine offer and ordered that he should pay a further £1 per week, being an increase of 10s. for herself and of 10s. for the child; the total maintenance for the wife, therefore, being £1 10s. per week and for the child £2 per week. The husband appealed.

D. J. C. Ackner and *E. H. Laughton-Scott* for the husband.

P. T. S. Boydell for the wife.

- A LORD MERRIMAN, P. :** The original order was for the payment of £1 for the benefit of the wife and £1 10s. for the benefit of the child. The justices have increased it to £1 10s. in respect of the wife and by 10s. in respect of the child, bringing the maintenance in respect of the child to £2. That fact has only to be stated to show that they have gone wrong, and it is not suggested that there is any answer to the appeal in that respect, for, though the wife's own maintenance is well within the statutory limit*, the maintenance in respect of the child, of whom she was given custody, has been increased to a sum which is 10s. more than the justices have power to award. The question is whether, in the circumstances of the present case, we can and should substitute for that form of increase another form which, with one exception, would arrive at precisely the same result, namely, that the whole of the extra £1 should be put on to the sum payable for the wife's own maintenance. The exception is that there would be an automatic terminus ad quem as regards the remaining 30s., when the child attains the age of sixteen years. I do not think that that is a matter of the slightest importance, for at any time it is open to the husband, or the wife, to get an appropriate variation in the amount of the maintenance payable directly to the wife within the statutory limit, which has never been reached so far as she is concerned. I will content myself for the moment with saying that counsel for the husband did not dispute that we have power, under the Matrimonial Causes Rules, 1950, r. 71 (6), to substitute in this respect any order which the justices should have made; but he has raised certain considerations on the question whether we ought to do that which we are entitled to do, and I would prefer to leave these over until I have discussed the real point in the present case.
- E** It is just as well, in connection with both these issues, to begin by saying what the wife's complaint was—when I say "complaint" I mean complaint in the technical sense in which that word has been used for over a hundred years in courts of summary jurisdiction† and is now used in the Magistrates' Courts Act, 1952, s. 43. Her complaint was that the original order should be varied by an order requiring the weekly payment for her maintenance to be increased,
- F** on the ground that she is no longer in employment and is unable to secure further employment of a part-time nature. There was an additional complaint, dealing solely with the question of access, to which it is unnecessary to refer. It was in respect of the former complaint that the order to which I have referred was made, and was made erroneously so far as the child's maintenance was concerned. It is only right to say, by way of excuse for the justices, who have gone wrong
- G** in that matter of jurisdiction, that the wife herself, when she was giving evidence, said that she wanted another £1, and suggested that 10s. should be added for her and that 10s. should be added in respect of the child.

In my opinion it is of cardinal importance to discover what jurisdiction the justices had on Jan. 6, 1955. The wife's complaint was that which I have just read. It is common ground that the husband himself made no complaint.

H There was no application, formal or otherwise, made by him to discharge the order. It is true that he gave evidence about his alleged offer and said that it had been refused, and the justices have given reasons for rejecting it, and it is true that no less than four of the grounds of this appeal are directed solely to that issue, viz.:

- I** " (i) That the justices were wrong in law in failing to find that the [wife] in refusing to live with the [husband] had deserted him; (ii) That the justices were wrong in law in finding that the [husband] was under any liability to maintain the [wife]; (iii) That the justices were wrong in law in failing to discharge or revoke that part of the said order of Nov. 11, 1954, which provided

* I.e., £5: see the Married Women (Maintenance) Act, 1949, s. 1 (1); 28 HALSBURY'S STATUTES (2nd Edn.) 736.

† See the Summary Jurisdiction Act, 1848, s. 1; 14 HALSBURY'S STATUTES (2nd Edn.) 769.

for the weekly payment by the [husband] of maintenance for and to the [wife] or alternatively to reduce the amount of the said payments to a nominal sum. (iv) That upon the law and the evidence the justices should have discharged or revoked that part of the said order of Nov. 11, 1954, which provided for the weekly payment by the [husband] of maintenance for and to the [wife] or should have reduced to a nominal sum the said weekly sum."

The substance of the matter is in the third ground of appeal. It is apparent beyond the slightest peradventure that the substance of the husband's defence, to which he was directing his evidence, was that the wife was a deserter and should be deprived of any rights under the order of Nov. 11. The question, therefore, of keeping the thing alive, if that view is right, by a nominal order, makes nonsense. Discharge is one thing; dismissal of her complaint for an increase is another. In my opinion, there is no practical importance in considering a nominal order.

I have referred to the wife's complaint, and to the absence of any complaint on the part of the husband. In my opinion it is not a mere technical matter that there was no complaint raising the husband's case that this order ought to be discharged because the wife had disentitled herself to have any order for the future. It is of the essence of the justices' jurisdiction. I do not propose to go in elaborate detail into this matter, because all that is necessary is to refer to the Magistrates' Courts Act, 1952, Part 2, relating to "Civil jurisdiction and procedure". Section 43 says:

"Subject to the provisions of this Act, where a complaint is made to a justice of the peace acting for any petty sessions area upon which a magistrates' court acting for that area has power to make an order against any person, the justice may issue a summons directed to that person requiring him to appear before a magistrates' court acting for that area to answer to the complaint."

I need not read s. 44, which deals with the territorial aspect of the jurisdiction to hear complaints. Section 45 directs what shall be the procedure, and provides by sub-s. (2) that

"The court, after hearing the evidence and the parties, shall make the order for which the complaint is made or dismiss the complaint."

For this aspect of the jurisdiction forms are prescribed in the schedule to the Magistrates' Courts (Forms) Rules, 1952. The form, authorised under s. 43 and s. 44 of the Act, and the Magistrates' Courts Rules, 1952, r. 4 (which says, in sub-r. (1), that in this class of case the complaint need not be made on oath), for the complaint is No. 75 in the schedule and reads as follows:

"In the . . . petty sessional division of . . . The complaint of C.D. of . . . who upon oath [or affirmation] states that A.B. of . . . on the . . . day of . . . 19 . . . at . . . in the [petty sessional division] aforesaid, (stating grounds of complaint). Taken and sworn [or affirmed] . . ."

On that a summons in form No. 76, to the same effect, is issued, and there are specific directions about the formal summons, which refers back to the prescribed form. Rule 75 (2) directs that

"A summons requiring a person to appear before a magistrates' court to answer to an information or complaint shall state shortly the matter of the information or complaint and shall state the time and place at which the defendant is required by the summons to appear."

Rule 76 contains the provisions as to service of the summons. That an application for discharge could have been dealt with on this occasion, had proper steps been taken, is beyond dispute. All that was necessary was for the husband to make a complaint that by reason of the wife's refusal to resume cohabitation

A with him unreasonably she had become a deserter, and therefore was not entitled to maintenance. Had that been done, and the matter heard at the same time as this, the form that these proceedings took would have been perfectly in order. As it was, however, the justices had no jurisdiction to go into the question whether this order should stand or be discharged. They had no jurisdiction, in effect, to do any of the things failure to do which is made the specific subject of complaint

B in the notice of appeal.

I agree, on the other hand, that on the issue that the amount should be increased or decreased the conduct of the parties is a relevant consideration, if it is regularly before the court. If, in the present case, the wife had so conducted herself as to justify a reduction in the amount by reason of conduct which was relevant to the amount, there is no doubt, in my mind, that that would have

C entitled the justices to dismiss her complaint, if the conduct was bad enough to justify them in reaching that conclusion. But that was not the point here. If that point had been taken below, instead of being taken now, when it was pointed out that the whole matter was misconceived, because there was no application to discharge before the court, I would not be disinclined to consider the matter from that point of view. The substance of the matter was, however,

D an attempt by the husband to have the order discharged, without raising the issue properly and in due form so as to give the justices jurisdiction, and I propose to deal with the matter on that basis. With regard to that issue I will read the justices' reasons. On the question of amount they find as a fact that the first order was made when the wife was working,

E "but as the wife is now unable to work we considered that the amount of the order should be increased."

That, by itself, is a finding which is not really challenged as a finding of fact, and justifies an increase in the amount. Then comes the matter which is complained of:

"When the original order was made on Nov. 11, 1954, the husband had

F left the matrimonial home, and the wife left the home some time in December, 1954, to stay with her mother. During the wife's absence the husband returned to the home on Jan. 3, 1955. In his evidence the husband said he was prepared to live with his wife again. We did not consider that the mere fact that he had returned to the home was a genuine offer to resume cohabitation with his wife, or that his conduct had been such that she might

G reasonably be expected so to regard it, and we accordingly refused to discharge the order."

It is plain, therefore, that they were dealing with it on the basis that they were being asked to discharge the order, and nothing else.

I have referred to the statute and the rules, but this matter is not without authority, because, in my opinion, the decision of the Court of Appeal in *Rigby v. Rigby* (1) ([1944] 1 All E.R. 336) is authority for the proposition that this question of the foundation of jurisdiction in a magistrates' court, on a complaint properly made, is of the essence of the matter, and is not mere form. It was a curious case, in which, mistakenly, the complaint put before the justices was of persistent cruelty. That complaint could only be supported by an allegation of communication of venereal disease, which was plainly accepted both by this court (LORD MERRIMAN, P., and HODSON, J.) and by the Court of Appeal as being a single

I instance, from which it followed that the element of persistence was lacking. This court referred to s. 1 (2) (b) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which appeared to deal with the same subject-matter, namely, that the husband, while suffering from venereal disease and knowing that he was so suffering, insisted on having sexual intercourse with the wife, and the court amended the complaint so as to substitute that charge. The Court of Appeal, however, allowed an appeal. This court had acted under the Matrimonial Causes Rules, 1937, r. 67 (6), now the Matrimonial Causes Rules,

1950, r. 71 (6) (the terms of which are the same as those of R.S.C., Ord. 58, r. 4, A governing the Court of Appeal itself), whereby the court

"may draw all inferences of fact which might have been drawn in the court below and may give any judgment and make any order which ought to have been made."

Sub-rule (5) gives power to the court to

"give leave to amend the grounds of appeal, or to make any other order on such terms as the court shall think just to ensure the determination on the merits of the real question in controversy between the parties."

It was with reference to that that GODDARD, L.J., agreed with the decision that there could not be persistent cruelty, but said ([1944] P. at p. 37):

"Thereupon, the Divisional Court, acting as they said under r. 67 (5) and (6), of the Matrimonial Causes Rules, 1937, held that they had the power not only to amend the order of the justices, but also to amend the proceedings by altering the complaint."

I am satisfied in my own mind that GODDARD, L.J., used the word complaint, meaning "complaint" within s. 1 of the Summary Jurisdiction Act, 1848. D He went on:

"I do not think that the Matrimonial Causes Rules, 1937, gave power to the Divisional Court to alter the proceedings from the outset and substitute a complaint which had never been preferred by the wife."

In the present case, if we were to say that the justices went wrong because they ought to have discharged the order of Nov. 11, 1954, on this evidence, we should be altering the proceedings from the outset, and should not be substituting but importing a complaint which had never been preferred by the husband, namely, that this order should be discharged, because, since the making of it, the wife had deserted her husband. Counsel for the husband, in a very attractive argument said this was perfectly in order, because s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, enables the magistrates' court concerned to

"alter, vary, or discharge any such order [i.e., order made under the powers set out in s. 5 of the Act, as amended by subsequent statutes* which give additional powers], and . . . upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed "

what was then the maximum of £2 and now is £5†. From this it is argued, in effect, that on a complaint by a wife that on certain specified grounds she is entitled to an increase, it is open to the justices to discharge the order. There is one essential fallacy in that argument. Since the Money Payments (Justices Procedure) Act, 1935, s. 9, which must be read, I think, first with the Married Women (Maintenance) Act, 1949, and now with the Magistrates' Courts Act, 1952, it is, in relation to increase or diminution of quantum, unnecessary to establish the complaint "upon fresh evidence", with all the limitations, which I need not go into, which the use of those words imports. There would, therefore, if the argument of the husband is right, be two quite distinct issues before the justices. They would have to be satisfied that within the strict meaning of the words there was some "fresh evidence", in any given case, which entitled them to discharge the order, whereas, in relation to increase or diminution, they would not. If, as was argued before us, this matter were relevant in relation to the amount of the order, the result would be that in raising the issue as a ground for discharge the husband would, indeed, be bound by the requirement of fresh evidence, but

* Licensing Act, 1902, s. 5 (1); Married Women (Maintenance) Act, 1920, s. 1 (1); Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (2).

† Married Women (Maintenance) Act, 1949, s. 1 (1): 28 HALSBURY'S STATUTES (2nd Edn.) 736.

A in raising the same issue (e.g., conduct of the parties) in relation to amount he would not be so bound. It is plain on the face of s. 7 itself that separate issues would be raised, and under the Magistrates' Courts Act, 1952, s. 43, as under the Summary Jurisdiction Act, 1848, s. 1, there must be a complaint which alleges that there should be an alteration and on what ground; or alleges that there should be a variation and on what ground; or alleges that there should be a discharge, and again on what ground, though in that case at least the ground must be based "upon fresh evidence".

B The result is that the whole discussion about facts leading to the discharge of the order was beside the point. The justices had no such matter before them, and should have declined to listen to it, unless and until it was properly put before them by a complaint directed to that point, and dealt with on the terms of the section. Having expressed my view that the whole of the grounds of appeal relating to this aspect of the matter are entirely misconceived, and also that the reasons given by the justices for rejecting the husband's submission that circumstances had arisen which would justify them in discharging it, are all beside the point, I wish to make it clear that the mere fact that these things were mistakenly discussed before the justices on Jan. 6, 1955, ought not, on the ground that they are stale and therefore cannot be said to be fresh evidence if the matter is brought up again, to preclude the justices from hearing the matter if it is properly brought before them. Counsel for the wife has expressly disclaimed, as one would expect, that any such point, in his view, would be open to the wife.

E It is, and always was, open to the husband at any time to try to get a reduction in the order, without being bound to adduce fresh evidence; and no application either by the husband or the wife would be dismissed because this matter has been discussed irrelevantly. Moreover, the husband, if he wishes, may make a timely application (for one has to consider what application the statutory time limit* may have, if any) to discharge the order. He will not be shut out.

F The one remaining point concerns the mistake over the application of the 10s. in respect of the child. If I felt that there was any reason why, if we put that right, that would prejudice any issue on the real point about which the husband is complaining, I would leave things alone, and merely correct the error by taking off the 10s., about which there cannot be any doubt, from the £2 awarded to the wife for the benefit of the child. But I do not think that it does make any difference. I think that we can deal with that matter quite independently.

G We can give effect to the wife's complaint that the weekly payment for her maintenance should be increased by £1. The fact that she rather foolishly said "Split it between me and the child" is neither here nor there. I think that we are fully entitled to take off the extra 10s. awarded for the benefit of the child and add it to the sum awarded for the benefit of the wife. That cannot do any harm to either party. On the contrary, it may save costs if there is no further application by the husband. The weekly result will be precisely the same so far as her money is concerned. That is what I propose that we should do. The appeal will necessarily be allowed to that extent, and that variation made in the order.

I DAVIES, J. : I agree. As LORD MERRIMAN, P., has pointed out, of the six grounds of appeal set out in the husband's notice of appeal, four of them are really directed to one and the same point, viz., that the justices ought to have discharged the order which the wife had obtained. It is perfectly true that it is suggested in the alternative that the amount of the order should have been reduced to a nominal sum, but that is really the same point. For the suggestion that it should be reduced to a nominal sum was based on the allegation attempted

* See the Summary Jurisdiction (Married Women) Act, 1895, s. 8, whereby proceedings under that Act were subject to the provisions, inter alia, of the Summary Jurisdiction Act, 1848, s. 11: 14 HALSBURY'S STATUTES (2nd Edn.) 781; see now s. 104 of the Magistrates' Courts Act, 1952; 32 HALSBURY'S STATUTES (2nd Edn.) 503.

to be made that the wife had refused to resume cohabitation with the husband, and, therefore, was entitled to nothing. A

For the reasons which LORD MERRIMAN, P., has given I agree that on an application by a wife for an increase of the amount payable under an order the court has no power, unless proper steps by a cross-summons are taken, to entertain an application to discharge that order. I do not think it is necessary to repeat the reasons that my Lord has given, or to examine the statutes. I should like to add one observation. Speaking for myself, I do not think it is necessary to decide, for the purposes of this appeal, whether on an application to increase the amount of an order, the court has power to decrease it. I do not desire to express any view about that, as I do not think that it is necessary for the purposes of this decision. For we are here concerned with a case where the justices on an application to increase have purported to entertain an application to discharge, and for the reasons that my Lord has given I am satisfied that that is wrong. B C

The argument of counsel for the wife was that the justices had no jurisdiction to consider evidence which went to the existence of the order; and, of course, if the court had no jurisdiction to consider the evidence, that evidence has never validly been considered. If, therefore, the husband were to apply again, by taking the proper steps, to discharge the order, even though the evidence that he might seek to adduce in support of that application would be the same as that which he purported to adduce on the previous occasion, in my view, and, I think, in my Lord's view also, that would not mean that that evidence would not be fresh evidence within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. D E

It is thought that there is going to be a petition for dissolution by the wife on the ground of cruelty, which may affect the practical aspect of further applications to the justices. If, however, any application is made, I think that it would be desirable that the complaint or complaints should be heard by a bench constituted differently from the bench from whom we are hearing the present appeal. My Lord is in agreement with me on this, I think. F

The only other matter that arises from the argument of counsel for the husband is that the justices, as, he says, is plain from their reasons, had failed, on the application to increase, to consider the conduct of the wife. It is perfectly true that in their reasons they put the two matters in separate compartments. They appear, on the face of their reasons, in para. 1, which concerns the increase of the amount, to be dealing only with figures. They deal with conduct in para. 2. If authority were needed for the purpose of showing that conduct of the parties is material on the question of amount, it is to be found in the decision of this court in *Wharton v. Wharton* (2) ([1952] 2 All E.R. 939, n). It is difficult, however, to see that that criticism on the facts of the present case really gets the husband anywhere. For when the justices do come to consider the question of conduct, in the wrong context, let it be assumed, in para. 2, they find the facts against the husband; and it is impossible to see, on their findings of fact, how any of the matters alleged by the husband could have induced them to increase the amount of the wife's order. Therefore, as I say, I do not think that this criticism that they ignored conduct in coming to the conclusion that there ought to be a small increase in the order is a valid one. G H

For these reasons, therefore, I agree with LORD MERRIMAN, P., that the order of Jan. 6, 1955, should be altered by making the increase to the wife £1 and making no increase to the child. I

LORD MERRIMAN, P.: By what he has just said DAVIES, J., has reminded me of something I must add to my judgment, namely, that in the event of the matter coming up again it should be dealt with by an entirely fresh panel of justices. I also did not mention the possibility of a divorce petition, about which it is said that an application for legal aid is pending. That, of course, will

- A be entirely a matter for consideration by the justices. If this ground for discharging the original order is put forward it will be a matter for their consideration how far, if at all, it raises the same sort of issues as are raised by the divorce petition, and they will no doubt act accordingly.

Appeal allowed in part and order of the justices varied.

- B Solicitors: *Titmuss, Sainer & Webb* (for the husband); *Bull & Bull*, agents for *Pringle & Co.*, Redhill (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

C RAMSAY-FAIRFAX (otherwise SCOTT-GIBSON) v. RAMSAY-FAIRFAX.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), May 6, 26, 27, June 7, 1955.]

- D Nullity—Jurisdiction—Residence—Petition alleging wilful refusal and incapacity on the part of the husband—Husband domiciled in Scotland—Husband and wife resident in England—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25). s. 8 (1) (a).

Divorce—Domicil—Scottish domicil of origin of husband—Purchase of house and temporary residence in England—Whether English domicil of choice acquired—Wife's petition for nullity.

- E The husband, whose domicil of origin was Scottish, was educated in England. In 1931 he obtained employment which required him to live in various railway hotels in England. In 1942 he joined the Army and he had ever since remained in that service. In 1943 he was posted overseas. In 1945 he met the wife in Egypt, and the parties were married there in 1947. After a while they separated and in 1948 the husband was posted back to the United Kingdom; the wife remained in Egypt and later moved to Cyprus.
- F During 1952 there was correspondence between the parties which resulted in a reconciliation, although the husband was undecided in what country to make his home. In May, 1953, the wife returned to England and the husband bought a house in Surrey where the parties lived together until they again quarrelled and the wife left. The husband continued to live at the house, and the wife lived in London.

- G On Mar. 2, 1954, the wife presented a petition for a decree of nullity on the ground of the husband's wilful refusal, alternatively his incapacity, to consummate the marriage. The wife alleged in the petition that the parties were domiciled in England. The husband entered an appearance under protest, alleging that he was domiciled in Scotland and that the English court had no jurisdiction. The wife contended that, even if the husband were domiciled in Scotland, the English court had jurisdiction since at all material times both parties were resident in England. On this issue,
- H

- I **Held:** (i) an intention on the part of the husband to continue to reside in England for an unlimited time had not been established, and the purchase of the house in Surrey was insufficient to warrant the inference that the husband was acquiring a domicil of choice in England; accordingly, the husband retained his domicil of origin, viz., domicil in Scotland (dictum of LORD WESTBURY in *Udny v. Udny* (1869) (L.R. 1 Sc. & Div. at p. 458) applied).

(ii) notwithstanding the Scottish domicil of the husband, the court had jurisdiction to hear the suit since both parties were resident in England (*Hutter v. Hutter* (otherwise *Perry*), [1944] 2 All E.R. 368, *Easterbrook v. Easterbrook* (otherwise *Jervis*), [1944] 1 All E.R. 90, followed; *Inverclyde* (otherwise *Tripp*) v. *Inverclyde*, [1931] P. 29, not followed).

Per CURIAM: jurisdiction to entertain proceedings for nullity on any other ground set out in s. 8 of the Matrimonial Causes Act, 1950, than wilful refusal can similarly be based on residence (see p. 716, letter I, post).

[**Editorial Note.** In *De Reneville v. De Reneville* ([1948] 1 All E.R. 56) and *Casey v. Casey* ([1949] 2 All E.R. 110) the Court of Appeal left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties were resident in England. The present case is one in which the marriage is voidable, not void ab initio. In deciding that the court had jurisdiction based on residence WILLMER, J., does not finally conclude whether the reasoning on which such a decision should be based is that the ecclesiastical courts founded jurisdiction on residence or, as is propounded by DR. CHESHIRE, in his *PRIVATE INTERNATIONAL LAW* (4th Edn.), pp. 333, 334, 339, that it is contrary to convenience and natural justice that jurisdiction should be confined to the court of the domicile (see pp. 717, 718, post). It should perhaps be stressed that in the present case both parties were resident in England.

Jurisdiction conferred by s. 18 (1) (b) of the Matrimonial Causes Act, 1950, was not applicable as the wife had not the necessary period of residence.

As to residence as a ground for jurisdiction in case of voidable marriages, see 7 HALSBURY'S LAWS (3rd Edn.) 109, para. 195, note (d); and for cases on the subject, see 11 DIGEST (Repl.) 480, 1077-1078.

As to evidence of change of domicile, see 7 HALSBURY'S LAWS (3rd Edn.) 22, para. 43; and for cases on the subject, see 11 DIGEST (Repl.) 331, 54 et seq., 338-340, 97-118.

For the Matrimonial Causes Act, 1950, s. 8 (1) (a), s. 18 (1) (b), see 29 HALSBURY'S STATUTES (2nd Edn.) 397, 405.

For the Matrimonial Causes Act, 1937, s. 7 (1), see 11 HALSBURY'S STATUTES (2nd Edn.) 840.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, see 5 HALSBURY'S STATUTES (2nd Edn.) 361.]

Cases referred to:

- (1) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441; 11 Digest (Repl.) 326, 22.
- (2) *Roberts v. Brennan*, [1902] P. 143; 71 L.J.P. 74; sub nom. *Brennan (otherwise Roberts) v. Brennan*, 86 L.T. 599; 11 Digest (Repl.) 478, 1068.
- (3) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, 1075.
- (4) *White (otherwise Bennett) v. White*, [1937] 1 All E.R. 708; [1937] P. 111; 106 L.J.P. 49; 156 L.T. 422; 11 Digest (Repl.) 479, 1073.
- (5) *Robert (otherwise De La Mare) v. Robert*, [1947] 2 All E.R. 22; [1947] P. 164; [1948] L.J.R. 680; 11 Digest (Repl.) 479, 1074.
- (6) *Casey v. Casey*, [1949] 2 All E.R. 110; [1949] P. 420; [1949] L.J.R. 1642; 11 Digest (Repl.) 479, 1076.
- (7) *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; Digest Supp.
- (8) *Easterbrook v. Easterbrook (otherwise Jervis)*, [1944] 1 All E.R. 90; [1944] P. 10; 113 L.J.P. 17; 170 L.T. 26; 11 Digest (Repl.) 480, 1077.
- (9) *Hutter v. Hutter (otherwise Perry)*, [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; 11 Digest (Repl.) 480, 1078.
- (10) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, 1011.
- (11) *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; 11 Digest (Repl.) 478, 1069.
- (12) *Chapelle v. Chapelle*, [1950] 1 All E.R. 236; [1950] P. 134; 11 Digest (Repl.) 485, 1101.

Issue.

The husband was born in 1909. His father was a serving officer in the Royal

A Navy and domiciled in Scotland. The husband was baptised in Scotland; he was educated at English schools and Cambridge University and used to spend holidays largely with his grandmother in Scotland. In about 1931 the husband obtained employment which required him to live in various railway hotels in England; in 1942 he joined the Army in which he had ever since remained. In 1943 he was posted overseas and in 1945 he met the wife in Egypt. In 1946 the husband's father died and the husband became entitled to a reversionary interest in a small estate in Scotland. At this time he made a will in Scottish form. He contributed to the maintenance of the family burial ground at St. Boswell's in Scotland, in return for which he and the wife enjoyed the right to be buried there.

On Nov. 22, 1947, the parties were married at Cairo, and cohabited in Egypt. C After a while, however, they quarrelled and separated. In 1948 the husband was posted back to the United Kingdom and was stationed at Perth; the wife remained in Egypt but later moved to Cyprus. In 1950 the wife returned for a brief visit to the United Kingdom but, although the parties met, there was no reconciliation. While in Scotland the husband joined the Scottish Nationalist Party and signed the Scottish Covenant. In 1951 the husband was posted to D Chessington, Surrey. During 1952 there was correspondence between the parties which resulted in the parties agreeing to a reconciliation, although the husband was undecided where to make his home. In May, 1953, the wife returned to England, and after further vacillation the husband bought a house in Kingston, Surrey. The parties lived together there until November, 1953, when the parties again quarrelled and the wife left. The husband continued to live in the house E until the end of 1954 when he sold it on being posted to the Far East. The husband was in England at the hearing of the suit.

On Mar. 2, 1954, the wife filed a petition for a decree of nullity alleging that the marriage had never been consummated owing to the husband's wilful refusal to consummate the marriage, alternatively, that the husband was at the time of the ceremony and had ever since been incapable of consummating the marriage. F The wife alleged in the petition that the parties were domiciled in England. On Mar. 30, 1954, the husband entered an appearance under protest. On May 7, 1954, Mr. REGISTRAR LONG ordered that an issue be tried to determine whether the court had jurisdiction to entertain the petition, and that the husband be the plaintiff and the wife the defendant on the issue.

G *R. J. A. Temple, Q.C.*, and *H. S. Law* for the husband.
R. C. Vaughan, Q.C., and *S. L. Elborne* for the wife.

Cur. adv. vult.

June 7. WILLMER, J., read the following judgment: The issue is whether or not the court has jurisdiction to entertain this petition. The petition is by the wife, praying for a decree of nullity on the ground of wilful refusal on the part H of the husband to consummate the marriage, or alternatively on the ground of the husband's incapacity. The petition alleges that the parties are domiciled in England. The husband appeared under protest, alleging that he is domiciled in Scotland, and on that ground denies that the court has jurisdiction to entertain the petition. The wife, however, contends in the alternative that, even if the husband be domiciled in Scotland, this court nevertheless has jurisdiction to I entertain the petition on the ground that at all material times both parties were resident in England. I was informed that the husband has himself instituted proceedings against the wife in Scotland, raising similar allegations against the wife and himself praying for a decree of nullity against her. It will be convenient to deal first with the question of the husband's domicile. Both parties gave oral evidence before me, and both were subjected to some measure of cross-examination to credit. Having heard the evidence of the parties, I see no reason to doubt the bona fides of either or to impute any unworthy motives to them for

maintaining their respective points of view. In the end it appeared to me that there was little dispute between them with regard to the material facts.

[His LORDSHIP stated the facts and continued:] It is conceded that the husband had a Scottish domicile of origin, but I am invited to find that he has subsequently acquired a domicile of choice in England. Unless and until it is proved to my satisfaction that he did acquire such a domicile of choice, his domicile of origin remains. The facts show that, although born and educated in England, this husband grew up with a largely Scottish background. There was a significant absence of any stable home in England—the only permanency in his childhood days being his grandmother's home in Scotland. Since attaining manhood he has shown obvious Scottish leanings, as is exemplified by his joining the Scottish Nationalist Party and by making his will in the Scottish form. As recently as June, 1953, at the very time when he was negotiating for the purchase of the house at Kingston, he executed a codicil, again in the Scottish form. In addition to that, I must bear in mind that he has an interest in the estate in Renfrewshire, as well as contributing to the maintenance of the family burial ground in Roxburghshire. Since his Cambridge days his residence has, for all practical purposes, been dictated by his employment—first in the railway hotels where he worked, and since 1942 in accordance with the exigencies of his military service. Only in 1952-53, with the prospect of a reconciliation with the wife, does he appear to have applied his mind to the possibility of making a home of his own in some other country. His letters, however, show that, at first at any rate, he was very far from arriving at any settled purpose. In the end counsel for the wife admitted that he could rely on nothing prior to the purchase of the house at Kingston as showing any settled intention to make a home in England.

In view of this submission it is helpful, I think, to refer to the words of LORD WESTBURY in *Udny v. Udny* (1) (1869) (L.R. 1 Sc. & Div. at p. 458):

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time . . . There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicile is established."

Do the facts in the present case warrant the inference that the residence at the house in Kingston was "general and indefinite in its future contemplation," or is the true inference rather that it was to be "for a limited period or particular purpose"?

[His LORDSHIP referred to the evidence of the parties and continued:] The effect of what both the husband and the wife said in evidence is that the house at Kingston was being purchased as a mere adjunct to the husband's present and probable future employment. Neither party appears to have looked beyond the period of the husband's working life, or to have given even a thought to the question of where they would settle when he ceased to be tied by his work to any particular locality. In face of the contrary indications—not the least of which is the fact of the codicil being made in the Scottish form at the very time of the purchase of the house—I find myself unable to accept that the purchase of the house in Kingston is sufficient to warrant the inference that the husband was abandoning his Scottish domicile of origin or acquiring a domicile of choice in England. Accordingly, I find that the husband was at all material times domiciled in Scotland.

I pass now to the second, and more difficult, question: whether this court

A has jurisdiction, in proceedings for nullity such as these, on the basis of the parties' residence in England. As to this there is no room for doubt about the facts. The husband, until his recent posting overseas, has been resident in England since 1951, and the wife since the spring of 1953. The parties resided together in England for four months during 1953. Both were resident in England at the time of the filing of the petition. It is as well to refer at the outset to two circumstances, which are not without importance in considering whether this court has jurisdiction on the basis of the residence of the parties. One is that the grounds on which the wife prays for the decree of nullity are such as, if proved, to render the marriage voidable only, and not void ab initio. The other is that the wife does not seek to, and could not rely on, s. 18 (1) (b) of the Matrimonial Causes Act, 1950, for the reason that she was not ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings. The question raised before me is whether this court has an inherent jurisdiction, inherited from the old ecclesiastical courts, to entertain proceedings for nullity, in the case of a marriage voidable but not void, where the parties are resident, but not domiciled, in England.

At one time there was authority for the proposition that mere residence of the petitioner wife in England was sufficient to found jurisdiction in nullity, notwithstanding that the husband might be both domiciled and resident elsewhere. This appears to have been the effect of the decision of SIR FRANCIS JEUNE, P., in *Roberts v. Brennan* (2), where he is reported to have said ([1902] P. at p. 144) that in nullity cases jurisdiction is based not on domicile but on residence. By this he must have meant residence of the wife, the petitioner, for it is clear on the facts of that case that the husband was not resident in England. The case was undefended, and does not appear to have been fully argued; moreover, as pointed out ([1948] 1 All E.R. at p. 62) by LORD GREENE, M.R., in *De Reneville v. De Reneville* (3), the report of *Roberts v. Brennan* (2) is by no means satisfactory. In the more recent case of *White (otherwise Bennett) v. White* (4) ([1937] 1 All E.R. 708) it was held by BUCKNILL, J., that a wife was entitled to a decree of nullity for bigamy, against a husband domiciled and resident abroad, on the ground that she herself was domiciled and resident in England. In this case, however, it may well be that the fact of the wife's residence in England was of secondary importance, having regard to the fact that she was in any case domiciled here. Finally, in *Robert (otherwise De La Mare) v. Robert* (5) ([1947] 2 All E.R. 22) where the parties were domiciled, and the husband was resident, abroad, but the wife was resident in England, it was held by BARNARD, J., that he had jurisdiction to entertain a petition by the wife for a decree of nullity on the ground of wilful refusal on the part of the husband. In so holding, BARNARD, J., expressly relied on the decision in *White v. White* (4).

These three decisions were discussed by the Court of Appeal in *De Reneville v. De Reneville* (3), but it was held in that case that residence of the petitioner alone was not sufficient to found jurisdiction in nullity suits. LORD GREENE, M.R. (with whose judgment SOMERVELL, L.J., expressed his concurrence), expressed the opinion ([1948] 1 All E.R. at p. 63) that the cases cited could not be accepted as establishing the proposition contended for, and they must, therefore, be taken as overruled, in so far as they were based on the mere residence of the petitioner alone. Both in *De Reneville v. De Reneville* (3), however, and in *Casey v. Casey* (6) ([1949] 2 All E.R. 110) the members of the Court of Appeal expressly left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties have been resident in England. On this question I am left to obtain what guidance I can from decisions at first instance, and unhappily for me I am confronted with conflicting decisions of this court on the subject. In *Inverclyde (otherwise Tripp) v. Inverclyde* (7) ([1931] P. 29) BATESON, J., drew a distinction between proceedings for nullity in cases where the marriage is void ab initio and those where the marriage is merely voidable

(as in the present case), and held that in the latter case nothing short of domicile would suffice to found jurisdiction to entertain the suit. On the other hand, in *Easterbrook v. Easterbrook* (otherwise *Jervis*) (8) ([1944] 1 All E.R. 90), where the same question arose again, in a suit for nullity on the ground of wilful refusal, HODSON, J., declined to follow *Inverclyde v. Inverclyde* (7). He stated (*ibid.*) that he was unable to see the distinction for the purpose of jurisdiction between voidable and void marriages, and held that he had jurisdiction on the basis that both parties were at all material times resident in England, and the ceremony of marriage was celebrated in England. The case was undefended, and the judgment of HODSON, J., as reported, is extremely brief; as he himself pointed out, he heard argument only on behalf of the petitioner. Later in the same year, in *Hutter v. Hutter* (otherwise *Perry*) (9) ([1944] 2 All E.R. 368), another suit for nullity on the ground of wilful refusal, the same question once more arose, this time before PILCHER, J. On this occasion, PILCHER, J., being confronted with the conflicting decisions in *Inverclyde v. Inverclyde* (7) and *Easterbrook v. Easterbrook* (8), called for the assistance of the King's Proctor under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181 (1)*, and the question was fully argued before him by SIR DONALD SOMERVELL, A.-G. In the result, PILCHER, J., like HODSON, J., declined to follow *Inverclyde v. Inverclyde* (7), but held that, notwithstanding the foreign domicile of the husband, the fact that both parties were resident in England was sufficient to found jurisdiction, more particularly as the marriage had been celebrated in England.

The decision of PILCHER, J., was founded on the fact that the jurisdiction of the court in respect of nullity—though enlarged by the Matrimonial Causes Act, 1937, s. 7 (1)† in the sense that new grounds were prescribed for granting this form of relief—was in essence derived from that of the old ecclesiastical courts. By contrast the jurisdiction in divorce is wholly statutory, the remedy of divorce having been conferred only in 1857 by the same statute (Matrimonial Causes Act, 1857, s. 31) which created (by s. 6) the new court for divorce and matrimonial causes. The jurisdiction of the ecclesiastical courts in respect of matters within their competence depended, as a matter of history, on the residence of the respondent within the territorial jurisdiction of the particular court before which he was cited to appear. The ecclesiastical courts granted decrees for nullity both in the case of marriages which were void, e.g., on the ground of bigamy, and in the case of marriages which were voidable on the ground of incapacity, no distinction being drawn between the two classes of case for the purpose of jurisdiction. When by the Act of 1857 the matrimonial jurisdiction of the ecclesiastical courts was transferred to the new court, it was specifically provided by s. 22 of the Act that in all suits and proceedings, other than proceedings for the new remedy of divorce, the court should proceed and act and give relief on principles and rules which in the opinion of the court should be

“as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief . . .”

That section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 (1) and Sch. 6, but its substance was re-enacted by s. 32 of the latter Act, which provides in relation to the jurisdiction of the High Court and the Court of Appeal:

“ . . . where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.”

The argument which prevailed in *Hutter v. Hutter* (9) was that, although since 1895 it has been settled (in *Le Mesurier v. Le Mesurier* (10), [1895] A.C. 517)

* Now the Matrimonial Causes Act, 1950, s. 10 (1).

† See now s. 8 (1) of the Matrimonial Causes Act, 1950.

- A that in relation to the new remedy of divorce jurisdiction depends solely on domicile, the effect of these statutory provisions has been to preserve, in relation to the forms of relief within the competence of the old ecclesiastical courts—including the relief of nullity, whether in respect of void or voidable marriages—the old principle of the ecclesiastical courts, whereby jurisdiction depended on residence. The contrary decision of BATESON, J., in *Inverclyde v. Inverclyde* (7) was based largely on *Salvesen (or von Lorange) v. Austrian Property Administrator* (11) ([1927] A.C. 641) and more particularly on a dictum of LORD PHILLIMORE (ibid., at p. 671). In that case a German court, admittedly the court of the domicile, had pronounced a decree of nullity on the ground of irregularity in the marriage ceremony. The House of Lords held that such a decree, being pronounced by the court of the domicile, amounted to a judgment in rem which was binding in Scotland. All their Lordships held that the court of the domicile was a competent court to pronounce such a decree, but LORD PHILLIMORE went further and expressed the view that it was the only competent court. This dictum was not of course necessary for the decision, but in *Inverclyde v. Inverclyde* (7) BATESON, J., adopted it and made it the basis of his judgment. He emphasised the distinction between void and voidable marriages, holding that the remedy in the latter case, though in form a decree of nullity, was in all essentials the same as a decree of dissolution; for, as he pointed out, in the case of a voidable marriage the marriage continues in being until one of the spouses seeks to get rid of the tie. A decree of nullity pronounced in such a case, like a decree of dissolution, alters the status of the parties. Such a decree, in the view of BATESON, J., being a judgment in rem, could be pronounced only by the court of the parties' domicile.

- E It is to be presumed that BATESON, J., would have decided otherwise if the case before him had been one of a marriage void ab initio. In the present case counsel for the husband did not dispute that in the case of a marriage void ab initio jurisdiction to pronounce a decree of nullity might be based on residence. It is to be remarked that in none of the speeches in *Salvesen v. Austrian Property Administrator* (11) was any distinction drawn between void and voidable marriages. The dictum of LORD PHILLIMORE, relied on by BATESON, J., was apparently intended to apply to any decree of nullity, and not only to a decree pronounced in the case of a voidable marriage—indeed the case before the House was a case of a marriage void ab initio. The distinction between void and voidable marriages is of course vital for some purposes—e.g., for the purpose of determining the domicile of a petitioning wife, so as to found jurisdiction, in a case where the husband is both domiciled and resident abroad (see *De Reneville v. De Reneville* (3), and cf. *Chapelle v. Chapelle* (12) ([1950] 1 All E.R. 236), in which I attempted to follow the reasoning of the Court of Appeal in *De Reneville v. De Reneville* (3)). But it does not follow from this that, for the purpose of determining jurisdiction where both parties are resident in England, the distinction between void and voidable marriages is necessarily of any relevance. In either event the remedy available today, as it was in the days of the ecclesiastical courts, is a decree of nullity. However anomalous it may seem, the legislature has enacted that the remedy for wilful refusal shall be a decree of nullity, and not, as might perhaps have been expected, a decree of dissolution. Since the remedy available today, whether the marriage be void or voidable, is the same as that which was available in the ecclesiastical courts, it is difficult to criticise the reasoning of PILCHER, J., in *Hutter v. Hutter* (9), when he held that the same test of jurisdiction should be applied. *Hutter v. Hutter* (9) was cited both in *De Reneville v. De Reneville* (3) and in *Casey v. Casey* (6), and, though they expressly left the point open, none of the members of the Court of Appeal in either case expressed any adverse criticism of the reasoning of PILCHER, J. The contrary decision in *Inverclyde v. Inverclyde* (7) has not received by any means universal approval, but has been adversely criticised by several of the leading text-book writers—see for

instance *RAYDEN ON DIVORCE* (6th Edn.), section III, para. 29 note (h), at pp. 37 and 38; and the commentary by Mr. J. E. S. SIMON, Q.C., printed as an appendix to the supplement to the 5th Edition. A

Since the date of the authorities to which I have referred, s. 1 (1) and (2) of the Law Reform (Miscellaneous Provisions) Act, 1949, which has been repealed but is substantially re-enacted in s. 18 (1) (b) of the Matrimonial Causes Act, 1950, has in certain instances enlarged the jurisdiction of the court in nullity and divorce proceedings in cases where relief is sought by a wife resident in England against a husband domiciled abroad. Section 18 provides as follows: B

“(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say . . . (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.” C

Counsel for the husband sought to found an argument on this section, as showing that apart from it there could not have been any jurisdiction in nullity based on mere residence of the parties. Why, he asked, if the residence of the parties in England (wherever they may be domiciled) is sufficient to found jurisdiction in nullity, did the legislature introduce the proviso that the husband must not be domiciled in any other part of the United Kingdom? The legislature, he argued, must have contemplated that in nullity, as in divorce, there could, apart from the section, be no jurisdiction based on mere residence. D

It seems to me that there are two answers to this argument. First, it is clear that the section is intended to have an enlarging, and not a restrictive, operation. The decision in *Hutter v. Hutter* (9) must have been before the draftsmen, and the section cannot be read as taking away a jurisdiction held to exist in *Hutter v. Hutter* (9), if that case was rightly decided. In fact the section enlarges the rights of a wife far beyond anything contended for in the present case, for it gives her rights against a husband both domiciled and resident elsewhere, provided the condition as to three years' residence is satisfied. In effect, the section restores the decision in *Robert v. Robert* (5), subject to the three years' qualification. Secondly, the section is expressed to be without prejudice to any jurisdiction exercisable apart from the section. It is clear in my judgment that these words were intended to save any jurisdiction in nullity that might be exercisable apart from that based on domicil. This, I think, becomes all the clearer if one looks at the wording of s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1949. Sub-section (1) of that section makes provision only for jurisdiction in divorce; jurisdiction in nullity is provided for by sub-s. (2), which is in the following terms: E F G H

“Without prejudice to any jurisdiction exercisable by the court apart from this section, the foregoing provisions of this section shall apply to proceedings for nullity of marriage as they apply to proceedings for divorce.”

Counsel for the husband further pointed out, as part of his argument, that if jurisdiction to entertain proceedings for nullity on the ground of wilful refusal can be based on the mere residence of the parties, the same must apply to proceedings for nullity on any of the other grounds set out in s. 8 of the Matrimonial Causes Act, 1950. I accept that this must be so, but it seems to me that it may well be thought no more than consonant with natural justice, as an illustration will show. Suppose a foreign husband, domiciled abroad, contracts a marriage with an English wife, and resides with her in this country, only to discover that she was, for instance, suffering from venereal disease in a communicable form at I

- A the time of the marriage. I see nothing repugnant to natural justice in supposing that Parliament intended that such a husband should have his remedy in this country. Or what of the converse position of a wife, who marries, and resides in England with, a foreign husband domiciled abroad? If the argument for the husband is right, that no court other than that of the domicile has jurisdiction to annul a voidable marriage, such a wife would have no remedy under s. 8 (1) (b).
- B She could, however, proceed under s. 18 (1) (b), provided that she could satisfy the requirement of showing three years' residence. If she has only recently taken up residence in this country, she may be out of time if she waits until the three years prescribed by s. 18 (1) (b) have elapsed, for under s. 8 (1), proviso (ii), she can only obtain relief if the proceedings are instituted within a year from the date of the marriage. This would indeed be a curious result. It seems to
- C me, in the result, that any argument based on s. 18 (1) (b) of the Act—bearing in mind the various grounds prescribed by s. 8 on which proceedings for nullity can be based—if it helps at all, tends to support the wife's rather than the husband's case.

- D Counsel for the husband further argued that jurisdiction based on residence of the parties is an exception to the general rule that matrimonial proceedings must be based on domicile, and should not be extended, certainly not to proceedings for nullity in respect of a voidable marriage. Bearing in mind that the matrimonial jurisdiction of the ecclesiastical courts was founded entirely on residence, it would in my judgment, as a matter of history, be truer to say that domicile as the test of jurisdiction in proceedings for divorce was rather the exception to the rule. It is an exception resulting from the special provision of
- E the very statute which first created the remedy of divorce, and which, in relation to other older remedies specifically preserved the principles and rules hitherto acted on by the ecclesiastical courts. At this stage it may be remarked that DR. CHESHIRE, in his book on PRIVATE INTERNATIONAL LAW (4th Edn.), at p. 339, is extremely critical of the argument which found favour in *Hutter v. Hutter* (9), i.e., that the court today has jurisdiction in nullity where the parties are resident
- F in this country because historically the matrimonial jurisdiction of the ecclesiastical courts was based on residence. He points out that, owing to the uniformity of matrimonial law and practice throughout Christendom, the early Church courts were not troubled with questions of the conflict of laws; the ecclesiastical rule as to residence dealt with questions not of international jurisdiction but of local competence. DR. CHESHIRE adds that the ecclesiastical rule
- G

“is scarcely a sure guide in days when the unity is a memory of the past, and if residence is to form a basis of jurisdiction it is in reason rather than in the history of a past age that it must find its vindication.”

- H What he means is, I think, made clear by an earlier passage, at pp. 333, 334, where he suggests that, if the matter is viewed in the light of convenience and natural justice, to confine jurisdiction in nullity to the court of the domicile is open to practical and serious objection, for it may deny relief to parties in a country where they have long been resident, though not technically domiciled. In other words common sense and reason demand that the court of the common residence should have jurisdiction, subject, however, to the proviso, on which
- I DR. CHESHIRE insists, that the court applies the proper law, i.e., the law of the domicile. This latter point is not one of any consequence in the present case; for I have an affidavit from a Scottish lawyer which satisfies me that in relation to proceedings such as the present Scots law, i.e., the law of the domicile, is the same as English law.

If this be the correct view, it amounts in effect to saying that *Hutter v. Hutter* (9) was rightly decided, but for the wrong reasons. It is a view which, I think, gains some support from the observations made by members of the Court of

Appeal in *Casey v. Casey* (6). BUCKNILL, L.J., with whose judgment COHEN, L.J., expressed his complete agreement, said ([1949] 2 All E.R. at p. 115):

"There may be considerable hardship to the petitioner in refusing jurisdiction where both parties are resident within the jurisdiction . . ."

He made it clear (*ibid.*, at p. 117) that his opinion in favour of dismissing the appeal was based partly on the balance of hardship to the parties. SOMERVELL, L.J., said (*ibid.*, at p. 118):

"... there seems to me considerable reasons of convenience for giving the courts where the respondent or both parties reside jurisdiction in this class of case, and I would desire, so far as this court is concerned, to keep that point open until it arises."

I confess that I regard the question I have to decide as one of no little difficulty. The only material distinction on the facts between the present case and *Hutter v. Hutter* (9) lies in the fact that in the latter case the marriage was celebrated in this country, whereas in the present case it was celebrated in Egypt in pursuance of s. 22 of the Foreign Marriage Act, 1892. I cannot think that this distinction makes any difference. After careful consideration I do not feel able to do other than follow the decision of PILCHER, J., in *Hutter v. Hutter* (9), a case which has twice been considered and discussed by the Court of Appeal without adverse comment. It follows that in my judgment, notwithstanding the Scottish domicile of the husband, the parties being at all material times resident in England, this court has jurisdiction to entertain the suit.

Order accordingly.

Solicitors: *G. P. Voss* (for the husband); *Lee, Ockerby, Johnson & Co.* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BULMER v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Vaisey, J.), June 14, 15, 21, 1955.]

Alien—Naturalisation—Certificate granted to applicant's father under local Act in Burma—Whether father became a British subject by naturalisation—Burma Independence Act, 1947 (11 Geo. 6 c. 3), Sch. 1, para. 2 (2).

In 1878 the plaintiff's father was granted in Rangoon a certificate of naturalisation under an Act passed by the Governor-General of India in Council (No. xxx of 1852) intituled "An Act for the naturalisation of aliens". By virtue of s. 8 of the Act the plaintiff's father was deemed within the territories therein referred to (i.e., the territories which were under the government of the East India Company, including Burma) to be a natural-born subject of the British Crown, as if he had been born within the said territories. The plaintiff was born in Burma in 1883, and held a British passport from 1900 to 1951. On the question whether the plaintiff had ceased by virtue of the Burma Independence Act, 1947, to be a British subject on Jan. 4, 1948 (the appointed day for the purposes of the Act), on the ground that his father's naturalisation was local and the term "British subject by naturalisation" in para. 2 (2) of Sch. 1 to that Act was confined to imperial naturalisation,

Held: on the true construction of the Burma Independence Act, 1947, Sch. 1, para. 2 (2), the plaintiff did not cease on Jan. 4, 1948, to be a British subject, because the local naturalisation obtained by the plaintiff's father was naturalisation within the meaning of that word in the enactment; accordingly, the plaintiff was a British subject.

Markwald v. A.-G. ([1920] 1 Ch. 348) explained.

- A [**Editorial Note.** If the father of a person born in Burma became a British subject by naturalisation, that person is excepted from being among those who ceased on Jan. 4, 1948, to be British subjects by virtue of s. 2 of, and para. 1 of Sch. 1 to, the Burma Independence Act, 1947. This exception is enacted by para. 2 (2) of that schedule. Accordingly, the plaintiff in the present case was entitled to succeed in his application for a declaration that he was a
- B British subject if he showed that his father had become a British subject by naturalisation. Naturalisation is not defined in the Act of 1947. The definition of "naturalised person" or "person naturalised in the United Kingdom and Colonies" in the British Nationality Act, 1948, s. 32 (1), does not distinguish between imperial and local naturalisation, c.f. *ibid.*, s. 32 (6); indeed it would be contrary to the general intention of legislation establishing British subjects
- C and Commonwealth citizens as equivalents to draw such a distinction.

It seems that the plaintiff had omitted to make a declaration of election to remain a British subject within the two years allowed by s. 2 (2) of the Act of 1947.

For a statement of the concept of distinct local nationalities within the Commonwealth before the British Nationality Act, 1948, see 1 HALSBURY'S

- D LAWS (3rd Edn.) 528, 529, para. 1023.

For the Burma Independence Act, 1947, Sch. 1, para. 2 (2), see 6 HALSBURY'S STATUTES (2nd Edn.) 204.]

Cases referred to:

- (1) *Markwald v. A.-G.*, [1920] 1 Ch. 348; 89 L.J.Ch. 225; 122 L.T. 603; Digest Supp.
- E (2) *R. v. Francis, Ex p. Markwald*, [1918] 1 K.B. 617; 87 L.J.K.B. 620; 118 L.T. 502; 82 J.P. 134; 2 Digest 189, 520.
- (3) *Calvin's Case*, (1608), 7 Co. Rep. 1a; 2 State Tr. 559; 77 E.R. 377; 2 Digest 121, 1.
- (4) *Joyce v. Public Prosecutions Director*, [1946] 1 All E.R. 186; [1946] A.C. 347; 115 L.J.K.B. 146; 174 L.T. 206; 2nd Digest Supp.

F Action.

The plaintiff, Walter Augustus Bulmer, claimed a declaration that on the true construction of the Burma Independence Act, 1947, and in the events which happened, he did not cease to be a British subject by reason of the provisions of that Act.

- G *F. W. Beney, Q.C.*, and *I. Goldsmith* for the plaintiff.

Milner Holland, Q.C., and *Denys B. Buckley* for the defendant, the Attorney-General.

Cur. adv. vult.

- H June 21. **VAISEY, J.**, read the following judgment: The plaintiff, Mr. Walter Augustus Bulmer, was born in Rangoon, Burma, on Aug. 9, 1883. His surname was originally Buhmeyer but he changed it to Bulmer by a deed-poll dated May 17, 1945. It is undisputed that he was, immediately before Jan. 4, 1948, a British subject. His father, the late Mr. Christian Gottfried Buhmeyer, was German by origin, but had long been resident in Burma. He was granted a certificate of naturalisation in Rangoon on May 21, 1878, under the provisions of an Act called "An Act for the naturalisation of aliens" (No. xxx of 1852)
- I passed by the Governor-General of India in Council on July 16, 1852. This Act (which I will call "the Act of 1852") recited that it was expedient to provide for the naturalisation of aliens resident in the territories under the government of the East India Company.

The plaintiff seeks a declaration that on the true construction of the Burma Independence Act, 1947 (to which I will refer as "the Act of 1947") and in the events which have happened he did not cease to be a British subject by reason of the provisions of the Act of 1947, and particularly s. 1 (2) and s. 2 (1) thereof,

and para. 1 (a) and para. 2 of Sch. 1 thereto. This enactment provided that persons born in Burma who were British subjects immediately before Jan. 4, 1948, should cease to be British subjects on that date, but it provided also (by para. 2 (2) of Sch. 1) that any such person should be deemed to be excepted from the operation of that provision if, among other things, his father "became a British subject by naturalisation". Those are the material words for the purposes of the present case. The defendant, the Attorney-General, suggested in the first place that, because the Act of 1947 was an Act of Parliament of this country, any reference to naturalisation contained in it should be read as meaning naturalisation recognised for all purposes as effectual in this country. I find myself unable to accept that argument.

The Act of 1852 derived its authority by delegation from the Act 3 & 4 Will. 4, c. 85 [Government of India Act, 1833, repealed, except s. 112, by the Government of India Act, 1915 (5 & 6 Geo. 5 c. 61)] which received the royal assent and became law on Aug. 28, 1833: see s. 43, s. 45 and s. 51. Section 8 of the Act of 1852 provides that on obtaining a certificate thereunder and taking and subscribing the oath thereafter directed, the person to whom such certificate was granted should, within the territories therein referred to, be deemed a natural-born subject of the British Crown as if he had been born within the said territories, and should be entitled within the said territories to all the rights, privileges and capacities of such a subject born within the said territories except such rights, privileges and capacities as might be specially excepted in such certificate. I cannot accept the argument that this was something short of actual naturalisation and merely the conferring of the rights, privileges and capacities incident to naturalisation, particularly in view of the recital in the Act of 1852 to which I have referred, and its title.

The certificate granted to the plaintiff's father purported to grant him all the rights, privileges and capacities of naturalisation under the Act of 1852. It contained no exceptions, and the plaintiff's father in due course took and subscribed the oath as provided by the Act. This is admitted, though the actual date of his doing so is unknown. By that oath, the plaintiff's father swore to be faithful and bear due allegiance to the Sovereign of the United Kingdom and all "these territories dependent thereon", and that he would be true and faithful to the East India Company. "These territories" and the territories referred to in s. 8 of the Act of 1852 are those which were under the government of the East India Company, and undoubtedly include Burma. I hold that the plaintiff's father became a British subject by naturalisation in Burma in or about 1878.

At all material times from 1900 until the beginning of 1951, the plaintiff held a British passport, but when, in or about March, 1951, he applied for a renewal of his passport, his application was refused on the ground that he was not entitled thereto because his father never became a British subject by naturalisation within the meaning of the Act of 1947, so that he, the plaintiff, had ceased to be a British subject on Jan. 4, 1948.

Though it is not, in my judgment, material for the purposes of the present decision, I cannot in the circumstances refrain from alluding to the fact that the plaintiff had, at considerable personal risk, done good service to this country during the war by supplying information from Germany, where it seems that he was residing in a species of open arrest as a prisoner-of-war.

The point in the case is whether the plaintiff's father became a British subject by naturalisation within the meaning of para. 2 (2) of Sch. 1 to the Act of 1947. The suggestion is that these words refer only to naturalisation unlimited as to locality (what is apparently known as "imperial" naturalisation) and are not satisfied by the merely local naturalisation which the plaintiff's father undoubtedly obtained in or about 1878. At first sight one would have thought that any naturalisation would have been covered by the words in question—i.e., "became a British subject by naturalisation"—but it is said that *Markwald v.*

A A.-G. (1) is an authority which requires me to decide otherwise. The headnote to the report of that case reads as follows ([1920] 1 Ch. 348):

B "By art. 51 of the Constitution scheduled to the Commonwealth of Australia Constitution Act, 1900, the Commonwealth Parliament was empowered to make laws (inter alia) with respect to ' (xix) Naturalisation and aliens '. In pursuance of those powers the Commonwealth Parliament passed the Naturalisation Act, 1903, which, by s. 7, empowers the Governor-General in Council to grant a certificate of naturalisation to an alien under certain conditions, provided that he shall not issue such a certificate until he has received from the applicant a certificate from one of the officers therein mentioned that the applicant has before him taken an oath or affirmation of allegiance in the form in the schedule to the Constitution.

C By s. 8 ' A person to whom a certificate of naturalisation is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth '. A natural-born German subject left Germany in 1878 and went to Australia, where, in 1908, he took the oath of allegiance to His Majesty and was granted under the powers of the Naturalisation Act, 1903, a certificate of naturalisation by which he became entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in the Commonwealth. He subsequently became a resident in London and was charged and convicted for that, being an alien, he had failed to furnish to a registration officer the particulars required by the Aliens Restriction (Consolidated) Order, 1916, and his conviction was afterwards upheld by a Divisional Court: *R. v. Francis, Ex p. Markwald* (2) ([1918] 1 K.B. 617). In an action brought by the plaintiff against the Attorney-General for a declaration that he was no alien in England, but a liege subject of His Majesty the King, and entitled to the protection of His Majesty the King in all parts of His Majesty's Kingdom and Dominions:—*Held* (affirming the decision of ASTBURY, J.), that neither the taking of the oath of allegiance alone, nor the taking of the oath coupled with the grant of the certificate in Australia, made the plaintiff a British subject in the United Kingdom, and that he was, therefore, an alien when in the United Kingdom, and that the declaration must be refused. Grounds of the judgments of the Divisional Court in *R. v. Francis, Ex p. Markwald* (2) ([1918] 1 K.B. 617) approved.

F *Calvin's Case* (3) (1608) (7 Co. Rep. 1a) distinguished.

G "Per YOUNGER, L.J., that the plaintiff was at least to this extent to be regarded as an alien, that he was a person so described in the British Nationality and Status of Aliens Act, 1914, and for the purposes of that Act. He was a person entitled under that Act to apply as an alien for and to have granted to him in the United Kingdom a certificate of naturalisation."

H It seems to me that all that was decided by *Markwald v. A.-G.* (1) was that an alien locally naturalised did not cease to be and still remained an alien outside the locality. I do not doubt that the plaintiff's father in all places other than those within the jurisdiction of the East India Company was and continued to be an alien for all purposes but it is equally clear to me that, within the limits of that jurisdiction, he was not an alien but a British subject, and a British subject by naturalisation. If the question had been put to the plaintiff, "Did your father ever become a British subject by naturalisation?", he could truthfully have given an affirmative answer. If the question were put to him in Burma I think he would naturally have left the answer unqualified. If the question had been put to the plaintiff in, say, this country or in Australia, he would no doubt have had to explain that his father's status as a British subject was of a purely local character and possessed no validity outside India including Burma. But I do not see how I can hold that the only kind of naturalisation

I

contemplated by the words of the schedule was the so-called "imperial" naturalisation, that is to say, unlimited as to locality. I should have thought that, in an Act concerning Burma, naturalisation in and quoad Burma was just the kind of naturalisation most likely to have been in the contemplation of the legislature. The words are perfectly general, and I do not see why they could not be satisfied by the father's naturalisation acquired anywhere, e.g., in Australia or Canada, and not only if he had acquired it everywhere or, at any rate, had acquired it in and for Great Britain. No doubt, if the fact had been that the plaintiff's father was naturalised as a British subject in Canada or Australia, his case would have been much more difficult because it might well have been argued that the legislature could not be supposed to have been considering a naturalisation which was effectual neither in this country nor in Burma. In no case could the hypothetical question which I have propounded have been answered in the negative, the hypothetical question being, of course, "Did your father ever become a British subject by naturalisation?" I need say nothing about the nature and extent of the obligations to which the plaintiff's father was subject in respect of his allegiance both under and apart from his oath. Such questions as were considered in *Joyce v. Public Prosecutions Director* (4) ([1946] 1 All E.R. 186) do not, in my judgment, arise here. I need say nothing about them.

It seems to me that the plaintiff's application for renewal of his British passport ought to have been acceded to, and I will declare that, on the true construction of the Act of 1947 and in the events which have happened, the plaintiff did not cease to be a British subject under the provisions of that Act, and that he is now a British subject.

Judgment for the plaintiff.

Solicitors: *Cardew-Smith & Ross* (for the plaintiff); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

MARTIN-BAKER AIRCRAFT CO., LTD. AND ANOTHER v. CANADIAN FLIGHT EQUIPMENT, LTD.

MARTIN-BAKER AIRCRAFT CO., LTD. v. MURISON.

[QUEEN'S BENCH DIVISION (McNair, J.), June 7, 8, 10, 1955.]

Contract—Duration—Whether determinable by reasonable notice—Commercial contract, of unspecified duration, involving trust and confidence—Licence to Canadian company to manufacture, and sell in America, products invented by managing director of English company—Agency contract containing provision for termination summarily in certain events—Length of notice.

Although where the character of perpetuity attaches to the legal personality of contracting parties (as, e.g., in the case of statutory undertakers), a contract between them, indefinite in duration, may not be determinable by one party by giving notice of termination, yet that doctrine of permanence either has no application to mercantile or commercial contracts or, if it applies, is subject to a wide class of exceptions, especially where mutual trust and confidence is involved.

By an agreement, which was dated Aug. 26, 1951, and was to be interpreted in accordance with English law, M.-B., an English company which manufactured aircraft ejection seats designed by its managing director, agreed to permit a Canadian company, which had been formed at the instance of the English company and of which one R.M., a former employee of the English company, was director, to manufacture, sell and exploit all M.-B. products on the American continent. The agreement contained no provision for its determination. By art. 1 M.-B. agreed, among other things, not to make a similar agreement with any other party on the

A American continent nor to permit anyone else to manufacture or sell any M.-B. products on that continent without first consulting the Canadian company, and the Canadian company agreed not to export the products made by them out of the American continent without prior consent of M.-B. By art. 2 M.-B. undertook to supply the Canadian company with the "know how" of the manufacture of all M.-B. products and to hand over to the
B Canadian company all the necessary documents concerning the products. Article 4 regulated the royalty rates payable by the Canadian company to M.-B., but there was no provision for any variation of those rates in the future. By art. 5, which provided for the exchange of information concerning improvements, any improvement which the Canadian company considered expedient was not to be incorporated without the prior permission
C of M.-B. By art. 6, the managing director of M.-B. was to have the right at all times to examine the processes of manufacture of the M.-B. products by the Canadian company; M.-B. were to give technical assistance to the Canadian company; and the Canadian company could send technical staff to England to examine the methods of production and to acquire the "know how" of the manufacture of the products.

D By an agreement dated Mar. 9, 1954 (superseding an earlier agreement of July, 1951, which had been in substantially the same terms), between M.-B. and R.M., M.-B. appointed R.M. their sole selling agent for all their products on the North American continent and by cl. 2 R.M. agreed, among other things, to use his best endeavours to promote and extend the sale of the products throughout the territory; to place any orders obtained for the
E products with M.-B., who would execute the orders reserving 17½ per cent. commission for R.M. who (by a modification of the 1951 agreement embodied in the 1954 agreement) was to pay it into the business of the Canadian company to expand the business. R.M. also agreed not to sell or be interested in any way in the territory in products which might be competitive with those manufactured by M.-B.; and to act as general consultant to M.-B. on
F all matters concerning the marketing of the products in the territory. By cl. 3 M.-B. agreed, among other things, not to appoint any other agent and not to sell their products direct in the territory. By cl. 4 it was mutually agreed (i) that, in the event of M.-B. negotiating manufacturing licences for any of their products in any countries in their territory, R.M. would assist
G in such negotiations and the net proceeds from all such licences would be shared between the parties equally; and (ii) that commissions due from M.-B. to R.M. should be payable quarterly. Clause 4 (iv) provided: "Without prejudice to any other remedy which either party may have against the other for the breach or non-observance of the provisions of this agreement either party shall be entitled summarily to determine this agreement"
H (a) in the event of a breach of the provisions of the agreement by the other party, and (b) if the other party went into liquidation or made any arrangement with creditors generally.

Differences having arisen between the parties, M.-B. claimed that the agreements of Aug. 26, 1951, and Mar. 9, 1954, were determinable by reasonable notice.

I **Held:** (i) the agreement of Aug. 26, 1951, being an agreement for a licence for commercial purposes was, on its true construction, determinable by reasonable notice because, among other factors, (a) although the agreement barred M.-B. from entering into any agreement with another party to manufacture, sell or exploit M.-B. products in America, it did not impose any obligation on the Canadian company to manufacture, sell or exploit those products; (b) there was no provision for any change in the royalty rates to correspond with any change in the value of currency; and (c) the terms

of the agreement involved the highest degree of mutual trust and confidence between the parties.

Llanelly Ry. & Dock Co. v. London & North Western Ry. Co. (1875) (L.R. 7 H.L. 550) considered and distinguished.

Dicta of LORD MACDERMOTT in *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* ([1947] 2 All E.R. at p. 343) applied.

(ii) the agreement of Mar. 9, 1954, regarded as a whole, was more analogous to an agreement between master and servant than to an agreement merely of agency as R.M. was to expend much time and money and was restricted from selling other persons' products; accordingly the agreement on its true construction was also determinable by reasonable notice, apart from the provisions of cl. 4 (iv) which rendered it determinable summarily in certain specified events.

Motion v. Michaud (1892) (8 T.L.R. 253, 447) considered.

(iii) the question what was a reasonable notice depended on the facts existing at the time when the notice was to be given, and, in the circumstances, each of the agreements was determinable on twelve months' notice.

[As to terminating licences founded on contract and contracts which are indefinite in regard to duration, see 8 HALSBURY'S LAWS (3rd Edn.) 156, para. 267.]

Cases referred to:

- (1) *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.*, (1875), L.R. 7 H.L. 550; 45 L.J.Ch. 539; 32 L.T. 575; *affg.* (1873), 8 Ch. App. 942; 42 L.J.Ch. 884; 29 L.T. 357; 38 Digest 318, 371.
- (2) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (3) *Thomas v. Sorrell*, (1673), Freem. K.B. 85, 137 (89 E.R. 63, 100); Vaugh. 330 (124 E.R. 1098); 30 Digest (Repl.) 10, 25.
- (4) *Wood v. Leadbitter*, (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 153 E.R. 351; 30 Digest (Repl.) 542, 1771.
- (5) *Re Berker Sportcraft, Ltd.'s Agreements*, (1947), 177 L.T. 420; 12 Digest (Repl.) 372, 2937.
- (6) *Crediton Gas Co. v. Crediton Urban District Council*, [1928] Ch. 174; *affd.* C.A., [1928] Ch. 447; 97 L.J.Ch. 184; 138 L.T. 723; 92 J.P. 76; Digest Supp.
- (7) *Motion v. Michaud*, (1892), 8 T.L.R. 253; *affd.* C.A., 8 T.L.R. 447; 1 Digest 546, 1981.

Actions.

In the first action the plaintiffs were Martin-Baker Aircraft Co., Ltd., an English company which manufactured aircraft ejection seats and allied products, and James Martin, the managing director of the plaintiff company and inventor of the products manufactured by the plaintiff company. The defendants were Canadian Flight Equipment, Ltd., a company incorporated under the laws of the province of Ontario, Canada. The plaintiffs claimed a declaration (a) that an agreement in writing made between the plaintiffs and the defendants on Aug. 26, 1951, was determinable by reasonable notice expiring at any time, alternatively on Aug. 26, or Feb. 26 in any year, or, alternatively on June 30 or Dec. 31 in any year; (b) that reasonable notice for such determination was six or, alternatively, twelve months. The plaintiff company further claimed (i) a declaration (a) that they were entitled, notwithstanding certain provisions of the agreement, to manufacture on the American continent the products which were the subject-matter of the agreement without prior consultation with, or permission from, the defendants, and (b) as to the amount of the moneys payable by the defendants under the terms of the agreement, and (ii) the sum of £14,120 due under the

A agreement. It was ordered that the issues in regard to the moneys payable under the agreement were to stand over pending trial of the questions whether the agreements were terminable.

In the second action the plaintiffs were Martin-Baker Aircraft Co., Ltd., and the defendant was Mr. R. A. J. Murison, a director of Canadian Flight Equipment, Ltd. The plaintiffs claimed a declaration that an agreement in writing made
B between the plaintiffs and the defendant on Mar. 9, 1954, was determinable by reasonable notice expiring at any time, or, alternatively, on any one of the usual quarter days in any year; and that reasonable notice for such determination was six or, alternatively, twelve months.

The facts and the provisions of the agreements are stated in the judgment.

C *Geoffrey Cross, Q.C.*, and *R. J. Parker* for the plaintiffs.
Sir Andrew Clark, Q.C., and *Denys B. Buckley* for the defendants.

McNAIR, J. : In these cases certain issues have been brought before me for determination of preliminary points. The sole issue which I have to determine is whether or not the plaintiffs are entitled to the declarations for which they ask as to their rights under two contracts between them and the defendants
D which are still running. They have taken the course of applying to this court for declaratory judgments primarily as to their right of determination of these two agreements in the hope that the decision of the court on those questions may enable them to guide their future course of action.

In the first action the plaintiffs are Martin-Baker Aircraft Co., Ltd. and James Martin, and they sue Canadian Flight Equipment, Ltd., a company incorporated under the law of the province of Ontario, claiming a declaration that they are entitled to determine by reasonable notice a written agreement made between those parties on Aug. 26, 1951. In that action the plaintiffs also claim a further declaration that under the terms of that agreement they are themselves entitled to manufacture their own products in Canada. In the second action, which has been called on and dealt with at the same time as the first action, Martin-Baker Aircraft Co., Ltd. (referred to hereinafter as "Martin-Baker") are the plaintiffs, and one R. A. J. Murison, who is a director of Canadian Flight Equipment, Ltd., is the defendant. In that action Martin-Baker seek a declaration that an agreement in writing of Mar. 9, 1954, is determinable by reasonable notice.

Before I consider the agreements themselves it is right that I should state the
G background against which these contracts have to be construed and out of which they arose. Mr. James Martin, the personal plaintiff in the first action, was the inventor of a device for self-ejecting pilot seats for use in aircraft. At the time in question there were two types of these seats in use, and it is sufficient for me to say that one was automatic and the other not automatic. Mr. Martin and Martin-Baker had been manufacturing these seats in this country for some time.
H The manufacture of the seats comprised some nine-tenths of the total production of Martin-Baker, and of those seats some eighty per cent. were supplied direct to the Ministry of Supply. In the spring of 1951, being moved to develop the sale of these seats on the North American continent, Mr. Martin arranged for Mr. R. A. J. Murison, who had been in the employment of Martin-Baker for
I some years, to go out to Canada for the purpose of setting up an organisation there. On July 17, 1951, Mr. Martin, as the managing director and chief designer of Martin-Baker, wrote to a firm of accountants in Canada asking them, in effect, to take the preliminary steps for carrying out this project in Canada. He wrote in these terms:

"Mr. Murison, who has been employed by me for some time, is emigrating to Canada at the end of August or early in September. He is going there in a dual capacity. He is my agent for North America and in addition to

that he is getting a manufacturing licence under which he will manufacture ejection seats in Canada, not only for the Canadian market but also for the United States market as well if required. In order to manufacture he will have to form a company, and this I would like you to do for him as soon as possible. My interest in the company is that it will pay me a certain sum under a licensing agreement and, of course, I am technically interested not only in the Canadian company, but in any company where my products are being manufactured. I will want to have access to the factory at all times and see how the products are being made and if necessary I will have to make suggestions where I deem it necessary, but this will be covered by the actual licence agreement. However, on your part I would very much like you to assist Mr. Murison by forming a company straight away as he requires something tangible with a name, furthermore we want to draw up and sign the licence agreement, and we are occasionally being asked what the name of our company in Canada is."

Eventually, in accordance with that instruction, the defendant company, Canadian Flight Equipment, Ltd., was formed as a company with limited liability under the laws of the province of Ontario.

On July 1, 1951, an agreement was executed between Martin-Baker and Mr. Murison, this agreement being for the most part in similar terms to the agreement between the same parties of Mar. 9, 1954, which is the actual agreement on which I am to pronounce my judgment. In order that the matter may be viewed chronologically it is desirable that I should indicate the terms of the agreement of July 1, 1951, at this stage. The terms were as follows:

"1. Martin-Baker hereby appoint Murison as their sole selling agents for all their products (hereinafter called 'the products') on the North American continent, as from May 1, 1951. 2. Murison agrees with Martin-Baker as follows: (i) To use his best endeavours through his agents correspondents or otherwise to promote and extend the sale of the said products on the maximum possible scale throughout the territory. (ii) To notify his agents and correspondents throughout the territory of their appointment as sole selling agents for the said products. (iii) On obtaining orders for the said products in the territory to place their orders with Martin-Baker who shall execute such orders reserving 17½ per cent. commission for Murison."

Clause 2 (iii) was amended in 1954 in the manner which I will indicate when I come to it in its order. Clause 2 continues:

"(iv) Not to sell or be interested in any way in the territory in products which may be competitive with those manufactured by Martin-Baker. (v) To act as general consultants to Martin-Baker on all matters concerning marketing in the territory of the said products."

By cl. 3:

"Martin-Baker agree with Murison as follows: (i) Not to appoint any other person firm or company as their agents or distributors for the sale of the said products in the territory and not to offer for sale or sell the same direct in any part of the territory. (ii) To refer to Murison all inquiries for the said products received by them from persons firms companies or bodies carrying on business in any part of the territory. (iii) To advise Murison their lowest export selling prices . . ."

In cl. 4 there is a mutual agreement as follows:

"(i) In the event of Martin-Baker negotiating manufacturing licences for any of their products in any countries in the territory Murison shall on request by Martin-Baker render all assistance in his power in such

A negotiation. The net proceeds from all such licences shall be shared between the parties during the full term of such licences on the basis of fifty per cent. to Martin-Baker and fifty per cent. to Murison. (ii) That commissions due from Martin-Baker to Murison shall be payable quarterly . . ."

In cl. 4 (iii) there is a provision that, if Martin-Baker receive an order from a British source for the products for shipment to the territory, they will reserve Murison's commission as in cl. 2 (iii). Then we come to the important clause dealing with termination:

C "4 (iv) Without prejudice to any other remedy which either party may have against the other for the breach or non-observance of the provisions of this agreement either party shall be entitled summarily to determine this agreement (a) in the event of the other party committing any breach of the provisions of this agreement and failing to remedy such a breach within fourteen days of notice requiring it to do so (b) in the event of the other party going or being put into liquidation or making any arrangement with its creditors generally."

D Then there is provision for arbitration.

Mr. Murison having been so appointed, in August, 1951, Canadian Flight Equipment, Ltd. (referred to hereinafter as "the Canadian company") was formed, and on Aug. 26, 1951, there was executed an agreement between the Canadian company so formed, of the first part, and James Martin and Martin-Baker, of the second part. It is under that agreement that in the first action I have to come to a decision (i) whether the agreement is determinable on reasonable notice, and (ii) whether under the terms of that agreement Martin-Baker themselves are entitled to manufacture in Canada. Having set out the parties in the way which I have indicated, the agreement continues really by way of recital, but not as operative obligation, that Martin-Baker agree to permit the Canadian company

F ". . . to manufacture, sell and exploit all Martin-Baker products (past, present and future)—whether covered by patent, registered design or not—in the American continent which products will hereafter be referred to as 'the products'."

Although that sentence occurs in a recital to the agreement, I think it right (and it has been so conceded) that I should treat it as being part of the contractual stipulations between the parties. That contractual stipulation having been made, the agreement then continues, in a series of eight articles, to regulate the conditions under which that licence or permission is to be operated. Article 1 provides:

H "Martin-Baker agree on their part not to make any similar agreement with any other party on the American continent nor will they permit anyone else to manufacture or sell any of the products on that continent without first consulting [the Canadian company] and getting their permission and terms as to the amount payable as compensation or otherwise to that company. Martin-Baker also agree that in so far as the products are or may in future be the object of American and Canadian patents or registered designs that they will give every facility to have this agreement registered by the American and Canadian patent offices. On their part [the Canadian company] agree not to export out of the American continent the products made by them, without the prior consent of Martin-Baker."

I Article 2 is the familiar form of condition under which Martin-Baker, as the licensors, agree to provide the Canadian company with the "know how" of the manufacture of their products, and it provides for the handing over of the

necessary documents covering the products. By art. 3 the Canadian company A
agree

"... that the supply of information with a security classification is subject to the approval of the Ministry of Supply and that classified information supplied to [the Canadian company] must be duly safeguarded by them."

Article 4 provides as follows:

"The price payable by [the Canadian company] to Martin-Baker for all the rights under this agreement shall be as follows: (i) In the case of Mark I (non-automatic) type ejection seats for the first hundred seats manufactured [which clearly means manufactured by the Canadian company] the sum of £40 per seat. For the next hundred seats manufactured the sum of £35 per seat and for all subsequent seats manufactured the sum of £30 per seat. (ii) In the case of the automatic type seats for the first hundred seats manufactured the sum of £80 per seat for the next hundred seats manufactured the sum of £70 per seat for subsequent seats the sum of £60 per seat. (iii) In the case of other products the amount payable will be ten per cent. of Martin-Baker selling price to the Ministry of Supply or if not sold to the Ministry of Supply then five per cent. of the price chargeable to other customers."

It is to be observed that there is nothing in that article which provides for any alteration of those fixed sums which have to be paid by the Canadian company for permission to manufacture, at any rate, the seats.

Then in art. 5 there is a clause providing that Martin-Baker shall give the Canadian company the benefit of any improvements in the design, and, on the other hand, that the Canadian company

"will inform Martin-Baker of any improvement that they consider expedient, but they will not incorporate such improvements without the prior permission of Martin-Baker."

Article 6 gives Mr. Martin the right at all times to examine the processes of manufacture of the products by the Canadian company, and obliges Martin-Baker to give technical assistance to the Canadian company. Furthermore, it provides that the Canadian company will be allowed to send technical staff to England to examine methods of production and also to acquire the "know how" of the manufacture of the products. Article 7 provides that the contract is to be interpreted under English law and is to be considered as an agreement made in England and subject to English law. Then, in art. 8, there is provision for arbitration in the event of dispute, but the arbitration clause has been waived in the circumstances of this case. It will be observed that in the agreement itself not a word is said about how long the agreement is to run, nor is there any express provision as to the method of determination if the agreement is, in fact, determinable.

Under those two agreements of July and August, 1951, respectively, business was carried on satisfactorily for some years. In the spring of 1954, as a result of a certain disagreement which is evidenced in the correspondence which has been read, it was thought desirable (primarily because Mr. Martin thought that Mr. Murison was getting rather too much out of the agreement and not doing sufficient under the agreement to earn his commission) that alterations should be made, and the agreement between Martin-Baker and Mr. Murison of July 1, 1951, was superseded by a new agreement of Mar. 9, 1954, between the same parties. The only alterations which were made were these. First, in cl. 2 (iii), dealing with the reservation of $17\frac{1}{2}$ per cent. commission for Mr. Murison, there is added the sentence: "It is understood that this $17\frac{1}{2}$ per cent. will be paid into the business to expand it". There is nothing in the agreement itself which

- A indicates what is meant by the term "the business", but it seems to me to be legitimate, according to the accepted rules of construction, to have that matter identified by extrinsic evidence, and the extrinsic evidence contained in the correspondence quite clearly identifies "the business" as being the business of the Canadian company. Therefore one finds now in this agreement of March, 1954, an understanding, if not an obligation, recorded that Mr. Murison's
- B commission shall be paid into the Canadian company to expand it. The only other new provision inserted in the 1954 agreement which was not contained in the 1951 agreement is that in cl. 4 (i), dealing with the question of manufacturing licences in Mr. Murison's territory, there is added the sentence: "It is understood here that any money paid for infringement or otherwise of patents by the United States government shall not come into this category"—that is, shall not
- C come into the calculation of the net proceeds from such licences shared between the parties on a fifty/fifty basis.

Bearing in mind that my task here is to determine the true effect of the agreement of Aug. 26, 1951, in the case of the first action, and of the agreement of Mar. 9, 1954, in the case of the second action, I approach the first problem—which is really common to both actions though the arguments are not entirely

D similar in each—whether those agreements, or either of them, are determinable by reasonable notice, as is contended by the plaintiffs, or whether, as the defendants contend, the agreements are in their nature permanent, or, perhaps more accurately stated, determinable only by mutual consent.

- In favour of the argument that they are permanent or determinable only by mutual consent, reliance was placed primarily on the well known decision of
- E *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.* (1) (1873), 8 Ch. App. 942, and (1875), L.R. 7 H.L. 550. Counsel for the defendants relied primarily on the statement of principle found in two passages in the judgments in that case. JAMES, L.J., said (8 Ch. App. at p. 949):

- "I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties."
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The same thought is expressed by LORD SELBORNE in his speech in the House of Lords (L.R. 7 H.L. at p. 567) where he stated his view on the matter as a question of principle:

- "My Lords, an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto. So far as the words go, there is here no limit; and if any limit, or the power of fixing a limit, is to be implied, it can only be in one or other of these two ways. In the present case, the character of perpetuity attaches both to the legal personality of each of the contracting parties, [the two contracting parties being statutory railway
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companies] and to the legal character and use of the subject-matter, the railway; and the objects of the agreement are favourably regarded by the law; all such companies having express statutory powers to contract (without any necessary limit of time) for such objects, and being (in the absence of contract) to some extent always under legal obligations, actual or potential, of a like general character. All these considerations, so far from introducing any implication from the nature of the subject-matter, or from any rule of law, against the natural import of the unlimited terms (as to time) in which this particular agreement is expressed, tend to confirm the *prima facie* conclusion that an agreement expressed in such indefinite terms is to have unlimited duration. The whole circumstances under which this agreement was made, and its particular terms, support the same conclusion."

On the basis of those two passages and other cases to which I was referred, counsel for the defendants formulated the propositions for which he contends in this way. The general rule, according to his contention, is that, where the contract contains no express provision for determination, it is *prima facie* determinable only by mutual consent, and not unilaterally; there is a wide class of exceptions, but those exceptions are all cases where some established rule of law relating to the subject-matter of the contract requires that that contract is to be deemed to be determinable either at the end of a fixed period, or at will, or by some fixed length of notice. Counsel classified examples of the exceptions as follows: (a) those determinable by law, such as partnerships, contracts of agency and licences to enter and occupy land; (b) those which have been decided to be determinable either at the end of a fixed period or by a fixed length of notice, such as contracts of hiring and service, which, by the ancient custom of the realm, were deemed to be contracts for a year, and contracts for a tenancy of land. He contended that, if the case fell within the general rule and not within the exceptions, it could be taken out of that general rule only where it was essential, in order to give business efficacy to the contract, to imply a term that it should be determined unilaterally, and, further, where there was nothing on the face of the contract which negated that implication. On the other hand, he submitted that a contract which fell within the exception might be excluded from the exception if there were indications on the face of the contract that the parties could not have intended that it was to be determinable according to the ordinary rule applicable to that exceptional case.

Accordingly, applying those propositions to the agency agreement in the second case (that is, the agreement of Mar. 9, 1954), counsel contended that, as the agreement itself contained provisions for determination summarily only in certain events, it was wrong to imply in that agreement any method of determination other than that dealt with by the express terms of the agreement. Applying his formulation of principle to the licence agreement, counsel contended that, not only was there no need to imply a term for revocation unilaterally by the one party or the other to give business efficacy to the contract, but the implication of any such term would stultify and negative the agreement, and not carry it out.

Those are clearly formidable contentions, but the basis of those contentions, as it seems to me, is the whole-hearted acceptance of the views expressed by MELLISH, L.J., in the Court of Appeal in the *Llanelly* case (1), and by LORD SELBORNE in that case in the House of Lords. It becomes necessary, therefore, to examine the extent to which those two judgments (i) form the basis of the decision in the *Llanelly* case (1), and (ii) have been commented on in subsequent cases. Without going through the various passages in the speeches in the House of Lords in the *Llanelly* case (1) in detail, it is to my mind quite clear that the majority of their Lordships, LORD CAIRNS, L.C., LORD CHELMSFORD and LORD HATHERLEY, decided in favour of permanency in that case, not on the basis of any presumption in favour of permanency, but solely on the terms of that

A particular agreement; and, in particular, they were influenced by the fact that, the agreement being one under which London and North Western Railway Co. obtained running powers over the lines of the Llanelly company, there were at that time in existence statutory provisions under which such an agreement was authorised and under which, if no agreement were reached, London and North Western Railway Co. could apply to some statutory tribunal to obtain those running powers in invitum the Llanelly company and such running powers would be granted for an indefinite time. It was with that statutory background examination of the detailed terms of the agreement that LORD CAIRNS, L.C., LORD CHELMSFORD and LORD HATHERLEY came to the clear conclusion that that particular agreement was permanent in its terms, and in arriving at that conclusion they did not rely on the presumption in favour of permanency which was later stated in the final speech by LORD SELBORNE.

C That case was also considered in the House of Lords recently in *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (2). This well known case concerned a licence to use and occupy part of a theatre, and the question was what rights of determination rested in the licensor under the agreement regulating the licence. LORD MACDERMOTT, in whose speech VISCOUNT SIMON, who presided, and LORD SIMONDS also concurred, approached consideration of the matter in this way ([1947] 2 All E.R. at p. 343):

E "My Lords, the first question in this appeal is whether the licence granted by the appellants was, according to the contract creating it, revocable when the present dispute arose. The answer depends, in my view solely, on the true construction of the letters of June 10, 1942, as ascertained in conformity with the ordinary principles applicable to the interpretation of written instruments. On this aspect of the case the respondents relied on the decision of this House in *Llanelly Ry. & Dock Co. v. London & North Western Ry. Co.* (1), and, in particular, on the passage in LORD SELBORNE's speech (L.R. 7 H.L. at p. 567) which reads . . ."

F LORD MACDERMOTT then cited the first paragraph of LORD SELBORNE's speech, which I have already read, and continued (*ibid.*):

G "My Lords, when the facts of that case are examined, it is plain that the contract for running powers which was there held to be permanent in character had little in common with the contract between the parties to this appeal, save that in neither instance was express provision made for revocation by the licensors. In the *Llanelly* case (1) the agreement not only contained terms which indicated the construction adopted, but, as a perpetual arrangement, it conferred rights of a kind contemplated by the railway legislation then in force—a circumstance which LORD CAIRNS, L.C., obviously regarded as important for he observed (L.R. 7 H.L. at p. 559): 'As those other terms, secured by Act of Parliament, would have been continuing, so this agreement, carrying more favourable terms, appears to me in its nature to be a continuing agreement'. In the present case there is no such statutory background and a close scrutiny of what the parties have agreed has failed to reveal any stipulation which I can regard as manifesting an intention that the licence was to go on for ever if the licensees so desired. No doubt, the dictum of LORD SELBORNE, which I have quoted above, is in wide terms, but it is not expressed as a universal rule of construction (as the cautionary words 'in general' show), and I doubt very much if it was intended to have any applicability to circumstances such as those now under consideration. If it has, I would, for my part, be prepared to arrive at the same conclusion as if it had not, for, even if an onus rests on the appellants in this matter, the whole tenor of the letters of June 10, 1942, and the nature of their subject-matter, seem to me to negative, quite definitely, the idea of irrevocability so strongly urged on behalf of the respondents."

LORD MACDERMOTT continued, in a passage relied on by counsel for the plaintiffs, in these words ([1947] 2 All E.R. at p. 343):

"The expressed purpose of the licence, the periodic payments, the complete retention of possession by the appellants, the various stipulations which give each of the parties a close and lively interest in the conduct and integrity of the other while the licence lasts, and, not least, the provisions of para. (c) of cl. 6 of the letter agreement as to the maintenance of the premises and the state and condition in which they are to be left on the termination of the licence, all point to this conclusion and away from the notion that the permission of the appellants was perpetual."

I will not continue with the latter part of that speech in which LORD MACDERMOTT dealt with the question of the length of notice required. It is also manifest in that case that LORD PORTER was, at least, in some doubt as to the generality of the application of LORD SELBORNE's proposition, for he stated (*ibid.*, at p. 339):

"Whether such a proposition is too widely stated, though in general it may be true, is not a matter which, in my opinion, it is material to decide. The other members of the House gave their decision upon the construction of the document itself, and, in any case, qualified it by bringing to the inquiry a consideration of the nature of the subject-matter involved."

Counsel for the defendants sought to distinguish the *Winter Garden Theatre* case (2) from the present case by urging that throughout the speeches in that case emphasis was laid on the fact that the licence agreement there being considered was a licence for the use of land, and counsel contended that the House was merely applying the well settled principle that a licence for the use of land was determinable by one party in invitum. With great respect to that argument, I do not so read the speeches. It is clear to my mind that LORD MACDERMOTT at least, with whose speech, as I have observed, VISCOUNT SIMON and LORD SIMONDS concurred, dealt with the question of principle, not as being a question of principle applying to the particular licence there involved (namely, a licence for the use of land), but as applying to licence agreements generally. LORD MACDERMOTT stated quite clearly the principle that whether or not such a contract was determinable depended solely on the true construction of the letters as ascertained in conformity with the ordinary principles applicable to the interpretation of written documents. Furthermore, I think it plain from the language used by LORD PORTER ([1947] 2 All E.R. at p. 338) that he, too, was approaching the question as to the revocability of the licence, not from the point of view of a licence for the use of land, but from the point of view of licences generally. That is particularly borne out by his references to *Thomas v. Sorrell* (3) (1673) (Vaugh. 330) and to *Wood v. Leadbitter* (4) (1845) (13 M. & W. 838) where ALDERSON, B., referred to *Thomas v. Sorrell* (3). LORD PORTER summed up the matter in these words ([1947] 2 All E.R. at p. 338):

"If this contention [namely, that licences given for a consideration are not revocable] were confined to a limited licence to do a particular act or series of acts, I do not think I should disagree, provided the performance of a particular act had been actually begun. So limited, the proposition does not conflict with the view that, normally, a licence is revocable . . ."

Accordingly it appears to me that I have to approach the determination of this question without any presumption in favour of permanence; and, indeed, if there is any presumption at all, it would seem to me to be a presumption the other way. It is to be borne in mind that this agreement is an agreement in a commercial or mercantile field. No case was cited to me where it has been held that this doctrine of irrevocability applies to a contract in the commercial or mercantile field, and I do not feel that the law merchant would normally look at

- A such an agreement as this as being an agreement intended to constitute permanent relationships. For example, I have little doubt that the law merchant would regard a contract for the sale of a hundred tons of coal monthly at a fixed price, no period being specified, as a contract determinable on reasonable notice. The common law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties
- B have made, on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently found their place in the great codifying statutes of the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, and the Bills of Exchange Act, 1882, where this view of the law merchant has been adopted and a provision
- C has been inserted to the effect that, where the contract makes no provision for fixing either price, or premium, or time, at which an act has to be performed, then the law is that a reasonable price, or reasonable premium, or reasonable time, will be implied.

It is, of course, quite true that this kind of consideration can in many cases be excluded by express provision; but, where the contract leaves the matter

D open, I think that the common law approach would be to provide a solution which is reasonable. At the same time I bear in mind that it is not the function of the court to make a reasonable contract between the parties, and, in so far as the matter is one of implying terms, one can only imply terms which are reasonable to give business efficacy to the contract. To my mind, however, the question whether a contract such as this is permanent or revocable does not

E depend on the insertion of an implied term, but depends on the true construction of the language used. This is certainly the view expressed by LORD MACDERMOTT in the *Winter Garden Theatre* case (2). Accordingly, subject to there being anything in the agreements of Aug. 26, 1951, and Mar. 9, 1954, which is inconsistent with their being revocable, I would favour the view that they are revocable.

- F An illustration of a case where there is something inconsistent with revocability of such an agreement as this is to be found in *Re Berker Sportcraft, Ltd.'s Agreements* (5) (1947) (177 L.T. 420), where JENKINS, J., had to consider whether or not an agreement between Mr. Norman Hartnell, the well-known dress designer, and the defendant company to manufacture ladies' garments was determinable on reasonable notice. The agreement in that case, although different in certain
- G terms from the present licence agreement, had certain features very much in common. In that case, as in this, the licensee was to make use of the designs of the licensor, and in both cases the reputation of the licensor might be affected by the goods manufactured by the licensee. In the case of that agreement there was an express provision for determination in certain specified events, namely, in the event of the commission or remuneration under the agreement not reaching
- H a certain specified sum, and it was because of that express provision in the agreement that JENKINS, J., took the view that it was not determinable on notice. I think it quite clear that, if those words had not been there, the learned judge would have taken a different view, for, after citing the passage which I have read from the judgment of JAMES, L.J., in the *Llanelly* case (1) (8 Ch. App. at
- I p. 949), he said (177 L.T. at p. 427):

"... applying that principle to the present case, Mr. Clark [for the plaintiff] in effect says: 'Here is a contract which does involve a great deal of trust and confidence and a great deal of necessity for being mutually satisfied with each other's conduct, and a certain amount of personal relations and some delegation of authority inasmuch as Berkertex, Ltd. are empowered to affix a label bearing Mr. Hartnell's name to the dresses manufactured by them'. It seems to me that that argument would have

very great force if this agreement had contained no provision for determination at all. Supposing the only provision as to the duration of the agreements had been the fact that they were to continue from year to year, I think the result would, in all probability, have been that, having regard to the content of the agreements, the court could not hold that the parties intended to go on for ever and so would come to the conclusion that they meant them to be determinable on reasonable notice . . .”

Before I turn to examination of the agreements themselves I should first refer to the decision in *Crediton Gas Co. v. Crediton Urban District Council* (6), before RUSSELL, J. ([1928] Ch. 174), and in the Court of Appeal (*ibid.*, 447). In that case the question was whether an agreement under seal for the provision of street lighting was determinable or permanent. It is quite true that the case was finally decided on the peculiar facts relating to a prior agreement. It is, however, interesting to observe that RUSSELL, J., in referring to the argument based on the *Llanelly* case (1), used these words ([1928] Ch. at p. 178):

“The contract was a commercial contract. The gas company was merely getting a customer for its gas. The remarks of JAMES, L.J., and of LORD SELBORNE do not point to that class of contract being perpetual. It is true that the character of perpetuity attaches to the legal personality of each of the contracting parties, one being a statutory company and the other a public authority; but it is impossible in these days when limited liability is the general rule to say that for that reason a contract, indefinite in point of time, by which a gas company secured a customer on particular terms, was intended to be permanent.”

That reinforces my view that the doctrine has no real application to the case of the ordinary mercantile or commercial contract. I accept also the view which was strongly urged by counsel for the plaintiffs that, even if the doctrine laid down by LORD SELBORNE is to be applied in full, there is a wide class of case—especially those involving mutual trust and confidence—which falls within the exception.

Having arrived at that conclusion as a matter of principle, I can turn to the licence agreement or manufacturing agreement. The first thing that one observes is that the operative part of the agreement is a mere licence to the Canadian company to manufacture, sell and exploit; and, accordingly, on the principles which I have adopted, *prima facie* the licence is determinable. It does not impose any obligation on the Canadian company to manufacture, sell or exploit any of the Martin-Baker products at all, although it does bar Martin-Baker from entering into any agreement with another party on the American continent to manufacture, sell or exploit if the Canadian company do nothing at all. That alone appears to me to be a consideration which points quite plainly to the view that Martin-Baker cannot have intended that they have their hands entirely tied by what may be wholly passive action by the Canadian company. That is one element in this agreement which points strongly in my view to determinability. I am also influenced by the fact that in art. 4, which regulates the royalty rates, no provision at all is made for any variation in those rates; and, if the defendants' contention is right, those royalty rates would remain at their present figure, whatever might be the change in the value of currency. Furthermore, throughout the agreement there are terms which involve the highest degree of mutual confidence and trust between the two contracting parties, and, therefore, it is an agreement which, even on the most limited application of LORD SELBORNE'S doctrine, would not be permanent, but would be terminable.

On the other hand, the very forceful argument is advanced by counsel for the defendants that it is really extremely difficult to believe that anyone in his senses would put up money to bring into existence plant for the manufacture of these special ejector seats unless he had the assurance of some degree of security. That

- A is a matter which I clearly have to weigh in the balance against the other contrary indications which I have mentioned, but, applying my best judgment to the matter, it appears to me that the former objections outweigh that forceful contention advanced in favour of permanence. After all, it is the common experience that people who are prepared to put up risk capital for the development of new business do run risks. It may be that, in putting up such capital
- B as was needed to tool up this factory, the parties relied, not on their strict legal rights, but on the relationships which had existed up to that time quite happily between them. I have no information at all as to who did, in fact, provide the capital for the formation or development of the Canadian company, nor, indeed, in my opinion, would that information be material in arriving at the only decision at which I have to arrive. In my judgment, therefore, the agreement of Aug. 26,
- C 1951, is terminable by notice.

- The next question on which I have to make up my mind is, by what notice. According to the speeches in the *Winter Garden Theatre* case (2), and, in particular, the speech of LORD MACDERMOTT, the question of length of notice has to be determined according to the ordinary principles applicable to the implication of terms into a contract. I have to bear in mind, as I have already observed, that
- D this contract contemplates that money will be put up in the business and that plant will be purchased. I have had very little information placed before me by either party as to the extent of that plant. It seems to me that on the balance sheet for the year ending April, 1954, the plant and machinery after depreciation stand at about £4,000, and there is an estimate that in November, 1954, the depreciated value of the plant and machinery would amount to some £5,000.
- E So it is not the question of a vast organisation. I should observe that, although the point was challenged at one time, I have formed the view that the question of length of notice has to be determined having regard to the facts as existing at the time when the notice is given, and is not determined by having regard to the facts as existing at the time when the contract was made. Applying the best judgment I can on the rather scanty evidence before me, I would say that this contract is determinable by twelve months' notice given at any time. Before parting with this agreement I should deal also with the second declaration asked for, namely, that Martin-Baker are themselves entitled to manufacture in Canada. Entitlement to that declaration is put in issue in the defence by the defendants, but counsel on their behalf conceded (in my view, quite rightly) that that declaration should be granted on the true construction of the agreement.
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- G I turn now to the question whether the agency agreement—to use that term without prejudicing the position for the moment—is also determinable. If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be determinable summarily at any moment. An agreement of this nature, however, has to be looked at as a whole and the whole of its contents considered, and if one finds (as one finds here) that the person who is
- H described as sole selling agent has to expend a great deal of time and money and is subject to restriction as to the sale of other persons' products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where, admittedly, the agreement is terminable by reasonable notice, though not determinable summarily except in the event of misconduct.

- I I was urged to hold that this agency agreement was terminable summarily on the basis of the decision in *Motion v. Michaud* (7), before DAY, J. (1892) (8 T.L.R. 253), and in the Court of Appeal (*ibid.*, 447), where it was held that an agreement, under which the plaintiff was appointed purely as a commission agent for the sale of the defendants' brandies in England, was determinable summarily or at will. DAY, J., decided that it was so, but in the course of his judgment he said (8 T.L.R. at p. 253):

“ . . . there was no evidence of anything in the nature of service or of a

contract only determinable by notice. The plaintiff was an independent merchant who sold wines for his own profit, and also sold champagne and beer for other people upon commission, and he undertook to see what he could do in the way of selling the defendants' brandies upon similar terms. He was in no sense their servant, and was not bound to devote any time or energy to the business on their behalf. No action in the nature of wrongful dismissal was maintainable in respect of such a relation."

The judgment of LORD ESHER, M.R., in the Court of Appeal is very shortly reported, and I cannot find any help in the determination of principle. It appears to me from the language of DAY, J., that, if he had had to consider the case now before me, he would clearly have taken the view, having regard to the form of the provisions of the agreement, that, although called an agency agreement, it was determinable only by reasonable notice.

If that conclusion is right, as I think it is, it follows that the provision in cl. 4 (iv) dealing with the right to determine summarily does not stand in the way of a decision that the agreement as a whole is determinable by reasonable notice. On that view, the provision as to summary determination is merely a regulation of or restriction on the right of summary determination which always exists in certain events, even in the case of an agreement ordinarily determinable by notice. Accordingly, bearing in mind that the relationship created here is essentially one of confidence and trust and is essentially a commercial relationship in the mercantile field, I would hold that this agreement is also determinable by reasonable notice. Against that view, however, it was urged very strongly that, taking into consideration the modification of March, 1954, by which Mr. Murison accepted an understanding that he would pay his whole commission into the business, which I have already held means the business of the Canadian company, to expand it, it would be wholly unreasonable that this agency agreement should be determinable. Against that view it is urged by counsel for the plaintiffs (it seems to me with considerable force) that, if I were to hold that this agreement is not determinable, then Mr. Murison, in so far as the article to which I have referred imposed any obligation on him, would be obliged to pay the whole of his commission into the Canadian company and to do the whole of his work for life for nothing. That appears to me an entirely unreasonable conclusion, and I, therefore, adhere to the decision which I have reached, namely, that this agreement likewise is determinable by notice. Although probably, as a matter of law, the two agreements have to be considered in isolation, for my part I take the view that it would be in the highest degree pedantic and artificial, and, accordingly, I am of opinion that this agreement, too, can only be determined by the same notice as I have already said is applicable to the licence agreement, namely, twelve months.

Declarations accordingly.

Solicitors: *Coward, Chance & Co.* (for the plaintiffs); *Boodle, Hatfield & Co.* (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

DAVIDSON-HOUSTON v. LANNING.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Gorman, JJ.), March 9, 1955.]

Street Traffic—Driving while disqualified for holding licence—Offender under twenty-one years of age—Sentence—When sentence of imprisonment may be imposed—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 7 (4)—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 17 (2).

In considering the sentence to be imposed on a person under twenty-one years of age convicted of an offence against the Road Traffic Act, 1930, s. 7 (4), which provides in effect that the penalty for the offence of driving while disqualified for holding a licence must be imprisonment unless there are special circumstances, the court should have regard to s. 17 (2) of the Criminal Justice Act, 1948, and accordingly may not sentence the offender to imprisonment unless the court is of opinion that no other method of dealing with him is appropriate.

The appellant, who was twenty years of age, was convicted by justices of, among other offences, driving a motor vehicle while disqualified for holding a licence contrary to s. 7 (4) of the Road Traffic Act, 1930. He had previous convictions for using motor vehicles while uninsured and other driving offences. The justices sentenced him for the offence against s. 7 (4) to imprisonment, stating that they considered that no other method of dealing with the appellant was appropriate having regard to his previous convictions and the serious nature of the offence charged. On appeal,

Held: in the circumstances the sentence of imprisonment was right. Appeal dismissed.

[For the Road Traffic Act, 1930, s. 7 (4), see 24 HALSBURY'S STATUTES (2nd Edn.) 580.

For the Criminal Justice Act, 1948, s. 17 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 366.

For the Magistrates' Courts Act, 1952, s. 107, see 32 HALSBURY'S STATUTES (2nd Edn.) 507.]

Case Stated.

This was a Case Stated by the justices for the county of Dorset, acting in and for the Petty Sessional Division of Wareham, in respect of their adjudication as a magistrates' court on Oct. 7, 1954. The appellant, who at the material time was a soldier and twenty years of age and was disqualified for holding a driving licence, was charged before the justices with and pleaded guilty to three offences against the Road Traffic Act, 1930, committed on Sept. 12, 1954, viz.: (i) unlawfully taking and driving away a motor car without the consent of the owner or other lawful authority contrary to s. 28 of the Act; (ii) unlawfully using a motor car, there not being in force in relation to the use of the car a policy of insurance against third-party risks, contrary to s. 35 of the Act; (iii) being disqualified for holding or obtaining a licence, unlawfully driving a motor car on a road, contrary to s. 7 of the Act. The facts found by the justices were as follows. The motor car unlawfully driven by the appellant belonged to an acquaintance of his, one Pittock, at Bovington camp. The appellant had asked Pittock to take him into Bournemouth, but Pittock, not wanting the appellant's company, had removed the main jet from his car and had told the appellant that the car was out of order; and, in the appellant's presence, Pittock had locked both the doors of the car and the doors of the garage in which the car was. The appellant had then asked Pittock to leave the keys of the car with him, but Pittock, knowing that the appellant was disqualified for holding a driving licence, told the appellant that he could have neither the keys nor the car. Pittock then left for Bournemouth in another car. After his departure the appellant broke into Pittock's garage, succeeded in starting the car and drove it, without a main jet,

into Bournemouth where he handed it over to Pittock. The appellant had been convicted at Eastbourne on Oct. 30, 1953, of using on Aug. 4, 1953, a motor vehicle while uninsured; for that he had been fined £5 and disqualified for twelve months. He was also convicted of driving without a road fund licence for which he was fined £1. On Nov. 12, 1953, he was convicted at Camberley for failing to report an accident on Aug. 9, 1953, for which he was fined £1, and for driving without a driving licence for which he was discharged absolutely. On Nov. 18, 1953, he was convicted at Cranbrook for driving without reasonable consideration for which he was fined £20 and costs and his licence was indorsed; he was also convicted for failing to stop when required to do so by the police for which he was fined £5, and for an offence under s. 35 of the Road Traffic Act, 1930, for which he was fined £10 and disqualified from driving for twelve months. The Eastbourne magistrates' court on May 3, 1954, granted the appellant a removal of the disqualification which that court had imposed; the appellant applied on May 19, 1954, to the Cranbrook magistrates' court for a similar removal of the disqualification imposed by that court, which was refused.

The appellant contended before the justices that s. 17 (2) of the Criminal Justice Act, 1948, was an overriding enactment which superseded s. 7 (4) of the Road Traffic Act, 1930, and that the justices were not required by law to pass a sentence of imprisonment in respect of the offence under s. 7 of the Act of 1930; it was further contended that they were not permitted by law to pass a sentence of imprisonment on an offender under the age of twenty-one years unless he had exhibited such unruliness or depravity as rendered any other method of dealing with him inappropriate. The justices being of opinion that s. 7 (4) of the Road Traffic Act, 1930, was not superseded by s. 17 (2) of the Criminal Justice Act, 1948, and that, even if this were so no method of dealing with the appellant other than imprisonment was appropriate having regard to his previous convictions, the circumstances and the serious nature of the offences committed by him on Sept. 12, 1954, imposed in respect of the charge under s. 7 of the Act of 1930 a sentence of three months' imprisonment. The question for the court was whether this decision was correct in law.

J. T. Molony for the appellant.

S. A. Morton for the respondent.

LORD GODDARD, C.J., having stated the facts, continued: The point taken on behalf of the appellant was that the justices were debarred from sending him to prison by reason of the provisions with regard to young offenders in the Criminal Justice Act, 1948. The justices did say that s. 7 (4) of the Road Traffic Act, 1930, was not superseded by s. 17 (2) of the Criminal Justice Act, 1948, and further that, even if it were so superseded no method of dealing with the appellant other than imprisonment was appropriate having regard to his previous convictions and the circumstances and the serious nature of the offences committed by him on Sept. 12, 1954. They proceeded to impose on him a sentence of three months' imprisonment. If the justices meant that they could in any case ignore the provisions of the Criminal Justice Act, 1948, s. 17, they were wrong, but I do not think that that is what they meant. I think that they were dealing with the question in accordance with this particular case. Section 107 (2) of the Magistrates' Courts Act, 1952 (which supersedes as regards magistrates' courts s. 17 (1) of the Criminal Justice Act, 1948) prohibits a court of summary jurisdiction from imposing imprisonment on a person under seventeen years of age. This young man was not under seventeen; he was twenty. Then s. 17 (2) of the Criminal Justice Act, 1948, provides:

"No court shall impose imprisonment on a person under twenty-one years of age unless the court is of opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall

A obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition."

B That sub-section is as binding on a judge as it is on justices sitting in a court of summary jurisdiction. The only difference is that a court of summary jurisdiction or quarter sessions must state their reasons* for holding that there is no other method of dealing with him and a judge need not. I do not think the justices could have thought that s. 107 of the Magistrates' Courts Act, 1952, did not supersede the provision in the Road Traffic Act, 1930, so far as it affected a boy under seventeen, but with regard to a boy over seventeen, the justices have to apply their minds to the provisions of s. 17 (2) of the Criminal Justice Act, 1948, and by their finding in the Case Stated they show that they have done so. They have said:

C "That having regard to the fines imposed upon the appellant for the previous convictions followed by the circumstances of and the apparent determination of the appellant to carry out his intention of committing the serious offences on Sept. 12, 1954, the only course we could take to enable the appellant to realise the seriousness of the offences was to sentence him to imprisonment."

D I do not see what else the justices could have done unless they sent him to quarter sessions with a view to sending him to Borstal. This is not, however, a Borstal case at all; it is the case of a young man who will not obey the law. He is twenty years of age and has finished his army service; he is not a child and he is not a boy. His service in the army has not instilled in him discipline and obeying the law, and I think the justices were perfectly right in passing a sentence of imprisonment and this appeal is dismissed with costs.

E **ORMEROD, J.:** I agree.

GORMAN, J.: I agree.

F

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook*, agents for *Lock, Reed & Lock*, Dorchester (for the appellant); *Walters & Hart*, agents for *Clerk of county council*, Dorchester (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

* This is required by s. 107 (3) of the Magistrates' Courts Act, 1952.

INGHAM AND ANOTHER v. EMES.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), June 8, 10, 22, 1955.]

Warranty—Work—Fitness of materials for particular purpose—Hair dye producing dermatitis—Preliminary test negative—Customer failing to disclose ill effects suffered on previous occasion.

In 1954 the plaintiff, who wished to have her hair dyed at the establishment of the defendant who was a ladies' hairdresser, agreed to undergo a test of Inecto, a hair dye which was known to be dangerous in certain cases. The plaintiff read the instructions on the Inecto package which included a warning that the use of Inecto Rapid without a test might be dangerous and prescribed a simple test for discovering whether a person had a predisposition to skin trouble as a result of using the dye. The test was duly applied to the plaintiff and proved negative, but, when subsequently used to dye the plaintiff's hair, the Inecto produced acute dermatitis. In 1947 Inecto had been used on the plaintiff's hair by another hairdresser and had had a bad effect on the plaintiff. She did not tell the defendant at the time when the use of Inecto was being considered that Inecto had previously been used and had had a bad effect. The plaintiff was one of a rare class of persons who reacted normally to the small test of Inecto but for whom a full application of the dye might still be harmful. In an action for damages for breach of warranty that the Inecto was suitable for use for the purpose for which it was required, viz., for dyeing the plaintiff's hair,

Held: the defendant was not liable since, although a warranty by the defendant was to be implied that Inecto was suitable for dyeing the hair of a person whose reaction to Inecto was normal, yet the plaintiff by failing to warn the defendant at the time of the test and treatment about the plaintiff's previous experience of the use of the dye, and thus, in effect, of the fact that the plaintiff was abnormally sensitive to Inecto, was disabled from relying on the warranty.

Griffiths v. Peter Conway, Ltd. ([1939] 1 All E.R. 685) applied.
Appeal allowed.

[Editorial Note. This case may be compared with *Watson v. Buckley, Osborne, Garrett & Co., Ltd.*, and *Wyrovoy's Products, Ltd.* ([1940] 1 All E.R. 174) where a hairdresser and distributors were held liable, in contract and negligence respectively, for the consequences of use of a particular hair dye.

As to the warranty of fitness where the purpose for which work and materials are intended is declared, see 2 HALSBURY'S LAWS (3rd Edn.) 131, para. 251 text and note (k); 23 HALSBURY'S LAWS (2nd Edn.) 631, para. 886, and 34 HALSBURY'S LAWS (2nd Edn.) 466, para. 531.]

Cases referred to:

- (1) *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96; Digest Supp.
- (2) *Stewart v. Reavell's Garage*, [1952] 1 All E.R. 1191; [1952] 2 Q.B. 545; 3rd Digest Supp.
- (3) *Griffiths v. Peter Conway, Ltd.*, [1939] 1 All E.R. 685; Digest Supp.

Appeal.

The defendant, a ladies' hairdresser, appealed against an order of His Honour JUDGE GORDON CLARK at Guildford County Court, dated Mar. 22, 1955, adjudging that the defendant should pay to the second plaintiff the sum of £60 damages and part costs in an action for damages for, among other grounds, breach of implied warranty. The action was brought by the husband of the second plaintiff, and the second plaintiff, who helped him in his business as a publican at an hotel. The second plaintiff had contracted dermatitis following the use of Inecto hair dye, after a test which gave negative results, by the defendant's

A assistant in dyeing the second plaintiff's hair. The defendant denied that she had committed any breach of warranty and contended that any warranty which she might have given was that the Inecto was suitable for use for dyeing the hair of a person whose reactions to it were normal, which the second plaintiff knew she was not, and that the second plaintiff had failed to disclose to the defendant the fact that she had suffered ill effects from its use previously.

B *S. H. Noakes* for the defendant.
R. B. Willis for the plaintiffs.

Cur. adv. vult.

June 22. The following judgments were read.

C **DENNING, L.J. :** Mrs. Ingham, the second plaintiff, is the wife of the licensee of the Sun Hotel, Dunsfold. In March, 1954, she had her hair dyed by a ladies' hairdresser called Maison Emes in Godalming. The preparation which was used was called Inecto Rapid. As a result of it she suffered acute dermatitis and she brings this action against the hairdresser for damages.

D The story starts, however, seven years before, in 1947, when the second plaintiff was attending another hairdresser. She then had her hair dyed with Inecto and after about two days her eyes became puffy. She consulted a doctor and he suspected that it might be the Inecto which caused the trouble. After that experience she did not have Inecto for a long time because she knew it might have a bad effect on her. In September, 1951, she started going to Maison Emes in Godalming where she was attended by an assistant named Mrs. Hughes. Thenceforward for two and a half years the second plaintiff regularly had her hair tinted by Mrs. Hughes with henna and they were on excellent terms with one another. During one of these visits the second plaintiff may well have told Mrs. Hughes about her previous Inecto experience, but rather in a gossipy manner, not in such a way as to make any impression on Mrs. Hughes' mind. In March, 1954, the second plaintiff had a coming engagement, when she was going with her husband to see the brewers and she wanted to look her best. F She was getting tired of the henna shampoos, as they needed to be done so often and were expensive. Thereupon, the assistant, Mrs. Hughes, suggested that the second plaintiff should try Inecto, and went on to say that, if she tried Inecto, she must have a test first, because it was dangerous. There was a conflict between the two ladies whether the second plaintiff on that occasion reminded Mrs. Hughes of her previous experience with Inecto. The second plaintiff says that she reminded Mrs. Hughes of it. Mrs. Hughes says that she did not. The judge found that Mrs. Hughes was right about this, because he did not think that Mrs. Hughes would have been so rash as to go on with Inecto if she had known of previous trouble. On Mar. 9, 1954, the second plaintiff went to have the test to see if she was likely to be harmed by Inecto. Mrs. Hughes opened a package of Inecto and put the instructions on the table. The H second plaintiff read them. The instructions said:

I "The manufacturers . . . draw attention below to a simple and easy test, which in the opinion of eminent skin specialists will disclose any predisposition to skin trouble from the use of the dye. The test must, as a matter of routine, be employed on each occasion prior to using the dye, regardless of the fact that it has been used with success on the same person on a previous occasion."

Then follows in large letters "It may be dangerous to use Inecto Rapid without this test". The test is then described of applying a little Inecto behind the ear, painting a film of collodion over it and leaving it for forty-eight hours. The instructions then say:

"If no irritation has been experienced and there is no redness or inflammation then the skin is free from predisposition and the colouring may be used."

On Mar. 9 Mrs. Hughes applied the test in exact accordance with the instructions. On Mar. 11 the second plaintiff returned. Mrs. Hughes examined the patch and said her skin was perfectly clear. She told the second plaintiff that she was not a reactor and that she was a safe person to have Inecto. The second plaintiff thereupon made an appointment to have her hair dyed with Inecto on Mar. 16. It was done on that day, and within a few days the second plaintiff was suffering from acute dermatitis. There is no doubt that it was due to the Inecto.

It appears from the evidence that the test is not infallible. Dr. Hassan, the expert called by the defendant, described Inecto as "an extremely dangerous substance". In very rare cases, even when the test is negative, the subject herself may be sensitive to it. For instance, she may be negative when the test is done, but sensitive a few days later when the dye is applied. Or she may not react to the small test but may react to the full dose. The judge came to the conclusion that the second plaintiff was "of the rare type to whom the ordinary test will not apply but who is allergic to a large dose", and he found that there was "no fault of either party". He dismissed the claim, therefore, founded on negligence, but he found in favour of the second plaintiff on the ground of breach of warranty. He found that there was a warranty by the hairdresser that the Inecto was suitable for this particular person, the second plaintiff, and that the defendant was liable when it turned out not to be suitable. If the second plaintiff had not had any previous trouble with Inecto, then I think the judge would have been right. She was apparently a perfectly normal person, and Mrs. Hughes said, or as good as said, to her: "If you pass the test you may safely have Inecto". There would be, I think, in those circumstances, an implied term that Inecto was reasonably fit for the purpose of dyeing the hair of this particular person, the second plaintiff, if she passed the test. But the second plaintiff to her own knowledge was not in this regard a perfectly normal person. She had experienced Inecto before and she knew that it might have a bad effect on her. In the modern phrase she knew that she was allergic to it. She ought clearly to have made that known to Mrs. Hughes; and she knew that she ought to have done so. That is shown by the fact that she herself insisted at the trial that she had told Mrs. Hughes about it on the very day that Inecto was suggested; but, unfortunately for her, the judge did not accept her evidence on this point. If she had made it known, Mrs. Hughes would never have gone on with the Inecto. It is rather like the case which I put in the course of the argument: if a doctor suggests penicillin, and the patient knows by experience that he is allergic to penicillin, he ought to tell the doctor so. I appreciate that cases of medical treatment are very different from the present, but there is in each case a duty to use reasonable care to disclose known peculiarities. The second plaintiff ought to have brought home to Mrs. Hughes that she was allergic to Inecto.

The difficulty that I have felt is that this looks to me like a plea of contributory negligence, or a plea that the second plaintiff was the author of her own misfortune; and that has never been pleaded or found. But I think the same result is reached by saying that the implied term as to fitness is dependent on proper disclosure by the customer of any relevant peculiarities known to her, and in particular of the fact that she knew by experience that Inecto might have a bad effect on her. The way this result is reached in law is this: in a contract for work and materials (such as the present), there is an implied term that the materials are reasonably fit for the purpose for which they are required: see *G. H. Myers & Co. v. Brent Cross Service Co.* (1) ([1934] 1 K.B. 46). This term is analogous to the corresponding term in the sale of goods: see *Stewart v. Reavell's Garage* (2) ([1952] 1 All E.R. 1191). In order for the implied term to arise, however, the customer must make known to the contractor expressly or by implication the "particular purpose" for which the materials are required, so as to show that he relies on the contractor's skill or judgment. The particular

A purpose in this case was to dye the hair, not of a normal person, but of a person known to be allergic to Inecto. The second plaintiff did not make that particular purpose known to Mrs. Hughes. She cannot therefore recover on the implied term.

B I ought perhaps to say that I do not think this case is governed by the Harris tweed case, *Griffiths v. Peter Conway, Ltd.* (3) ([1939] 1 All E.R. 685). In that case a lady suffered from dermatitis owing to wearing a Harris tweed coat, which was specially made for her, and she failed to recover. Harris tweed is not a dangerous thing and it is reasonably fit for any normal person, test or no test: whereas Inecto is a dangerous thing which is not reasonably fit for anyone unless she passes a test. The manufacturers in their instructions represent in effect that, if a person passes the test, Inecto is safe. The hairdresser passed on that representation to her customer on her own account. That brings an implied term into operation in favour of all persons who pass the test except those, such as the second plaintiff, who know that they are allergic and do not disclose it. I would therefore allow the appeal and give judgment for the defendant.

D BIRKETT, L.J. : It is not necessary to repeat the facts of this case which have been fully set out in the judgment of my Lord; but, in view of the arguments addressed to this court in this appeal, it is both interesting and instructive to see the way the case was presented before the learned county court judge.

E In the particulars of claim it was pleaded that Mrs. Hughes, the servant of the defendant, Mrs. Emes, advised the second plaintiff that, instead of using the henna dye, with which she had been in the habit of tinting her hair, she should have her hair dyed by the dye known as Inecto. It is then pleaded that Inecto was a dangerous substance as Mrs. Hughes well knew; that she knew further that the second plaintiff was allergic to Inecto or predisposed to skin trouble with its use. It was therefore pleaded, and the case in the county court was fought on the contention, that, in the circumstances, Inecto should not have been used on the second plaintiff without making a proper test as laid down by F the manufacturers; that such test as was carried out was negligently and improperly done so that there was in fact no proper test at all; and that the defendant through Mrs. Hughes had been guilty of negligence, and breach of the implied warranty that she had properly carried out the test and that the second plaintiff could safely use Inecto.

G Now the learned county court judge formed a very high opinion of Mrs. Hughes as a witness, and he found as a fact that the main contention of the second plaintiff that the test had not been properly carried out could not be sustained. The test was properly carried out, and there was no negligence on the part of Mrs. Hughes. Equally the suggestion that the implied warranty given by Mrs. Hughes, that she had carried out the test properly, had been broken by Mrs. Hughes also failed. There was another very important question of H fact. The second plaintiff made it part of her case in the county court that in 1947 at the premises of another hairdresser she had had an application of Inecto and in two days had a puffiness round the eyes in consequence. She also said in evidence: "I knew Inecto might have a bad effect on me". She was very emphatic that she had told Mrs. Hughes of this experience. When giving evidence she said:

I "I had told Mrs. Hughes about my previous Inecto experience. I can't remember exactly when. February, 1954. We were talking about hair. Mrs. Hughes said time for another tint. I said I was rather fed up with having henna as the grey hair showed through in a week or two and that it was a bit expensive. She said: 'Of course, there is another method—Inecto'. I said: 'I told you what happened to me before'. She said: 'You didn't have a test, though, did you?' I said: 'No'. She said: 'If you decide to have it we will give you the test first'."

Mrs. Hughes had been a hairdresser for twenty-six years, and had been giving Inecto applications for twenty years without any previous trouble. She told the learned judge that, if she knew that a customer had had an Inecto application before and had had trouble, she would not handle the case at all; she would not even make a test. Now in the passage from the judgment of the learned county court judge it seems to me to be fairly clear that he is not accepting the version given by the second plaintiff. He says:

"If the second plaintiff is to be believed about her conversation about her previous trouble how much worse was Mrs. Hughes' conduct—she would have said: 'Well, if I do do it I will give you a proper test'. It is incredible that she should not take the trouble."

It would seem to me that there is some fault in the transcription of these notes and something would appear to have been left out. But the learned judge in his judgment said this:

"She says that Mrs. Hughes suggested she should try Inecto; a conflict between Mrs. Hughes and the second plaintiff, as the second plaintiff says 'I've had it before as I told you'; and Mrs. Hughes replied: 'You had no test then, you will have one now'. The second plaintiff says she had mentioned her previous trouble. Mrs. Hughes denies anything of the sort. 'I should never have gone as far as a test if I had known of previous trouble'. In the course of gossip the second plaintiff may well have mentioned Inecto plus slight trouble, but hard to credit here that no sooner did Mrs. Hughes mention Inecto than she reminded her—if so Mrs. Hughes would be very rash if she continued to suggest it."

The learned judge said of Mrs. Hughes:

"Mrs. Hughes was a decidedly impressive witness; she didn't give me the impression of one who would be likely to overlook a precaution."

The learned judge then proceeded to decide the case on the footing that a proper test had been applied by Mrs. Hughes, that as a result of it she was entirely justified in telling the second plaintiff that she might safely have the Inecto application; and that the explanation of the whole matter was that the second plaintiff was that rare type to whom the ordinary test will not apply but who is nevertheless allergic to a large dose or application. The learned county court judge said of the finding that there was no fault in either party:

"Upon that finding upon whom does the responsibility lie for the misfortune of the second plaintiff? This is a narrow point. It is conceded that as in the parallel case of the sale of goods there is *prima facie* an implied warranty that the stuff supplied will be suitable for what it has to do; a hair dye which produced dermatitis is not suitable; it may be suitable for the vast majority but unfortunately it was not suitable for this particular person—what escape is there for the defendant? While they repel the allegation of negligence, how can they get out of the allegation that they used material which was not in fact suitable?"

Now on the evidence there can be no doubt, I think, that the second plaintiff was not a normal, ordinary person so far as the effects of Inecto were concerned. It was the foundation of her case in the county court that she was not, and that she had made her disability in this connection quite plain to Mrs. Hughes. But the learned judge has found that this knowledge was not effectively conveyed to Mrs. Hughes. Everything in the case points to the conclusion that this experienced hairdresser would have had nothing to do with a customer who was allergic to Inecto having an application of it. The circular issued by the manufacturers stressed in large type: "It may be dangerous to use Inecto. Rapid without this test", and the second plaintiff had also read this circular. Now

- A what is the position in law when an important fact is concealed in circumstances like these which ought to be made known? The learned county court judge referred to the implied warranty which arises in certain circumstances under the Sale of Goods Act, 1893, and he asked the question: How can the defendant get out of the allegation that material was used which was not in fact suitable? For it was never contended that the second plaintiff had not suffered from the
- B application of Inecto in this case. But when the learned judge says that

“ . . . the risk of putting on the wrong person even if no skill or care could discover it must rest on the defendant ”,

- he is overlooking the important fact that this knowledge was already known to the second plaintiff, and she was under a duty to inform Mrs. Hughes of her
- C peculiar position. That the second plaintiff recognised this is clear from the evidence she gave that she did in fact disclose her knowledge, although the learned county court judge did not accept the evidence. In my opinion Mrs. Hughes did not impliedly warrant that Inecto was safe to be used by persons who were in fact allergic to it, but only by those who, having passed the test, could be regarded as normal ordinary people. But the second plaintiff was not an
- D ordinary normal person in this sense at all, and knowing of her peculiarity and failing to disclose it to Mrs. Hughes, I think that she disables herself from relying on the implied warranty. In a limited sense she made known the purpose to Mrs. Hughes, and that purpose was to have her hair dyed; but the true purpose was to have her hair dyed as a person allergic to Inecto to her knowledge and this purpose was never disclosed to Mrs. Hughes. I should allow the appeal.

- E **ROMER, L.J. :** I agree. In my opinion the decisive fact in this case which precludes the second plaintiff from succeeding is that, when she had her hair dyed with Inecto in 1951, she knew, but Mrs. Hughes did not know, that she had in 1947 suffered ill effects from the application of this dye. “ I knew ”, she said in her evidence, “ that Inecto might have a bad effect on me ”. She
- F further said that she in fact passed this information on to Mrs. Hughes at the time when this lady suggested the Inecto treatment, and her emphasis on this point shows the importance which she rightly attached to it. The learned judge, however, found himself unable to accept her evidence as to this, and it must be taken that she never did convey to Mrs. Hughes’ mind that she had had any unfortunate experience of Inecto on a previous occasion. Counsel for
- G the plaintiffs submitted that her omission to communicate this experience to Mrs. Hughes was an irrelevant consideration. His contention was that the defendant, through Mrs. Hughes, warranted that, if the second plaintiff satisfactorily passed the test which Mrs. Hughes suggested (and she did so pass it), then the second plaintiff could safely receive the Inecto treatment. The liability of the defendant, he submitted, under this warranty, was absolute and was unaffected by the second plaintiff’s failure to mention the incident which had
- H occurred in 1947. I am quite unable to accept this submission. Mrs. Hughes had no reason to suppose that the second plaintiff was other than normal in her reactions to Inecto and the test itself indicated her normality. The second plaintiff herself, however, had reason to know, and did know, that she was abnormal in this respect, but withheld this vital information from Mrs. Hughes. In these circumstances it appears to me that it would be against all justice
- I that the second plaintiff should recover damages against the defendant for breach of a warranty which she would never have thought of giving if she had known what the second plaintiff herself knew. In the *Harris tweed* case, *Griffiths v. Peter Conway, Ltd.* (3), SIR WILFRID GREENE, M.R., said ([1939] 1 All E.R. at p. 692):

“ In this particular case, the judge has found the existence of abnormality, and, that being so, it seems to me impossible to say that the seller here had the particular purpose pointed out to him so as to show that the buyer relied

on his skill or judgment. After all, the object of that is to enable the seller to make up his mind whether or not he will accept the burden of the implied condition, and the effect of the argument addressed to us would be to impose that implied condition upon the seller without his having the opportunity of knowing the vital matter which would affect his mind."

SIR WILFRID GREENE was dealing there with the condition as to fitness implied by s. 14 (1) of the Sale of Goods Act, 1893, but his reasoning appears to me to be applicable to the warranty on which the plaintiffs rely in the present case. The "particular purpose" which the second plaintiff made known was the dyeing of the hair of a person whose reaction to Inecto was normal and it was in respect of such a person and no other that Mrs. Hughes was accepting the liability which her assurance involved. If she had shared the second plaintiff's own knowledge as to the 1947 incident, she would not have accepted this liability, and in my judgment the second plaintiff's reticence vitiates Mrs. Hughes' assurance with the result that no liability thereunder arises.

I would prefer to express no concluded opinion as to what the position would have been if the second plaintiff had had no reason to suppose that Inecto was harmful to her. It might be argued that the satisfactory outcome of the test converted Inecto from a potentially dangerous material to one which was safe in relation to all but a very few abnormal people and thus assimilated the dye to the Harris tweed in *Griffiths v. Peter Conway, Ltd.* (3). On the other hand the true view might be that the defendant would have been held liable on the ground that Inecto is inherently dangerous and that this quality distinguishes it from Harris tweed, which is a normally safe material. Having regard to the facts of this particular case, the question does not arise for decision and I would prefer to reserve my opinion on it. I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Chamberlain & Co.* (for the defendant); *Day, Whateley & Co.*, Godalming (for the plaintiffs).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A

Re JOYCE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.), June 20, 1955.]

B

Bankruptcy—Discharge—Certificate of misfortune—Bankruptcy caused by “misfortune” without any misconduct—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (2)—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 26 (4).

Bankruptcy—Appeal—Appeal against refusal of certificate of misfortune, on discharge—Inter partes appeal—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 26 (4).

C

The bankrupt, who was formerly a solicitors' managing clerk, was granted a discharge, suspended for two years, but his application for a certificate, under the Bankruptcy Act, 1883, s. 32 (2) and the Bankruptcy Act, 1914, s. 26 (4), that the bankruptcy was caused by misfortune without any misconduct on his part was refused. The order which was made recited, among other things, that the bankrupt had, with intent to defraud, forged a document connected with an insurance policy and had been guilty of misconduct in his dealings with the affairs of certain companies. The bankrupt appealed, ex parte, to the Court of Appeal, against the refusal of the certificate.

D

Held: the bankrupt was not entitled to a certificate of misfortune, because the bankruptcy was not caused by “misfortune without any misconduct on his part”, within the meaning of s. 32 (2) of the Bankruptcy Act, 1883, and s. 26 (4) of the Act of 1914.

E

Dicta of LORD ESHER, M.R., and FRY, L.J., in *Re Lord Colin Campbell* (1888) (20 Q.B.D. at pp. 821, 822) applied.

Per CURIAM: if a debtor wishes to appeal against a refusal to grant a certificate of misfortune, he should do so by way of a notice of appeal inter partes in the ordinary way (see p. 750, letter B, post).

Appeal dismissed.

F

[As to the circumstances when a certificate of misfortune will be granted or refused, see 2 HALSBURY'S LAWS (3rd Edn.) 353, para. 689, note (h).

For the Bankruptcy Act, 1883, s. 32 (2) and the Bankruptcy Act, 1914, s. 26 (4), see 2 HALSBURY'S STATUTES (2nd Edn.) 303, 359.]

Cases referred to:

G

- (1) *Re Boulton Brothers & Co.*, [1927] 1 Ch. 79; 96 L.J.Ch. 90; Digest Supp.
- (2) *Re Campbell (Lord Colin)*, (1888), 20 Q.B.D. 816; 59 L.T. 194; 4 Digest 178, 1656.

Appeal.

This was an appeal by the debtor, Arthur Alfred Joyce, against the refusal of MR. REGISTRAR CUNLIFFE on May 18, 1955, to grant a certificate of misfortune.

H

On Oct. 20, 1953, a receiving order was made against the debtor, and on Nov. 3, 1953, he was adjudged bankrupt. The debtor having applied for a discharge, the registrar, on May 18, 1955, made an order suspending the discharge until Feb. 23, 1957, but refused to grant a certificate of misfortune. The debtor thereupon made an ex parte application to the Court of Appeal to grant the certificate. The Court of Appeal adjourned the application so that counsel for

I

the Official Receiver could attend the hearing as *amicus curiae*.

The debtor appeared in person.

Muir Hunter for the Official Receiver, as *amicus curiae*.

SIR RAYMOND EVERSHERD, M.R.: This is an appeal, under the express provisions for that purpose of s. 26 (4) of the Bankruptcy Act, 1914, against the refusal of the bankruptcy court, on the occasion of granting to the debtor his discharge, suspended for two years, to grant at that time a certificate of misfortune. The order which was made recites that certain facts have been

found. Those facts include, among other things, that the debtor had, with intent to defraud, forged a certain document connected with an insurance policy. I have mentioned that matter for reasons to which I will return. The order further recites that, among other things, the bankrupt had been guilty of misconduct in his dealings with the affairs of certain companies, the Globe Hotel (King's Lynn), Ltd., the Plough Hotel (Cheltenham), Ltd., and John Walker (Thame), Ltd., and after all those recitals the court ordered that the bankrupt's discharge be suspended for two years from Feb. 22, 1955, the date when the application first came before the court, and that he be discharged as from Feb. 23, 1957. Then come the four words, "Certificate of misfortune refused".

I propose to deal first (though I shall deal shortly) with the merits of this matter, treating the appeal as it is before us and having had the advantage of hearing counsel for the Official Receiver, who, I think, has at all times been the trustee in bankruptcy. It will be observed that the appeal is against the refusal of the certificate—no more. It does not appear to me that there has, by way of appeal, been any other challenge to the order; and, of course, if that is a correct view of the approach to the question, it is fatal to the appeal: for (without any attempt at elaboration) it is quite obvious from the recitals which I have read that nobody could quarrel with the registrar's refusal to grant, on those found facts, a certificate of misfortune. In case, however, that should be thought to be too technical a view, although I do not myself think it really is, I am still quite unpersuaded by the debtor's arguments to accept the view that the registrar wrongly refused this certificate. I should perhaps refer to the un repealed s. 32 of the Bankruptcy Act, 1883, which is still applicable. Section 32 (1) recites the disqualifications to which a bankrupt is subject, and s. 32 (2) reads:

"The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when . . . (b) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part. The court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal."

It seems to me that, even if full allowance is made for the explanations which the debtor has here suggested, still it would be impossible to quarrel with the exercise by the court of the discretion to withhold the certificate, on the facts as they clearly are and as the debtor really concedes them to be in this case. I can, however, go further. The "misfortune" which is contemplated is, by the terms of s. 32 (2) (b) of the Act of 1883, and s. 26 (4) of the Act of 1914, "misfortune without any misconduct"; and in *Re Boulton Brothers & Co.* (1), a decision of this court, LORD HANWORTH, M.R., quoted ([1927] 1 Ch. at p. 89) language of LORD ESHER, M.R., in *Re Lord Colin Campbell* (2) (1888) (20 Q.B.D. at p. 821):

"It is impossible to give an exhaustive definition of the meaning to be attached to 'misfortune'. I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducting causes of which, the debtor has no control, it cannot be said to arise from 'misfortune'."

LORD HANWORTH, M.R., went on to say ([1927] 1 Ch. at p. 89):

"It appears to me that what LORD ESHER meant is that we ought in considering 'misfortune' to reject active conduct on the part of the debtor from being included in the word. But I think also that we must consider 'misfortune' in relation to the purposes for which it is used—namely, the removal of a statutory disqualification . . . FRY, L.J., said (20 Q.B.D. at p. 822): 'It appears to me that what the legislature had in view in this proviso was, the possibility of there being cases in which a man might become

- A a bankrupt without thereby raising a presumption of his unfitness for holding a public position'."

I follow LORD HANWORTH, M.R., in making no attempt at definition. I would, however, just mention these further facts; and they are by no means the whole story. I have referred to the recitals about the forged document relating to the policy. That it was forged is not now in doubt. That it was connected with the bankruptcy seems to me clear, when it is considered that the insurance company made advances on the faith of the assignment and are now proving in the bankruptcy for a sum of which, I gather, little or nothing is likely to be recovered by them. The debtor, however, says, in effect: "True I may have mismanaged the affairs of these companies: that is not the same thing as misconduct". I am not prepared to accept that view. If the test which FRY, L.J., indicated is applied, it seems to me that the story of mismanagement of these companies, coupled with the fact that at all material times the debtor was a solicitors' managing clerk, provides more than ample justification for the view that the statutory disqualifications ought not to be removed.

- On the merits, therefore, I am quite unable to accede to the application.
- D We have, however, considered also the procedural aspects of this matter, and it may be right that I should say a word or two on them. I have read all that is material from s. 32 of the Act of 1883. This matter of certificates of misfortune is picked up by s. 26 (4) of the Act of 1914, and, although there is one other later reference to it, the whole thing is left a little casually by the Act. The Act lays down no clear or precise rules of the procedure which was thought appropriate, particularly by the last words of s. 26 (4), "but a refusal to grant such a certificate shall be subject to appeal." Thus has been raised the question, what kind of appeal is contemplated? The sub-section shows that a discharge might be obtained and that with the discharge there might be coupled (as one of the qualities, so to speak, of the discharge) this certificate. As JENKINS, L.J., has observed, there is nothing to show that the certificate might not be granted and attached, so to speak, to the discharge on the court's own motion. On the other hand, it appears from the authorities, including *Lord Colin Campbell's* case (2), that sometimes a discharge has been obtained and then later, and by some substantive application, a debtor has gone back to the bankruptcy court and asked to have such a certificate. In those cases, no doubt, it would be necessary for some substantive application to be made.
- G In the present case, however, and in what I imagine would be the ordinary case, no separate application would be made: the debtor would apply, in the ordinary course, and following ordinary procedure, for his discharge, and the matter would then be gone into. As we were informed by counsel for the Official Receiver, the trustee in bankruptcy, and perhaps a creditor or creditors, would attend, if they desired to oppose, and the question of an immediate discharge or of a lengthy suspension would be debated on the merits of the case. Then (and I am speaking again of the ordinary case) if things went well for the bankrupt, when the registrar intimated that he was prepared to grant the discharge, immediately or after an interval, the bankrupt would, at that stage, ask for the certificate, and, if anyone (for all the parties would be there) had anything to say about it, they would, no doubt, say it. In this case, as I stated earlier, things did not go at all well, obviously, for the debtor, because the order recites a number of damaging findings of fact. Nevertheless, the debtor did ask for the certificate, as he was entitled to do. He got a negative answer, and he has come here, as he also is entitled to do. He came here in the first instance, however, by way of *ex parte* application, and that raised at once two difficulties. First, it seemed to us, at the time when he first mentioned this matter, that it would be desirable (and I now think that it would be essential in most cases) that we should have the benefit of assistance from someone representing the Official Receiver. Moreover a second

question emerges: If the proper procedure is by way of notice of appeal served on the trustee, then what of the security which a debtor, on making such an appeal, has normally to give? In the present case that difficulty was got over by treating the appeal as *ex parte*, and it was only adjourned in order (as has happened to our advantage) that counsel should be instructed by the Official Receiver to attend and assist the court. Having, however, now considered the procedural aspect of the matter, although I do not in any way quarrel with the existing practice in making applications to the registrar, I think, nevertheless, that the right procedure, if the debtor wishes to exercise his right of appeal, is that he should do so by way of a notice of appeal *inter partes* in the ordinary way—particularly if the debtor desires to challenge any part of the order save merely the expression of the refusal to grant a certificate. A B

The argument was suggested that, since the application to the registrar was *ex parte*, then by virtue of R.S.C., Ord. 58, r. 10, the appeal to this court would be *ex parte*; but in my judgment, application for a certificate is not, properly speaking, *ex parte* at all. I do not think that in the average case any separate substantive application would be necessary. That, however, is not to say that it is *ex parte*. The certificate is asked for as one of the things which the statute* says that the registrar may grant when the bankrupt obtains his discharge. D The debtor, however, asks to have that relief at a time when the whole matter is being dealt with *inter partes* before the registrar, and, if that is so, I think it follows that counsel for the Official Receiver was right to say that appeals against a refusal should come before this court *inter partes*, following the appropriate procedure for that purpose. In the circumstances of this case, we have not dealt with it as such and the matter has but academic relevance E now, but, for future guidance, that is my view of the proper procedure. It will, of course, involve this result, that the debtor normally would have to provide the security usually required before he could sustain an appeal. On the merits of this case, as I have earlier said, I see no grounds which could possibly justify interference with the view taken by the registrar, and I think that the appeal should be dismissed. F

JENKINS, L.J.: I agree.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitor: *Solicitor, Board of Trade.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* Section 26 (4) of the Bankruptcy Act, 1914. By s. 102 (3) of the Act, orders of discharge and certificates of removal of disqualifications may be granted by the registrars in bankruptcy in the High Court,

NOTE.

THE PLANTER.

OWNERS OF STEAMSHIP BRIXTON v. OWNERS OF
STEAMSHIP OR MOTOR VESSEL PLANTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 2, 3, 4, 7, 8, 1955.]

Admiralty—Practice—Expert witness—Order that each party be at liberty to call one expert witness—Condition that statements be exchanged beforehand—Plans and other documents to be exchanged with statements.

[As to expert witnesses in cases of collisions of ships, see 13 HALSBURY'S LAWS (2nd Edn.) 603, para. 670 note (a); and for cases on the subject, see 22 DIGEST (Repl.) 507, 5619-5627.]

Action.

The plaintiffs, the South Eastern Gas Board, owners of the steamship Brixton, claimed damages against the defendants, the owners of the steamship or motor vessel Planter, in respect of a collision between the two vessels in the River Thames on Feb. 6, 1954. The owners of the Planter denied that they caused the collision and counterclaimed against the owners of the Brixton. The parties were unable to agree, inter alia, the angle of collision between the two vessels.

On the summons for directions, WILLMER, J., ordered that each party be at liberty to call one surveyor.

J. V. Naisby, Q.C., and *D. H. Hene* for the plaintiffs.

R. F. Hayward, Q.C., and *G. N. W. Boyes* for the defendants.

WILLMER, J., having found that the Planter was alone to blame for the collision and having given judgment for the plaintiffs, intimated on the question of costs that as the collision angle had proved immaterial, the plaintiffs need not have called their surveyor and that he would, therefore, disallow the plaintiffs the costs of and incidental to the evidence of their surveyor. His LORDSHIP concluded by saying: When I ordered, as a term of giving liberty to call surveyors, that statements of their proposed evidence should be exchanged, I had in mind that the exchange should include the exchange of any plans or documents to be used in connection with the statements. I think that we would have saved possibly quite an appreciable part of the time occupied in taking the surveyors' evidence, if they had exchanged their plans as well as their statements beforehand. I make that remark so that it may be noted for future reference; similar orders, if made in the future, should be regarded as including any plans and documents that go with the statements.

Solicitors: *Botterell & Roche* (for the plaintiffs); *Simpson, North, Harley & Co.* (for the defendants).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

R. v. MAYWHORT.

A

[CHESTER ASSIZES (Sellers, J.), June 7, 8, 1955.]

Criminal Law—Fraudulent conversion by trustee—Protection from prosecution—Act first disclosed on oath, in consequence of compulsory process of court of law or equity—Conversion by executor of assets comprised in the estate—First disclosed in affidavit made by executor to secure release from imprisonment for contempt of court in failing to comply with order for accounts—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 43 (2).

B

Criminal Law—Indictment—Motion to quash—Time for making the application.

The defendant and his brother were the executors and trustees of their mother's will and her residuary estate was to be divided between them. At the time of the mother's death in 1949, the brother was abroad and the defendant, who was a solicitor, obtained probate of the will and made himself responsible for administering the estate. In December, 1953, on an originating summons taken out by the brother, an order was made for the administration of the estate by the court, and by an order dated Jan. 19, 1954, the defendant was required to lodge at a district registry on or before Feb. 12, certain accounts and a statement, all of which were to be verified by affidavit. The defendant having failed to comply with the order of Jan. 19, by an order, dated Mar. 4, the brother was given leave to issue a writ of attachment against the defendant for his contempt of court, and on Mar. 8 the defendant was arrested and put in prison. On Mar. 23 he was released, after having apologised to the court and undertaken to comply with the order of Jan. 19 within a month of his release. He again failed to comply with the order and also with a renewal order, in the same terms, made on Apr. 23, and on June 8 he was again arrested and put in prison for contempt of court. On Sept. 22, 1954, while still in prison, the defendant swore an affidavit in which, after apologising to the court for his failure to prepare in proper form the accounts which he had been ordered to produce, he explained that he had no money to do so and disclosed, for the first time, that he had converted to his own use most of the assets from his mother's estate. He then went on to ask for his release. Subsequently the defendant was prosecuted for fraudulent conversion, under the Larceny Act, 1916, s. 21. The defence moved to quash the indictment on the ground that, under s. 43 (2) of the Act*, the defendant was not liable to be convicted.

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Held: the conversion constituting the offence charged had been first disclosed on oath by the defendant "in consequence of . . . compulsory process of [a] court of law or equity in [a] proceeding" within the meaning of those words in s. 43 (2) of the Larceny Act, 1916, and accordingly the defendant was protected by the sub-section from being convicted and the indictment should be quashed.

G

R. v. Noel ([1914] 3 K.B. 848) and *R. v. Tuttle* (1929) (140 L.T. 701) distinguished.

H

Per **SELLERS, J.:** a motion to quash an indictment on the ground that the defendant was protected by s. 43 (2) of the Larceny Act, 1916, should be made before plea (see p. 753, letter F, post).

Observations on evidence on such a motion (p. 753, letter G, post).

[**Editorial Note.** Although a motion to quash an indictment may be made at any time before verdict, the proper time, except in the case of some great crime such as treason, is before the prisoner pleads to the charge; see the cases cited in 10 HALSBURY'S LAWS (3rd Edn.) 403, para. 731. As to the statutory protection from prosecution where the offence is first disclosed on oath in consequence of a compulsory process of a court of law, see 10 HALSBURY'S LAWS (3rd Edn.) 793, para. 1535.]

I

* The terms of the sub-section are printed at p. 753, letter D, post.

A Cases referred to:

- (1) *R. v. Noel*, [1914] 3 K.B. 848; 84 L.J.K.B. 142; 112 L.T. 47; 14 Digest 408, 4286.
 (2) *R. v. Tuttle*, (1929), 140 L.T. 701; Digest Supp.

Trial on indictment.

B The defendant, Frank Havelock Maywhort, was charged at Chester Assizes, before SELLERS, J., and a jury, on an indictment containing three counts charging him with fraudulent conversion as a trustee, under the Larceny Act, 1916, s. 21. The defence moved to quash the indictment on the ground that the defendant was protected from prosecution by s. 43 (2) of the Act, because the offence was first disclosed in consequence of a compulsory process of a court of law, within the meaning of the sub-section.

C *G. G. Lind-Smith* for the prosecution.
Robin David for the defendant.

SELLERS, J. : Frank Havelock Maywhort is indicted on three separate charges of fraudulent conversion, contrary to s. 21 of the Larceny Act, 1916. The charges allege that he, being a trustee of certain property, fraudulently D converted it to his own use. Section 21 of the Larceny Act, 1916, is the section dealing with conversion by a trustee. The defence have applied to quash the indictment, relying on s. 43 (2) of the same Act, which reads:

E “No person shall be liable to be convicted of any offence against s. 6, s. 7 (1), s. 20, s. 21 and s. 22 of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such an act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved.”

F The procedure for bringing before the court the reliance on s. 43 (2) was discussed by counsel for the prosecution and for the defence, and it seemed to me appropriate, although there is no clear precedent to which I have been referred, that a motion to quash could and should be taken before plea and at the outset of the case, because, if the submission that s. 43 (2) applies is correct, the court would have no jurisdiction to try the case. If the case had been tried the trial would be a nullity if the submission later succeeded. In regard to the evidence which is to be adduced and the manner of its presentation G on such an application, counsel for the defence was content to rely on the evidence in the depositions taken before the justices and the documents which were exhibited. It may be, however, although it is not necessary to decide this in the present case, that other evidence might be brought before the court on such a motion to quash, because, notwithstanding anything that may have been revealed by the defendant in any proceedings such as those referred to in s. 43 (2), H the charges in an indictment might well be supported by evidence independent of that, and the sub-section expressly states that a person who comes within the sub-section shall not be liable to be convicted “upon any evidence whatever in respect of any act done by him”.

I The evidence on which the submission is made is derived very largely from the documents and to a minor extent from the depositions. It appears that the defendant was appointed to be an executor and trustee of his mother's will jointly with his brother. The will was made in 1949, shortly before the testatrix died on Apr. 20, 1949. The brother was abroad and the defendant, who was a solicitor, took out probate and made himself liable for administering the estate according to law. The documents showing the extent of the estate were prepared and submitted by him. The will provided, after a legacy, that the whole of the residue of the estate, both real and personal, should be devised and bequeathed to the trustees on the customary trusts to call in and convert, and that the proceeds should be divided between the testatrix's two sons, who were the

defendant and his brother. By 1953 the brother, who was abroad, was dissatisfied with the administration of the estate and consulted a solicitor. The brother's solicitor on Jan. 14, 1953, wrote to the defendant:

"We have been instructed by your brother to take charge of his interest so far as his mother's estate is concerned, and will you please let us have at once particulars of the estate and transfers to transfer one-half of the investments."

Correspondence continued for some time on a very unsatisfactory basis for the brother, so much so that by August, 1953, the brother was advised to take proceedings, and on Oct. 21, 1953, an originating summons was taken out in the Chancery Division in the customary form.

On Dec. 23, 1953, the summons came for consideration before UPJOHN, J., in chambers in London, when apparently the defendant did not appear. It was then ordered that the estate of Alice Maywhort, the deceased, should be administered by the court and some consequential orders were made directing an account to be taken by the district registrar of Manchester. Those proceedings proved unsatisfactory. On Jan. 14, 1954, there was a further summons heard in London before HARMAN, J., in Chancery chambers. Again the defendant did not appear, and an order dated Jan. 19, 1954, required the defendant on or before 4 p.m. of Friday, Feb. 12, to lodge at the district registry in Manchester four different accounts which were specified and, in particular, as far as this case is concerned, under heading No. 5, to lodge a statement showing what parts, if any, of the testatrix's property were outstanding or undisposed of, and whether any parts of such property outstanding and undisposed of were subject to any and what encumbrances, and, in each case, it was ordered that the statement, or accounts, should be verified by an affidavit and that all payments were to be properly vouched. Notwithstanding that, the district registrar at Manchester had to certify that certain accounts which had been lodged had not been verified by affidavit, and on Mar. 4, 1954, before HARMAN, J., in London, proceedings were taken to enforce the defendant to comply with the order of the court. HARMAN, J., ordered that the plaintiff, that is, the brother, should be at liberty to issue a writ of attachment against the defendant for his contempt in not having lodged the accounts and statement which he was ordered to do, and, as a result of that, on Mar. 8 the defendant was arrested and put into prison. That is a step which the court is entitled and empowered to take when a man deliberately flouts his obligations to the court and fails to comply with its order.

When in prison the defendant wrote a letter, dated Mar. 11, 1954, expressing his extreme regret that he had neglected to comply with the order, and he undertook within one month of his release to furnish the accounts and he apologised to the court. Following that letter, the matter being referred back to HARMAN, J., in London, by an order dated Mar. 23, 1954, the attachment of imprisonment for contempt of court was discharged and the defendant was released from prison. However, notwithstanding that experience, the defendant still failed to carry out his obligations and, in particular, to make an affidavit in respect of the five matters which have been specified, and a renewal order in the same terms came into being on Apr. 23, 1954, on this occasion made by DANCKWERTS, J., in Chancery chambers. The defendant was again ordered by a particular date to lodge with the court a statement showing what property was outstanding and how it had been disposed of, and in each case to verify what he said by affidavit and all payments were to be properly vouched. On that, apparently, some further accounts were produced, but again without the affidavit, and by June 3 the matter came back to DANCKWERTS, J., for a second time. An order was made that the brother should be at liberty to issue a writ of attachment against the defendant for his contempt of court in failing to carry out the order of Apr. 23, and on June 8 the defendant was again arrested. That arrest was on similar grounds to those causing his original imprisonment because in

A contempt of court he had failed to carry out the court's order and, in particular, to state the position of the estate which he was administering with regard to property which was outstanding or undisposed of. If he had made that statement, it would have meant that he would have had to reveal what the true position was. He was arrested because he refused to make such a statement and the arrest was to enforce compliance with the court's order.

B The defendant remained imprisoned under the order of June 3 for a considerable time and it was not until well into September that his position was considered by the Official Solicitor acting on his behalf. It was thought fit to go to see him, and a representative of the Official Solicitor went with another solicitor, who was a commissioner for oaths, with a prepared affidavit, which the defendant swore on Sept. 22, 1954. In the course of that affidavit he made
C what is here said to be the first disclosure of any act done by him which amounted to wrongdoing of the nature which is alleged in the indictment on which he now stands charged. In the course of that affidavit the defendant says that he has been detained in Strangeways Prison, Manchester, for fourteen weeks and upwards by order of the court of June 3. He goes on to say that he is sorry that he has not carried out the order and prepared in proper and suitable form the
D accounts ordered to be produced, and that he has no money to do so. The vital paragraph is para. 4, which I will read:

“ Save that I have paid to [the brother] sundry small sums on account of his share in the estate of my mother, the said Alice Maywhort, deceased, I confess that I have converted to my own use all other assets comprised in the said estate save as aforesaid and save the dwelling-house known as No.
E 10, Swan Bank, Congleton, in the county of Chester. I am unable to estimate the value of this dwelling-house, but I do not think that the proceeds of sale of such dwelling-house would satisfy the share in the estate to which my brother is entitled. There are however no other assets of the said estate remaining nor have I any money or, assets from which I could make good to [my brother] his said share.”

F He then craves to be released from prison, saying that it is impossible, in the circumstances related, to comply with the order. He humbly submits that, as he has appropriated to his own use such assets as he has, in all the circumstances such accounts prepared would be needless expense, and, as he is personally unable to meet the expense, he asks that he should be released.

G That affidavit was subsequently brought before the court but the defendant remained in prison. He was seen on Oct. 14, still in prison, by a detective-sergeant who was then investigating the charges which have given rise to this indictment. On Mar. 29, 1955, he was charged before the justices with these offences, and he comes before the court on bail.

H It was admitted by the prosecution that the affidavit of Sept. 22, 1954, did disclose for the first time that the defendant had converted to his own use the property which was due to his brother, and the question arises whether s. 43 (2) of the Larceny Act, 1916, has the effect which it is submitted it has by the defence. Was the disclosure in that affidavit

I “ in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved ” ?

The originating summons to which I have referred was certainly a proceeding which was bona fide instituted by the brother who was a person aggrieved. Was the disclosure “ in consequence of ” the orders to which I have referred, particularly the final order, which gave rise to the second term of imprisonment ? That final order which required the defendant to give information on affidavit was made in those proceedings. The information which was ordered by the court could, but for the special provisions of s. 43 (2) and, as I think, the fact that he

was a trustee, have been refused. In the ordinary way a party to a cause can refuse to give evidence which would tend to incriminate him if he can satisfy the court that that would be a possible or likely effect of his answer. It is quite clear that the evidence in the defendant's affidavit would have incriminated him, but s. 43 (2) deprived him of the right to take objection that it would do so. He was, therefore, bound, because of s. 43 (2), to obey the order made by the court; the judge could not excuse him by saying that he was not bound because he was protected by this general rule of law, and he himself could make no claim to such protection. A

The object of this very special provision in s. 43 (2), which may serve to let a party who has committed a fraud escape criminal punishment, would appear to be to benefit beneficiaries and persons aggrieved. A trustee cannot hide behind any privilege of non-disclosure of incriminating evidence. The sub-section, in effect, makes it obligatory on him to disclose the true facts. If he refuses to do that, it leaves the power in the court to enforce their production by imprisonment, of which this case is a striking example because on two occasions the court (and the court only does this when it is driven to it by the action of a party) had to invoke its supreme powers of placing the defendant in custody. The fact that the court could do so seems to me to be due to this provision that he was bound to disclose that which would, and in the result did, incriminate him. B C D

Therefore, as s. 43 (2) has so operated that the defendant was compelled to disclose to the court his wrongdoing, it can be invoked so as to protect him from being liable to conviction on the matters which he then first disclosed. That is dependent on the interpretation of this provision which says that the disclosure on oath which is relied on must be "in consequence of any compulsory process of any court of law or equity . . ." It was submitted by the prosecution that the disclosure on the affidavit to which I have referred was not in consequence of any compulsory process. There certainly was a compulsory process. I know of no greater compulsory process which is in the hands of the civil court than to do what was done here. The defendant was ordered to comply with the five matters in the order made against him. Because he did not do that he was imprisoned. It is true that he could have stayed in prison, but if he wanted to get out of prison he had to make some submission to the court, and it is customarily made by affidavit, as was done here, in order to be released. He was imprisoned in order to compel him to comply with the order. His affidavit was in consequence of that compulsory process which was imposed on him. Its main motive was that he should be released from prison, but it was, indeed, in consequence of the fact that he was there (and that in order to get out he had to show good grounds) that he then did reveal for the first time what the true position was. E F G

I think it would be hair-splitting to accept the argument that, since the disclosure was made in the affidavit which the defendant put in to escape the burden under which he was suffering, the position was different from what it would have been if the defendant had made the same disclosure in an affidavit in strict compliance with the order. I think that in either case the disclosure should be held to be in consequence of the heavy compulsion which the court found it necessary to impose on him. H

A second point taken by the prosecution was that what was disclosed was not "any act done by him", as was contemplated by s. 43 (2), because it was only a general statement of the defendant's wrongdoing and did not show it in particularity. I do not think that that is a submission which can stand. It may be that what has been disclosed—which really does show that the whole of the estate has gone, and gone to the defendant, except for small items at the outset paid to the brother—may not give sufficient evidence for those interested in the brother's share to follow, if they can, the proceeds of the sale of the shares of the estate. That can perhaps be ascertained in a different way. I

A Section 43 (2) having been obviously invoked in order to justify the imprisonment for contempt of court (the defendant having no ground for refusing to comply with the court order), I think its counter-effect is that it can be invoked now to defeat these present charges because it provides that "No person shall be liable to be convicted of any offence against . . . s. 21 . . ." if he has disclosed for the first time the matters which give rise to the charge in circumstances to which the sub-section applies. [HIS LORDSHIP then discharged the defendant, and continued:]

The prosecution cited two cases, *R. v. Noel* (1) ([1914] 3 K.B. 848) and *R. v. Tuttle* (2) (1929) (140 L.T. 701). The defence submitted that they were both distinguishable, and I think that they clearly are. *R. v. Noel* (1) arose in different circumstances. The appellant, who was in the position of a trustee, gave evidence in a civil action brought against him and was cross-examined. In the course of the cross-examination he revealed, for the first time, criminal conduct. Subsequently he was prosecuted for fraudulent conversion, and, in order to make the proceedings ineffective, the defence sought to invoke, both at the trial and in the Court of Criminal Appeal, s. 85 of the Larceny Act, 1861, which contains a similar provision to that in s. 43 (2) of the Act of 1916.

D The headnote of the case reads ([1914] 3 K.B. 848):

"When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him 'in consequence of any compulsory process' of a court of law, within the meaning of s. 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence . . . in respect of the act so disclosed."

E The basis of the decision of the Court of Criminal Appeal was that the appellant was a voluntary witness. RIDLEY, J., delivering the judgment of the court, said (*ibid.*, at p. 851):

"It seems to us that the expression 'compulsory process', in s. 85, signifies something more than the mere putting of a question to a witness which he may not wish to answer. If there were a compulsory examination, as in bankruptcy, or by interrogatories, or by a bill in equity, that would be a compulsory process of a court of law or equity."

The learned judge, however, went on to say (*ibid.*):

"Also, possibly, if a witness claims the privilege of refusing to answer a question because his answer may tend to criminate him, and the court orders him to answer the question, that may be a 'compulsory process' of the court within the meaning of s. 85. We do not, however, desire to decide that point, as it is not necessary to do so in the present case. In this case no such privilege was claimed, and it is not necessary for us to go further than to say that, where evidence is given voluntarily by a witness in proceedings in a court of law or equity, it is not given 'in consequence of any compulsory process of a court of law or equity', within the meaning of s. 85."

The decision in the case was on a narrow ground because it would appear that, if s. 85 of the Act of 1861 and s. 43 (2) of Act of 1916 applied, the witness could take no objection that an answer would incriminate him. It would not be a valid objection. The appropriate section rules it out. Neither would it be within the compass of the judge, who so often does give a warning, to give a witness any warning that he need not give an answer which would incriminate him. In the present case, the defendant did all he could in the proceedings to avoid answering. It was only under the experience of imprisonment that he made any answer.

I In *R. v. Tuttle* (2) a similar point* was taken in a case of fraudulent conversion. The answer in that case, as appears from the judgment of the Court of Criminal

* In *R. v. Tuttle* (2), the defence relied on s. 43 (3) of the Larceny Act, 1916.

Appeal delivered by AVORY, J., was that, so far from the evidence of the appellant disclosing an act which rendered him liable to be charged with a criminal offence, the matter which was relied on was to the contrary. The appellant sought to justify what he had done and suggested that he had invested the money with the approval of his co-trustee and the beneficiary, so that the point really had no substance there. It was also held that the disclosure was not made under any compulsion at all. AVORY, J., said (140 L.T. at p. 703):

"Quite apart from the question whether there was in fact any disclosure within the meaning of that section [s. 85 of the Larceny Act, 1861], it seems clear also that it was not a disclosure in consequence of any compulsory process of any court of law. It was a voluntary statement made by the accused on affidavit, in answer to the allegation which was made against him. There was no compulsion upon him to file any affidavit at all, and no compulsion upon him to make any statement at that stage, in regard to what had become of this money."

In the present case, the prosecution submitted that there was no compulsion on the defendant to make any affidavit, and, in a sense, the prosecution are right. If the defendant had wanted to stay in prison for the rest of his life, the prosecution are right, but I do not think that that helps their submission. The two cases to which I have referred are quite distinguishable, and I have discharged the defendant.

Indictment quashed.

Solicitors: *Director of Public Prosecutions* (for the Crown); *H. P. & H. C. Rigby, Sandbach* (for the defendant).

[*Reported by SEYS LLEWELLYN, Esq., Barrister-at-Law.*]

TEMPLE v. NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LTD.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), June 13, 14, 15, 1955.]

Rent Restriction—Premises not within Acts—Rateable value—Flats let together on appropriate day (Apr. 6, 1939) and assessed together for rates—Rateable value of each flat ascertained by apportionment—Flats subsequently separately assessed—Such assessment not first assessment—Rent and Mortgage Interest Restrictions Act, 1939 (2 & 3 Geo. 6 c. 71), s. 3 (1), s. 7 (2), (3).

When first let in 1935, two adjoining flats (Nos. 27, 28) in London were occupied together and were assessed as a composite whole at £147 rateable value. In 1940 the tenant left and the flats were again divided. In 1941 the two flats were assessed separately by the rating authority at £95 for No. 28 and £34 for No. 27. In applications by the landlords for the determination of the rateable value of flat No. 28 and by the tenant for the determination of the standard rent, the county court judge apportioned the rateable value of the two flats combined in force in 1939 under s. 7 (2) of the Rent and Mortgage Interest Restrictions Act, 1939, and attributed £108 of this value to No. 28 and £39 to No. 27. The tenant contended that the flat was a dwelling-house to which the Rent Restrictions Acts applied by virtue of s. 3 (1) of the Act of 1939, since it was first assessed after the appropriate day (Apr. 6, 1939 in London) under s. 7 (3) of the Act of 1939 at a rateable value of £95, i.e., a value under the £100 specified in s. 3 (1).

Held: flat No. 28 was assessed on the appropriate day as part of a composite whole (viz., Nos. 27, 28 occupied as one dwelling-house) and was not first assessed in 1941 when Nos. 27 and 28 were separately assessed; accordingly the Rent Restrictions Acts did not apply to flat No. 28 as on the appropriate day the rateable value of the flat for the purposes of those

- A Acts was the value apportioned to it under s. 7 (2) of the Act of 1939, which was in excess of £100.
R. v. Sidmouth Rent Tribunal, Ex p. Sellek ([1951] 1 All E.R. 107) distinguished.
 Appeal dismissed.
- B [**Editorial Note.** This case may be compared with *Langford Property Co., Ltd. v. Goldrich* ([1949] 1 All E.R. 402) which illustrates the converse of the present case, for there two premises were let to the same tenant and the rateable value of the premises so let was the aggregate of the rateable values of each. Apportionment of rent or rateable value is inappropriate where the applicant for apportionment is tenant of the whole; see *Amphlett v. Dorrell* ([1948] 2 All E.R. 674).
- C For the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and s. 7 (1), (2), (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 1077, 1080.]
- Cases referred to:
- (1) *R. v. Sidmouth Rent Tribunal, Ex p. Sellek*, [1951] 1 All E.R. 107; [1951] 1 K.B. 778; 115 J.P. 39; 3rd Digest Supp.
- D (2) *R. & P. Properties, Ltd. v. Baldwin*, [1938] 4 All E.R. 845; [1939] 1 K.B. 461; 108 L.J.K.B. 463; 160 L.T. 445; 31 Digest (Repl.) 728, 8111.
- (3) *Capital & Provincial Property Trust, Ltd. v. Rice*, [1951] 2 All E.R. 600; [1952] A.C. 142; 3rd Digest Supp.

Appeal.

- E The appellant was the tenant of a flat No. 28, Ascot Court, St. John's Wood, in the county of London. The respondent landlords made an application to the Marylebone County Court under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, for the determination of the rateable value of the flat and for the apportionment of the rateable value on Apr. 6, 1939, of the two flats, Nos. 27 and 28, Ascot Court, then let and occupied together and assessed together at £147 rateable value, for the purpose of determining the rateable value of No. 28. The tenant made an application to the court for the determination of the standard rent of the flat under the Acts and for the dismissal of the landlords' application. On Oct. 25, 1954, Mr. Registrar PLATT dismissed both applications. On further applications to the judge, His Honour DEPUTY JUDGE MIDDLETON on Feb. 15, 1955, dismissed the tenant's application and on the landlords' application held that the flat was first assessed, not when it was first separately assessed, at £95 rateable value, in 1941, but when it was assessed jointly with No. 27, and apportioned the assessment of the two flats combined of £147 rateable value between them as follows: No. 27 £39 rateable value, No. 28 £108 rateable value. He held that the rateable value of flat No. 28 on Apr. 6, 1939, was £108. The tenant appealed.
- F
- G
- H *I. H. Jacob* for the tenant.
M. R. Hoare for the landlords.

I **DENNING, L.J.:** In 1935 a new block of flats was built in St. John's Wood overlooking Lord's cricket ground. It was called Ascot Court. The question for determination is whether flat No. 28 in this block is within the Rent Restrictions Acts or not. This depends on its rateable value. If the rateable value on the appropriate day did not exceed £100 it is within the Acts. If it was more than £100 it is outside the Acts. The problem arises in this way. The next flat to No. 28 is a smaller flat, No. 27. When the flats were first let in 1935, those two flats, Nos. 27 and 28, were taken by a tenant who wanted much space and took them both together. They were thrown into one flat and let as one. This composite flat was assessed as one whole at a rateable value of £147 a year and that was the assessment in force in 1939. If that figure of £147 is apportioned between the two flats it gives £108 to No. 28 and £39 to No. 27.

That would mean that in 1939 No. 28 was over £100 rateable value. In 1940, however, the tenant left and the composite flat was divided again into two separate flats. Owing to the war, many people had left London and flats were difficult to let. In 1941, therefore, the owners asked for a new separate assessment of the two flats. On May 28, 1941, the rating authority assessed No. 28 at £95 and No. 27 at £34. That means that in 1941 No. 28 was under £100 rateable value. On Mar. 7, 1945, the two flats were re-assessed. Flat No. 28 was raised to £107 and flat No. 27 to £38, so that in 1945 flat No. 28 was over £100 rateable value.

In those circumstances the crucial question is, How is the rateable value of flat No. 28 to be ascertained? Is it to be ascertained on the 1939 figure when it was over £100 or on the 1941 figure when it was under £100? As I read the Rent and Mortgage Interest Restrictions Act, 1939, s. 7 (1) (2) and (3), if the flat was assessed on Apr. 6, 1939, the rateable value must be assessed as at that date; but if the flat was first assessed after Apr. 6, 1939, the rateable value must be ascertained as on the day it was first assessed.

In my opinion, in this case, the flat was assessed on Apr. 6, 1939. It is true it was not then separately assessed, but it was assessed as part of a composite whole. In those circumstances, the case comes within s. 7 (2) of the Act of 1939 and the rateable value is to be ascertained by apportionment of the £147, which was the 1939 figure for the whole.

Counsel for the tenant urged us to say that flat No. 28 was first assessed in 1941, on the occasion when it was first assessed separately. The figure was then £95, which would bring it within the Act. He says the case comes within s. 7 (3) of the Act of 1939. I do not think that is correct. Section 7 (3) applies only to cases where the dwelling-house was not assessed at all on Apr. 6, 1939, not even as part of a composite whole. That might happen, for instance, because it was built after that date or was converted so as to become a new entity after that day or something of that kind. Nothing of that kind appears here. Counsel referred us to *R. v. Sidmouth Rent Tribunal, Ex p. Sellek* (1) ([1951] 1 All E.R. 107). It may well be that that case can be justified on its special facts on the ground that, owing to the conversion into flats, a new entity was created; but in so far as it proceeded on any other ground, I do not agree with it.

Counsel next urged us to say that, in the present case, when the composite flat was divided into two, a new entity was created and he referred us to *R. & P. Properties, Ltd. v. Baldwin* (2) ([1938] 4 All E.R. 845). But it seems to me that the observations of LORD PORTER in *Capital & Provincial Property Trust, Ltd. v. Rice* (3) ([1951] 2 All E.R. at p. 602) dispose of that suggestion. The county court judge has found here that there was no creation of a new entity and his finding on that point should not be disturbed.

The matter becomes one simply of apportioning the £147 in proper proportion between the two flats. The judge attributed £108 to No. 28 and I see no ground for interfering with that figure. It is indeed under the Act final and conclusive. This means that flat No. 28 is outside the Act because the rateable value on the appropriate day, Apr. 6, 1939, was over £100. The appeal must, therefore, be dismissed.

BIRKETT, L.J.: I am of the same opinion. The first point seems to me to be the only substantial point that counsel for the tenant had to make, i.e., that s. 7 (3) was the appropriate section covering the facts of this case. Counsel for the tenant contended that flat No. 28 was first assessed on May 28, 1941, when the rateable value was £95. His other two points, about the change of identity and the apportionment, were alternative submissions in case he should be wrong on the first point. Although it would be wrong to say that any point under the Rent Restrictions Acts was simple, it seems to me that the point can be simply stated. The contention of counsel for the tenant was that the first assessment of the flat was in 1941. It is plain that there had been an assessment of No. 28

- A before 1941, though not a separate assessment. It was an assessment in conjunction with No. 27, but, nevertheless, it was an assessment. I read s. 7 (3) as saying that the section applies in relation to any dwelling-house first assessed after the appropriate day (here Apr. 6, 1939). Giving the language its proper meaning, it seems to me to be impossible to say that this was in fact the first assessment. There had been an assessment and, therefore, without dealing with the second or
- B third points, I am entirely of my Lord's opinion on the first point and agree with his conclusion.

- ROMER, L.J.: I also agree. The general principle of the Act of 1939 was to resort for the purposes of the Act to the rateable value of premises as at a particular date (Apr. 6, 1939, in the case of properties in London) where such
- C resort is practicable. Where such resort cannot be made in relation to any particular dwelling-house because the house had not been assessed at that date, then some other point of time had to be selected, and s. 7 (3) says that in such cases the date is to be the date of first assessment. The expression in s. 7 (3) "first assessed" postulates that a dwelling-house had not been assessed at all at the relevant date. If it had been assessed at that date then s. 7 (3) cannot, in
- D my opinion, apply. In the present case, it cannot be said that flat No. 28 had not been assessed on Apr. 6, 1939, because it had been included in an assessment which had been made on Feb. 6, 1935, and which was still current in 1939. It was true that it had not been separately assessed but it had undoubtedly been assessed. In those circumstances, in my opinion, it accordingly cannot be said that it was first assessed after Apr. 6, 1939, and it follows that s. 7 (3), which, be it
- E noted, operates on dwelling-houses first assessed and not on dwelling-houses first separately assessed after the appropriate date, does not apply. It appears to me that s. 7 (2) which appears to envisage in its application, and to include, dwelling-houses which had been assessed jointly with other dwelling-houses, precisely fits the facts in the present case, whereas s. 7 (3) does not apply by reason of the assessment made in 1935. On the other two points, to which my
- F Lord has referred, I have nothing to add to the conclusion which he has expressed that it was a matter for the county court judge to decide and his decision will not be interfered with in this case by this court. I accordingly agree that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Harold Miller & Co.* (for the tenant); *Markby, Stewart & Wadesons* (for the landlords).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

GORDON v. GONDA.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Hodson and Romer, L.JJ.), May 2, 3, 1955.]

Judgment—Order—Construction—Unambiguous judgment—Pleadings and history of action not regarded for purpose of construing judgment.

Trust and Trustee—Breach of trust—Rate of interest chargeable against trustee.

Partnership—Partners—Fiduciary relationship—When partner a trustee.

In 1938 the plaintiff and the defendant entered into partnership to exploit certain inventions of the defendant. In 1940 the defendant agreed to transfer the rights in the partnership inventions to A. Ltd. (a company formed by a syndicate to exploit the inventions) and one hundred shares of that company were allotted to the defendant in exchange for such rights. In 1941 the trading with the enemy legislation was extended to Hungary where the plaintiff was living, and accordingly the partnership was brought to an end. In 1943 the defendant transferred the one hundred shares in A. Ltd. to H. Ltd. and received in exchange 13,333 shares of H. Ltd., of which he forthwith sold 6,667 for £6,667 using the proceeds for his own purposes. This sale of 6,667 shares and conversion of the proceeds did not become known to the plaintiff until the master gave his certificate hereinafter mentioned. The plaintiff brought an action against the defendant, relying on the partnership agreement and claiming a declaration as to the beneficial entitlement to shares or property received by the defendant on the transfer of partnership assets, and dissolution of the partnership and accounts and inquiries. The judgment of the court in the action contained a declaration that "the plaintiff was upon the allotment to the defendant of one hundred shares of £1 each in [A. Ltd.] . . . beneficially entitled to one moiety of the said one hundred shares and that the defendant is accountable to the plaintiff for one moiety of the consideration which was payable to or receivable by the defendant upon the sale by him of the said one hundred shares to [H. Ltd.] . . ." The court ordered inquiries what was the said consideration payable to or receivable by the defendant, and what had become of it, and also an inquiry what payment of interest dividends or bonus had been made on the property comprised in the said consideration. The master having certified the result of the inquiries, the plaintiff issued a summons for (among other things) payment to him of £3,333 10s., and also interest on that sum at five per cent. per annum from the date on which the defendant had received it. On appeal on the question what interest, if any, the defendant was liable to pay,

Held: (i) the defendant was declared by the judgment in effect to have been a trustee for the plaintiff as to one-half of the one hundred shares in A. Ltd. and, although the substance of the statement of claim was that a partnership had existed between the parties and such a declaration was unusual in such an action, the declaration was unambiguous, and therefore regard could not be had to the pleadings in the action and the history of the case for the purpose of attributing another meaning to the declaration.

(ii) as the defendant had converted trust money to his own use, and as the appropriate rate of interest chargeable against a trustee for breach of trust was five per cent., the subsequent order, after the inquiries had been made, charging him with interest at that rate, was rightly made, notwithstanding that the judgment directing the inquiries contained no reference to such interest.

Per SIR RAYMOND EVERSLED, M.R.: where, as in the present case, the partnership has been dissolved by the impact of the trading with the enemy legislation and where the active partner in this country has exchanged the

- A partnership assets for other assets vested in his name, to say that the partner is not a trustee for the partnership of those other assets goes too far (see p. 766, letter E, post).
- Knox v. Gye* (1872) (L.R. 5 H.L. 656) and *Featherstonhaugh v. Fenwick* (1810) (17 Ves. 298) considered.
- Appeal dismissed.
- B [As to the relationship between partners, see 24 HALSBURY'S LAWS (2nd Edn.) 396, para. 744.
- As to rights of a retiring partner to income or profits made after dissolution of partnership, see 24 HALSBURY'S LAWS (2nd Edn.) 509, 510, paras. 969, 970; and for cases on the subject, see 36 DIGEST (Repl.) 624-626, 1862-1897.]
- C Cases referred to:
- (1) *Piddocke v. Burt*, [1894] 1 Ch. 343; 63 L.J.Ch. 246; 70 L.T. 553; 36 Digest (Repl.) 424, 12.
 - (2) *Knox v. Gye*, (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234; 43 Digest 664, 966.
 - (3) *Featherstonhaugh v. Fenwick*, (1810), 17 Ves. 298; 34 E.R. 115; 36 Digest (Repl.) 529, 929.
- D
- (4) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.
 - (5) *Burdick v. Garrick*, (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 43 Digest 659, 929.
 - (6) *Re Davis*, [1902] 2 Ch. 314; 71 L.J.Ch. 539; 86 L.T. 523; 43 Digest 973, 4134.
- E
- Appeal.**
- Appeal by the defendant from an order of ROXBURGH, J., dated Feb. 23, 1955, in an action begun by a writ dated Sept. 17, 1952.
- By his statement of claim the plaintiff alleged that in August, 1938, the plaintiff and the defendant, who were both Hungarian nationals, entered into a partnership agreement with the intention of exploiting inventions of the defendant. Some patent specifications had already been filed, and others were later filed by the defendant. By an agreement dated Nov. 17, 1939, the defendant and an English syndicate agreed to form a company for the exploitation of the early inventions of the defendant. On Feb. 24, 1940, the company, called Aeroelectric Mouldings, Ltd., was incorporated with a capital of £300 divided into three hundred shares of £1 each, of which one hundred were issued to the defendant in consideration of the transfer of his patents (which were partnership assets). The plaintiff was at this time in Hungary. On Apr. 8, 1941, the Trading with the Enemy Act, 1939, was extended to Hungary, where the plaintiff was still living, and on Dec. 7, 1941, war was declared between Great Britain and Hungary. By virtue of the Trading with the Enemy Act, 1939, the partnership was terminated. Subsequently, the defendant assigned further inventions of his to Aeroelectric Mouldings, Ltd. On Sept. 24, 1943, the defendant transferred his shares in Aeroelectric Mouldings, Ltd., to Holoplast, Ltd., receiving in exchange 13,333 ordinary shares of £1 each in the latter company. The defendant sold 6,667 shares at par and used the proceeds of the sale for his own purposes. The plaintiff claimed (i) a declaration that the defendant was accountable to the plaintiff for one-half of all shares or other property or assets moneys or other benefits obtained by the defendant under or as a result of or in any way arising out of the agreement of 1939; (ii) an inquiry as to what shares or other property or assets, moneys or other benefits were obtained by the defendant as aforesaid and what had become of them, and an order for transfer or payment on the footing of the said declaration and inquiry; (iii) alternatively a declaration that there had been from Aug. 18, 1938, or was until Dec. 7, 1941, or Apr. 8, 1941, a partnership between the plaintiff and the defendant for the purpose of exploiting certain inventions; (iv) dissolution of the said partnership; and (v) accounts

and inquiries. The action was heard by DANCKWERTS, J.,* who by judgment A dated Jan. 26, 1954, declared

"that the plaintiff was upon the allotment to the defendant of one hundred shares of £1 each in Aeroelectric Mouldings, Ltd., pursuant to the agreement dated Nov. 17, 1939 mentioned in . . . the amended statement of claim beneficially entitled to one moiety of the said one hundred shares and that the defendant is accountable to the plaintiff for one moiety of the consideration which was payable to or receivable by the defendant upon the sale by him of the said one hundred shares to Holoplast, Ltd., under an agreement dated Sept. 24, 1943 and made between the defendant . . . and the said Holoplast, Ltd. . . ."

The learned judge also ordered that the following inquiries be made:

"(1) An inquiry what was the consideration payable to or receivable by the defendant upon the said sale by him to Holoplast, Ltd., of the said one hundred shares in Aeroelectric Mouldings, Ltd. (2) An inquiry what has become of the said consideration and of any moneys shares or other property of which the same consisted. (3) An inquiry what payments or distributions by way of interest dividend or bonus have been made upon any of the said moneys shares or other property. And the said inquiries are to be conducted upon the footing that each of the inventions which are the subject-matter of the five British letters patent mentioned in . . . the amended statement of claim fell within the ambit of the agreement between the plaintiff and the defendant."

His Lordship gave the plaintiff liberty to apply for such further inquiries or accounts and for such order for payment or transfer by the defendant to the plaintiff as might be necessary or proper to give effect to the said declaration and to the findings on the inquiries. On the inquiries it transpired that, very shortly after the allotment to him of the 13,333 shares in Holoplast, Ltd., the defendant had sold 6,667 of such shares at par, and had used the £6,667 proceeds for his own purposes. The plaintiff then issued a summons, under the liberty to apply, for (amongst other things) payment to him of £3,333 10s. (being a moiety of £6,667) together with interest thereon at five per cent. per annum from Sept. 30, 1943 (the date of receipt by the defendant of the £6,667) until payment. ROXBURGH, J., made the order asked for. The order made by DANCKWERTS, J., had not expressly charged the defendant with payment of interest.

On appeal, the defendant contended that he ought not to be ordered to pay any sum by way of interest; or alternatively that the rate of interest which he was ordered to pay was too high.

K. E. Shelley, Q.C., and *D. W. Falconer* for the defendant.

J. G. Strangman, Q.C., and *G. B. H. Dillon* for the plaintiff.

SIR RAYMOND EVERSLED, M.R. (having read the order of DANCKWERTS, J.): The first question is what does that order mean? At first sight, I must confess that it would appear to me quite plain that the effect of the order was to declare the defendant to have been a trustee for the plaintiff of one-half of the one hundred shares in Aeroelectric Mouldings, Ltd., which were issued to or allotted to the defendant pursuant to the agreement mentioned in the order. To state, as the order states, that the plaintiff was on the allotment of those shares beneficially entitled to a moiety of them is to my mind exactly the same thing as to say that the defendant, on the shares being allotted to him, was a trustee as to a moiety of them for the plaintiff, the beneficial owner. If that view is the right view (as I shall, I hope, show), everything else seems to me to follow; but, as ROXBURGH, J., observed, the form of the order which

* Reported (1954) 71 R.P.C. 121.

- A I have read is in a sense unexpected when regard is had to the pleadings in the action which are themselves read into the order. [HIS LORDSHIP considered the statement of claim, and continued:] I think that it is quite true to say that, notwithstanding the first form of declaration prayed for, the whole substance of the statement of claim was an allegation that there had been a partnership between the plaintiff and the defendant and, moreover, that certain later inventions or developments of the original invention made by the defendant had been the subject of or comprehended within the partnership agreement; and, indeed, as counsel for the plaintiff agreed at the trial before DANCKWERTS, J., the only real matter of fact which fell to be determined, and which was determined in favour of the plaintiff, was: Did the partnership agreement, did the joint venture, comprise or did it not comprise, the later and, as it turned out, successful inventions of the defendant? On that issue the judge, who took plainly a somewhat strongly adverse view of the defendant as a witness, found in the plaintiff's favour. [HIS LORDSHIP stated the history of the matter, and continued:] On the face of it, the claim was for relief on the ground that the plaintiff and defendant had been partners, and since the effect of the extension of the trading with the enemy legislation to Hungary was to determine that partnership, the form of order which one would have expected would, I think, have been somewhat to the following effect (notwithstanding the form of the first declaration in the prayer of the statement of claim). It would have contained a declaration that the plaintiff and defendant had been partners in respect of the inventions and would no doubt have gone on to make clear that the partnership covered the later and valuable invention; it would have declared that the partnership was dissolved on Apr. 8, 1941 (when the Trading with the Enemy Act, 1939, was applied to Hungary by S.R. & O. 1941 No. 495), and would then have directed accounts and inquiries in order to show of what the partnership assets consisted at that date and what, if any, were its liabilities, and also an inquiry what had become of the assets of the former partnership since that date. I am by no means satisfied that if the order had taken that form it would, in the end of all, have made any difference; but the order took a different form. In the language of ROXBURGH, J., the action appears to have been converted from an ordinary partnership action, which would have resulted in relief in the common form I have indicated, into something else. The question is: When regard is had to the pleadings and to the history which I have stated and to the fact that the pleadings were read in this order and the evidence was referred
- G to, does the declaration in the order assume some different aspect? Is what I have called its *prima facie* meaning thereby altered? I cannot think that it is. I cannot myself think that the fact that one is entitled to look at the pleadings and entitled to have regard to the circumstances that I have mentioned in any way qualifies the plain meaning of the words which follow: "The court doth declare that the plaintiff was beneficially entitled to a moiety of the one hundred shares allotted to the defendant"; and that is, to my way of thinking, necessarily the same thing as saying, if it had been put the other way round, that the defendant was a trustee for the plaintiff in respect of one moiety of the one hundred shares.

- I The argument (and it may be put, I think, quite shortly) for the defendant was this, both before ROXBURGH, J., and in this court: It was said that, notwithstanding the form of the order, the true substance and intent of it was a decree appropriate in a partnership action; and counsel for the defendant said that, as between partners in the ordinary way, when accounts are taken, no question of the one being regarded as a trustee for the other properly arises. For that proposition, counsel has referred us to text-books, viz., 24 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), at p. 396, and also POLLOCK'S LAW OF PARTNERSHIP (14th Edn.), at p. 119 (in which the relevant passage reproduces exactly what was said in the earlier edition edited by SIR FREDERICK POLLOCK himself),

and to certain cases, notably *Piddocke v. Burt* (1) ([1894] 1 Ch. 343), and *Knox v. Gye* (2) (1872) (L.R. 5 H.L. 656). The passage in *POLLOCK* is to this effect (p. 119):

"A surviving partner has sometimes been said to be a trustee for the deceased partner's representatives in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the Statute of Limitations . . ."

In *HALSBURY* it is said (Vol. 24, 2nd Edn., p. 396, para. 774):

"The relation between partners is not that of debtor and creditor, unless and until the partnership accounts have been finally taken after dissolution and a balance has been ascertained to be owing from one to another. Nor are the partners, as such, trustees for each other or for their firm."

Knox v. Gye (2) was a case of great complication, in which the matter arose between the representatives of a deceased partner and a surviving partner, the business having ceased. According to the majority opinion of the House of Lords it was held that the claim of the representatives of the deceased partner was barred by the Statute of Limitations, and that depended on the view that, on the facts of that case, the surviving partner could not be treated as having been a trustee for the representatives of the deceased partner, not in respect of some particular asset, but in respect of his (the deceased partner's) share in the partnership assets. Certainly so long as a partnership continues and until it has been wound up, one partner has no specific interest in any particular asset; but it seems to me that where, as in the present case, the partnership has been dissolved by the impact of the trading with the enemy legislation and where, as it appears, the active partner in this country has used partnership assets in this way, that he has exchanged them for some other asset which had been vested in his name, it would be going very much too far to say that the partner who so acts is not a trustee for the partnership of the asset which has come into his hands in exchange for the assets of the partnership which he gave for it. One could well imagine examples when it would (I should have thought) be impossible to resist the view that a partner who, by using partnership moneys or partnership assets, acquired some asset in his name would not be held to be a trustee for the firm, i.e., for himself and his co-partner, of the asset which he had thus obtained. Indeed, the case referred to by counsel for the plaintiff, *Featherstonhaugh v. Fenwick* (3) (1810) (17 Ves. 298) is an example of such a result, a case which has been followed consistently since and was particularly referred to by LORD ATKINSON in his speech in *Hugh Stevenson & Sons v. Akt. für Cartonagen Industrie* (4) ([1918] A.C. 239). Counsel for the plaintiff referred particularly to the passage in LORD ATKINSON's opinion (beginning, *ibid.*, at p. 250), where it is to be noted that the noble Lord referred, when mentioning *Knox v. Gye* (2), to the dissenting opinion of LORD HATHERLEY without indeed observing that it was a dissenting opinion and without further reference to any of the other opinions.

However that may be, it is quite unnecessary in this case for the court to express any view as to the limitations or scope of the decisions in such cases as *Knox v. Gye* (2) on the one hand and *Featherstonhaugh v. Fenwick* (3) on the other. I have only made such reference to them as I have in order to make good a point which I earlier indicated. In my judgment, even if the form of the order made by DANCKWERTS, J., had been one appropriate strictly to a partnership action, declaring that the partnership had been dissolved and directing the usual inquiries, it is by no means clear to me that it would not have inevitably followed, either on the first inquiry or at least at some other stage, that the assets which the defendant had obtained when he disposed of the partnership assets (to wit, the patents) were held by him as trustee for the partnership; and in the events (*viz.*, that the partnership had ceased operations

A and had no debts or liabilities to discharge) that the defendant thereupon held that asset as a trustee as to one-half for himself and as to the other half for the plaintiff. However that may be, I return to the order of Jan. 26, 1954, made by DANCKWERTS, J., which we are called on to construe. Bearing all the relevant matters in mind and paying regard to the cases to which we have been referred, it still remains clear to me that the effect of the declaration was (as I have many times said) that the defendant was held to be a trustee as to one-half of the one hundred shares in Aeroelectric Mouldings, Ltd., for the plaintiff. The defendant did not appeal from the order, which is accordingly not now capable of being challenged by him, and, in my judgment, it follows from the terms of the order and the declaration which it contained that the defendant was a trustee for the plaintiff as to one-half of what the defendant got in exchange for the Aeroelectric shares, namely, 13,333 Holoplast shares; and, being a trustee of one-half of those shares for the plaintiff, it equally follows that he was a trustee for the plaintiff of the money he received on a sale by him of half the Holoplast shares.

C What, then, is the right conclusion? The master certified that the £6,667 was wholly spent by the defendant. ROXBURCH, J., required further investigation into that matter, and it may now be taken that in fact the defendant put that money (stating the matter in popular language) in his pocket. He used it for his own purposes, in discharging his own liabilities, or otherwise for his own requirements. Seeing that, as to one-half, it was trust money, it follows that the defendant must be regarded as having converted one-half of the cash consideration to his own use. What, then, is the result? It is true that the thought of this interest claim may have dawned somewhat late on the plaintiff or his advisers, but none the less it was, in my judgment, as a consequence and a necessary consequence of the premises I have stated, a just claim which they could make. The trustee, having converted part of the cash consideration he received for trust property to his own use, must be accountable to the beneficiary, not only for the sum he received, but for interest on it.

E No point was taken, and I assume it never could have been taken, that there was here any possible limitation of the period during which interest would run from the date when the money was received and spent in September, 1943, to the date when the principal figure of £3,333 10s. was paid over in December, 1954; nor does it appear that any great point was taken as to the rate of interest. It appeared to me, when I first looked at the matter, that five per cent. was, in these days, a somewhat high figure. But since the defendant is to be treated as having converted the money to his own use, it is too late now, certainly in the circumstances of this case, in which the question never really was gone into below, for us to depart from the ordinary rule which has undoubtedly been applicable for a great many years. The rule is that where a trustee is chargeable with interest as for breach of trust, the rate of interest with which he is charged is five per cent., unless his conduct is such (as is not the case here) that he is made to pay compound interest. That rule as to interest dates back to cases like *Burdick v. Garrick* (5) (1870) (5 Ch. App. 233) and *Re Davis* (6) ([1902] 2 Ch. 314), and it may be said to be supported in the present case by the circumstance that in certain sections of the Partnership Act, 1890, itself (see s. 24 (3), and s. 42) a partner is liable to pay interest at five per cent. in respect of that for which he may be found accountable to a co-partner. Whether, having regard to the change in money rates, that rate ought to be varied, is not a question which we have to decide in this case. The rule is well established, and in all the circumstances I can see no grounds which would justify us departing from it, given the premises which I have stated.

I The result, therefore, is that the defendant ought, in my judgment, on the face of the order which was made in January, 1954, to pay interest and to pay it at the rate stated by the learned judge, viz., five per cent. In my judgment, this appeal fails and must be dismissed.

HODSON, L.J.: I entirely agree and have nothing to add.

ROMER, L.J.: I agree and have very little to add. Inasmuch as the defendant never appealed against the order of DANCKWERTS, J., which was made on Jan. 26, 1954, it is clear that he is bound by the provisions of that order, whatever those provisions may be. For the reasons which the Master of the Rolls has stated, it appears to me to be clear that the order proceeded on the footing of a trusteeship of the defendant of the original one hundred shares which were allotted to him and on the corresponding footing that the plaintiff was the cestui que trust of one-half of those shares. If that is the meaning of the order, then cadit questio, because the defendant never appealed it. It is only if the order is open to some other construction, if it is ambiguous in its terms, that it appears to me to admit of the argument which counsel for the defendant addressed to us, viz., that in the circumstances which existed, in view of the pleadings in the action and the acceptance by the judge that there was a partnership and in view also of the general law which is applicable as between partners, the judge cannot have intended to hold that the defendant was a trustee of the shares which were allotted to him. There is no such ambiguity as to render that argument permissible, because this order proceeds (and, in my opinion, proceeds only) on the footing of a trusteeship. Even if there were such an ambiguity as counsel suggested and on which he founded his attempt to show that the conception of a trusteeship was not one which ought to be accepted, nevertheless if one looks to the observations that SIR WILLIAM GRANT, M.R., made in *Featherstonhaugh v. Fenwick* (3) and to LORD ATKINSON's opinion in the *Hugh Stevenson* case (4) to which the Master of the Rolls has referred, there was material, one need say no more, on which the judge could find, as in my opinion he did find, that there was a trusteeship.

There is only one other point I should like to mention; that is that counsel for the defendant said that this order only intended to effect what it expressed and one looks to the order in vain for any indication that the defendant was to be held liable for interest on any part of the money which came into his hands in respect of the sale of these shares. That, of course, is true, but at the time when this order was made, although the defendant knew or presumably knew what he received as consideration for the shares and what he did with it, the plaintiff did not know. Accordingly, all the plaintiff could ask for is what he did ask for, viz., an order for a common account against a person who was in the position of a trustee. When, in the course of working that order out, or any order such as that, it transpires that the trustee has converted trust property to his own use, or applied it to purposes that he had no right to apply it to, the mere fact that the original order was an order for a common account does not and cannot preclude a cestui que trust from subsequently saying: "Now we know what the facts are, we are entitled to what the court has always allowed to a beneficiary as a remedy against a trustee who has wrongfully applied trust property, viz., not only restoration of the property, but interest at the appropriate rate". Therefore, it seems to me that that point which counsel for the defendant took is no answer to the summons which the plaintiff issued after the certificate, asking for interest on the footing of a trusteeship.

In my judgment, ROXBURGH, J., was quite right in ordering interest, having regard to the construction of the order and the common practice; and I agree with the Master of the Rolls that no ground is shown for altering the rate of such interest which has prevailed for many years, viz., five per cent. I accordingly agree that the appeal fails.

Appeal dismissed.

Solicitors: *Halsey, Lightly & Hemsley* (for the defendant); *Hardman, Phillips & Mann* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A JENNINGS v. TAVENER.

[QUEEN'S BENCH DIVISION (Jones, J.), May 2, 3, 11, 1955.]

Sale of Land—Warranty—Sale by builder of new house—House in course of erection—Implied warranty—Cracks in walls due to settlement caused by roots of poplar trees.

B By a contract in writing dated Feb. 22, 1950, the plaintiff's husband agreed to buy a bungalow then in course of erection from the defendant, who was building it without the assistance of an architect but according to plans originally prepared by an architect. After the plaintiff and her husband had moved into the bungalow, cracks appeared in the walls, which were caused by the withdrawal of moisture from the clay soil of the site by the roots of some poplar trees some thirty to forty feet from the back of the bungalow. The withdrawal of moisture by such roots was a well-recognised danger. In an action by the plaintiff for damages for breach of contract in which she alleged that the bungalow was unfit for habitation,

C **Held:** the warranty, which is implied in a contract for the sale of a house in course of construction, that the house when completed shall be fit for human habitation, extends to the foundations of the house below ground, and, as these had not been built in a place or manner which ensured that they did not settle in consequence of the extraction of moisture from the soil by roots of neighbouring poplars, the defendant was liable in damages for breach of the warranty.

D *Miller v. Cannon Hill Estates, Ltd.* ([1931] 2 K.B. 113) and *Perry v. Sharon Development Co., Ltd.* ([1937] 4 All E.R. 390) considered.

E [As to implied stipulations as to workmanship and materials in a building contract, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 818 and p. 442, para. 837; and for cases on the subject, see DIGEST SUPP.]

Cases referred to:

- (1) *Lawrence v. Cassel*, [1930] 2 K.B. 83; 99 L.J.K.B. 525; 143 L.T. 291; Digest Supp.
- F (2) *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113; 100 L.J.K.B. 740; 144 L.T. 567; Digest Supp.
- (3) *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390; Digest Supp.
- (4) *Re Puckett & Smith's Contract*, [1902] 2 Ch. 258; 71 L.J.Ch. 666; 87 L.T. 189; 40 Digest 45, 286.
- (5) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- G (6) *Butler v. Standard Telephones & Cables, Ltd.*, *McCarthy v. Standard Telephones & Cables, Ltd.*, [1940] 1 All E.R. 121; [1940] 1 K.B. 399; 109 L.J.K.B. 238; 163 L.T. 145; 2nd Digest Supp.
- (7) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 44 Digest 104, 828.

H Action.

I In 1939 the defendant, Jack Lockhart Harry Tavenor, a builder, acquired some land at Chingford, Essex. He had some plans for the building of houses and bungalows prepared by an architect, but, owing to the war, he was unable to proceed until 1946, when he made an application to the Chingford Borough Council for permission to build on the land. In 1949 he was granted a licence to build, in addition to other buildings, two semi-detached bungalows to be known as No. 34 and No. 36, Gunners Grove, Chingford. In 1949 the plaintiff's husband, Ronald Raymond George Jennings, entered into an agreement to buy No. 34, Gunners Grove, from the defendant, and paid a deposit. In December, 1949, in answer to a questionnaire about the bungalow submitted by the plaintiff's solicitors, the defendant's solicitors described the bungalow as being in course of construction. On Feb. 22, 1950, the contract was signed. The contract contained certain special conditions and the National Conditions of Sale (15th Edn.) were incorporated in it so far as they were not inconsistent with the special conditions.

The bungalow was completed on May 11, 1950, the purchase was completed on May 17, and the plaintiff and her husband moved in on May 20. The plaintiff's husband died on Sept. 8, 1950. Before his death the plaintiff's husband made complaints to the defendant of cracks in the structure, and, after his death, the plaintiff also made such complaints to the defendant. In 1953 the plaintiff consulted Mr. Mathew, an architect, who inspected the bungalow and came to the conclusion that the cracks were caused by the withdrawal of moisture from the site by the roots of certain poplar trees in a cemetery about thirty to forty feet from the back of the bungalow. On Dec. 2, 1953, the plaintiff's solicitors wrote to the proprietors of the cemetery who cut down the poplars and destroyed their roots. No further damage to the bungalow occurred after this. In January, 1954, the plaintiff, as administratrix of her husband's estate, commenced an action against the defendant for damages for breach of a contract for the sale of a bungalow in the course of erection or to be erected. By para. 4 of the statement of claim, she alleged that the defendant had failed and/or neglected to build the bungalow with reasonable skill and care, with good and suitable materials or in a proper, efficient and workmanlike manner in that (i) he failed to take any, or any adequate, precautions against damage to the bungalow resulting from shrinkage in the subsoil which he knew, or ought to have known, was likely to occur, (ii) he failed to take any, or any effective, steps to remove the roots of poplar trees from the site of the bungalow, or otherwise to prevent the roots from affecting the stability of the soil on which the bungalow was built, (iii) he laid a wide concrete slab outside the rear wall of the bungalow, thereby increasing the likelihood of shrinking of the soil and damage resulting therefrom, (iv) he failed to lay sufficiently deep foundations to the bungalow having regard to the nature of the soil and subsoil on which it was to stand, and (v) he laid a six-inch drain close to and below the level of the concrete foundations of the bungalow.

C. P. Harvey, Q.C., and M. R. Hickman for the plaintiff.

H. J. Phillimore, Q.C., and H. E. Francis for the defendant.

Cur. adv. vult.

May 11. **JONES, J.**, read the following judgment in which he stated the facts, reviewed the evidence, and continued: The plaintiff alleges that certain terms are implied in the contract, namely, those which are set out in para. 3 of the statement of claim, that the bungalow should be built with reasonable skill and care, that the materials to be used therein should be good and suitable and that the work of building should be done in a proper, efficient and workmanlike manner. She alleges that there have been breaches by the defendant of these implied terms which are set out in the particulars in para. 4 of the statement of claim. I do not think I need read them, because there they are. She alleges that the bungalow was unfit for habitation, which the defendant denies in his defence. More specifically, in para. 4 of his defence, he denies that he has committed any breach of contract as is alleged in the statement of claim.

I was referred by counsel for the plaintiff to the following authorities: *Lawrence v. Cassel* (1) ([1930] 2 K.B. 83); *Miller v. Cannon Hill Estates, Ltd.* (2) ([1931] 2 K.B. 113); *Perry v. Sharon Development Co., Ltd.* (3) ([1937] 4 All E.R. 390); *Re Puckett & Smith's Contract* (4) ([1902] 2 Ch. 258); and *Thomson v. Cremin* (5) ([1953] 2 All E.R. 1185). Counsel for the defendant referred me to *Butler v. Standard Telephones & Cables, Ltd.* (6) ([1940] 1 All E.R. 121). I have considered all these cases. Counsel for the plaintiff relied on an implied warranty that the house would be built in a workmanlike manner. Counsel for the defendant agreed that a warranty of fitness is to be implied in the case of the sale of a half-built house, but he maintained that the warranty was only that the builder would complete the building in a proper and workmanlike manner, and he claimed that the defendant had done this. He relied also on condition 12 (3) of the National Conditions of Sale (15th Edn.). Counsel for the plaintiff submitted

- A that that condition was inconsistent with special condition 10, and did not apply to the contract. I have difficulty in making up my mind, and so I am not sure, if the defendant knew that these poplar trees were likely to cause this damage. I think that he should have known, as much literature had been published to builders that informed them of this danger, and I think that it is certain that, if the defendant had employed an architect to supervise the building of the
- B bungalow, the architect would have known of the danger caused by the presence of these trees. It is interesting to notice the facts in *Bulter v. Standard Telephones & Cables, Ltd.* (6), where damage was done, and I observed in "The Times" of May 10, that there was a case* before HARMAN, J., in which similar damage appeared to have been done.

- C I hold that condition 12 (3) of the National Conditions does not apply to this contract, as it seems to me (though it is not very easy to decide the point) to apply to a completed house and to be inconsistent with special condition 10, which clearly applies to a house in course of construction.

- D It is necessary first of all to ascertain what is the nature and extent of the warranty in the case of the sale of a house in course of construction. In the first case to which I was referred, *Lawrence v. Cassel* (1), there was an express agreement to complete the house in accordance with certain plans, and it was a breach of that agreement that was alleged. It is interesting, however, to observe the passage in the judgment of SCRUTTON, L.J., where he said this ([1930] 2 K.B. at p. 89):

- E "I agree that it might require very careful consideration whether the agreement to complete the house referred exclusively to work to be done subsequently, accepting what had already been done as executed according to the contract, or whether it included the whole of the work to be done on the house—that which purported to be completed as well as that which was plainly unfinished. There is a good deal to be said for the view that a contract to complete a house is not performed by making a house full of defects some of which subsequently appear in consequence of work badly done before the
- F contract and some of which are due to bad work done after the contract. But on this question I say nothing, because no point was made at the trial that cl. 4 of the contract only related to work which was to be done under cl. 5, after the date of the contract and before completion of the sale, but did not apply to work done before the contract. In these circumstances I do not think we ought to interfere even if we were of opinion that the
- G contract had no relation to work which had been done before it was entered into, a question which, as I say, I am not going to decide."

The headnote to the report of *Miller v. Cannon Hill Estates, Ltd.* (2), is as follows ([1931] 2 K.B. 113):

- H "In a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials, and that it shall be fit for habitation. *Lawrence v. Cassel* (1) ([1930] 2 K.B. 83) followed. A representation by builders in conversation with a prospective buyer, that all houses on the estate are of the best material and workmanship, may amount to a
- I warranty collateral to a subsequent formal contract, for breach of which an action will lie."

That is not really material to this case. In the course of his judgment in that case, which came before a Divisional Court in the days when appeals from county courts went to a Divisional Court, SWIFT, J., first of all referred to the sale of a completed house. Then he said ([1931] 2 K.B. at p. 121):

"The position is quite different when you contract with a builder or with

* *McCombe v. Read* (ante, p. 458).

the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling. Our attention has been called to the well known passage from the judgment of BOWEN, L.J., in *The Moorcock* (7) (1889) (14 P.D. at p. 68) as to the cases in which a warranty will be implied in law. Can the parties here be thought, when the plaintiffs were bargaining for a dwelling-house which was to be erected in accordance with the character of the other dwelling-houses in the neighbourhood, to have been bargaining for something which was no protection in wet weather? The jury have found here that this house was in such a leaking or porous condition that it was quite unfit for human habitation. If the plaintiff has no implied warranty that it shall be fit for human habitation, then the consideration for which he bought this house wholly fails."

The decision in *Miller v. Cannon Hill Estates, Ltd.* (2) was considered and approved by the Court of Appeal in *Perry v. Sharon Development Co., Ltd.* (3). The headnote is as follows ([1937] 4 All E.R. 390):

"The plaintiff on Dec. 19, 1935, entered into an agreement for the purchase of a house stated to be 'erected or in the course of erection.' The balance of the purchase money was to be paid, and completion to be made, on Jan. 7, 1936, or 'so soon thereafter as the premises shall be completely finished and ready for occupation.' On Dec. 19, the house, in addition to the decorations, lacked such things as water-taps, baths, and grates, and the plastering of the walls of the dining-room and drawing-room was incomplete. The plaintiff actually went into occupation on Jan. 7, 1936. In May, 1936, he complained of various defects in the house, and in this action he relied upon an implied warranty that the house should be of the same standard of building and of finish as was the show-house, and, in any event, that the construction should be carried out in a proper, efficient and workmanlike manner. It was contended that this was the sale of a completed house, and that there was no such implied warranty. Held: this was a purchase of a house in the course of erection, and not a purchase of a completed house, and the plaintiff was, therefore, entitled to rely upon the implied warranty."

SIR WILFRID GREENE, M.R., said (*ibid.*, at p. 392):

"The county court judge has dealt with the matter of law only. He has not gone into any of the details of the damage claimed . . . Accordingly, in his judgment he dealt with the question of law only, and he held that the warranties, or terms mentioned in the particulars of claim, were to be implied, basing himself on *Miller v. Cannon Hill Estates, Ltd.* (2). I propose to consider this case without reference to any authorities, for the moment. It is, of course, well settled that a vendor of a completed house, in respect of which there is no work going on and no work to be done, does not, in the absence of some express bargain, undertake any obligation with regard to the condition of that house. It is further well settled that, quite apart from obligations in contract, there is no obligation in tort lying upon him in respect of want of proper care in the construction or in the condition of the house which he is selling. Indeed, the reason for that is obvious. Every contract must, of course, be construed with reference to the subject-matter with which it is dealing, and, where a contract for the sale and purchase of a house is dealing with a house which is, in the contemplation of both parties, and to the knowledge of both parties, supposed to be a completed house, there is

- A no room for the implication of any term as to the doing of further work upon it. But it seems to me that, where the contract is a contract relating to a house which is still in the process of being completed, where the vendors' workmen are still on the job, and particularly where the completion is not to take place until the house has arrived at the contemplated condition—namely, complete finish and readiness for occupation—there must be implied in that
- B contract an undertaking that the house shall be in that condition. The very fact that the contract is a contract for the purchase of a house in course of erection, that the contract contemplates that it is not to be completed until the house has been erected, and contemplates that the degree or the state of erection which that is to mean is the complete finishing of the house and its readiness for occupation, makes it almost possible to say (and I am not sure
- C whether it is not more correct to say) that, on the true construction of the contract itself, there is an express obligation to finish that house. For present purposes, however, it matters not which way it is put. When this contract is examined in relation to the facts of the case as found by the county court judge, there is, in my opinion, imported into it an obligation on the vendors to put the house into the contemplated condition of complete finish
- D and readiness for occupation. The county court judge has found that that was not done."

SIR WILFRID GREENE, M.R., said further, dealing particularly with the judgment of SWIFT, J., in the earlier case (*ibid.*, at p. 394):

- E "The case upon which the county court judge relied in this case was a decision of the Divisional Court in the case of *Miller v. Cannon Hill Estates, Ltd.* (2). That was a case where there was a collateral agreement which had been held to amount to a contract, and it was held by the Divisional Court that the jury was entitled to find that there was a contract. A further matter was discussed, where SWIFT, J., says in his judgment ([1931] 2 K.B. at p. 120): 'Indeed it seems to me that it is a matter of very little moment whether there was or whether there was not an express warranty as to the condition
- F of the material or the nature of the workmanship which should be used in this house, because I think that it is plain from the whole of the facts of the case that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in.'

- G The Master of the Rolls goes on ([1937] 4 All E.R. at p. 394):

- H "Then SWIFT, J., deals with the case of an unfurnished house, and points out that there is no implied contract with regard to its condition. He goes on to say ([1931] 2 K.B. at p. 121): 'The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house'."

The Master of the Rolls went on to say (*ibid.*):

- I "I am not sure (and it is not necessary to go into this question) whether some of the reasoning of the judge in that judgment commends itself to me, but, so far as concerns his conclusion as to the implication of a term in the contract in the case where it is dealing with a house in course of erection, I am in agreement with the general conclusion to which he came."

ROMER, L.J., delivering judgment said (*ibid.*):

"It is well-established by numerous authorities, to some of which Serjeant Sullivan has called our attention, that, in the case of the sale of a

completed house, there is to be implied on the part of the vendor no warranty as to the house being in any particular condition. The same rule would apply in the case of an uncompleted house, which is the subject-matter of a sale, where the structure stands at the time of the sale. Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation."

He said further—it is not necessary to read all that he said—(ibid., at p. 395):

"In my opinion, in those circumstances, there was an implied contract on the part of the vendors that, at the date of completion, the house should be in a state fit for human habitation."

MACKINNON, L.J., in a short judgment, said (ibid.):

"The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the maxim caveat emptor cannot apply, and the buyer, in so far as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, in so far as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly."

In my view, the evidence of Mr. Mathew, [an architect who examined the bungalow on behalf of the plaintiff] which I accept in preference to the evidence of the defendant and Mr. Wilson [a surveyor who inspected the bungalow on behalf of the defendant] where there is a conflict between their evidence, and also the photographs of the cracks in the bungalow, which are really not disputed, establish that this bungalow was not in a state fit for human habitation, and had not been completed in a workmanlike manner when handed over by the defendant to the plaintiff's husband at the date of completion, because the defendant had failed to take the necessary steps to prevent a settlement of the walls of the bungalow which resulted inevitably in these cracks in the walls. I hold that a breach has been committed of the warranty that is implied in the case of the sale of a house in course of construction. I think that the obligation imposed on the defendant by the implied warranty was not confined to building the parts of the bungalow that are above the ground but extended to the provision of proper foundations for the bungalow, and the building of these foundations in a place where they would not settle or collapse. The defendant assumed the responsibility of supervision of the siting and building of the bungalow without the assistance of an architect, and failed to provide the plaintiff's husband with a bungalow fit for habitation, as he omitted to consider or guard against the well-recognised danger that the proposed site of a house may be unfit for that purpose because moisture has been extracted from it by the roots of such quick-growing trees as poplars growing in the immediate neighbourhood of the site. I find that the defendant could have prevented the occurrence of these cracks by cutting the roots of the trees at a distance from the bungalow, or by asking the cemetery company to do so, or by putting a concrete bed under the foundations. I find also that the other defects in the bungalow mentioned by Mr. Mathew existed, but neither of those alone would have made the bungalow unfit for habitation.

The damages have been agreed, subject to the issue of liability being decided, at the sum of £275, and, therefore, I give judgment for the plaintiff for the sum of £275.

Judgment for the plaintiff.

Solicitors: *Chandler & Creeke* (for the plaintiff); *J. H. Fellowes* (for the defendant).
[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

Re B. JOHNSON & CO. (BUILDERS), LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.JJ.),
June 15, 16, 17, 20, 21, 1955.]

B

Company—Winding-up—Misfeasance—Liability for misfeasance—Receiver and manager appointed by debenture-holder—Liquidator—Whether receiver a manager of company—Whether alleged default within section—Interest of plaintiff in subject-matter of misfeasance summons—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 333 (1), s. 455 (1).

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In 1940, B.J. Ltd. issued to a bank a debenture in ordinary banker's form, containing a floating charge on all the assets of the company, to secure an overdraft. In August, 1947, the bank appointed A. as receiver and manager. A. immediately terminated the active operations of the company and in January, 1948, the unsecured creditors of the company presented a petition for the compulsory winding-up of B.J. Ltd. A winding-up order was made on Jan. 27, 1948, and later B. and another (who died in 1952) were appointed joint liquidators. A contributory of the company, who held seven hundred of the total issued share capital of one thousand shares of £1 each, issued a summons in the winding-up under the Companies Act, 1948, s. 333*, to have examined the conduct of A. while acting as receiver and manager from August, 1947, until the winding-up order was made, and of B. while acting as liquidator since the date of that order, on the footing that A. and B. had been guilty of misfeasance. The principal grounds of the application in relation to A. were (a) that on his appointment he stopped all building work notwithstanding that he was told that that would entail great loss to the company; (b) that he made to the Central Land Board an incorrect application for loss of development value in respect of land at Huyton; and (c) that he failed to make application under the Town and Country Planning Act, 1947, s. 80, for a certificate of exemption in respect of other land and to make a claim for loss of development value in respect of that land. In relation to B. the principal ground alleged was that the claim in respect of the land at Huyton was taken over by the liquidators, who, although the incorrectness of the claim was pointed out, failed to put in a proper application, so that the compensation received was £4,500 instead of £8,600. The claims of unsecured creditors amounted to about £10,000 and only £83 was available after satisfaction of the debts having priority.

Held: (i) A. was not a manager of the company within the words "director, manager or liquidator . . . of the company" in s. 333 (1) of the Companies Act, 1948, because he was not concerned to manage for the benefit of the company but, as receiver and manager of the property of the company appointed out of court by the debenture-holder, was concerned to realise the debenture-holder's security; accordingly, s. 333 of the Act did not extend to A.

(ii) the grounds of complaint alleged against A. were not within s. 333 because, as regards allegation (a), a receiver and manager appointed by a debenture-holder was under no duty to the company or its contributories to preserve the goodwill and business of the company, and allegations (b) and (c) were in substance charges of negligence, not of any misapplication or misfeasance for which a charge could be sustained under the section.

Dicta of MAUGHAM, J., in *Re Etic, Ltd.* ([1928] Ch. at p. 873) and of LINDLEY and LOPES, L.JJ., in *Re Kingston Cotton Mill Co. (No. 2)* ([1896] 2 Ch. at pp. 283, 288) applied.

(iii) the ground of complaint alleged against B. was also not of misapplication or misfeasance within s. 333; moreover even if £8,600 had

* The text of s. 333 (1) is printed at p. 778, letter F, post.

been received as compensation in respect of the land at Huyton, there would still have been nothing available for contributories, and, therefore, the contributory had not sufficient interest in the subject-matter of his claim to entitle him to proceed under s. 333.

Appeals allowed.

[**Editorial Note.** In the present case no definition of what is a misfeasance within s. 333 of the Companies Act, 1948, is given but, after considering the observations of LINDLEY and LOPES, L.J.J., referred to above, SIR RAYMOND EVERSHED, M.R. (at pp. 782, 783, post), concludes that what they were saying was that where a breach of duty had been committed which did in fact result in a misapplication of the company's property, such transactions would be within the section.

As to liability for misfeasance, see 6 HALSBURY'S LAWS (3rd Edn.) 621-625, paras. 1223-1231; and for cases on the subject, see 10 DIGEST 900-909, 6150-6212.

For the Companies Act, 1948, s. 333, see 3 HALSBURY'S STATUTES (2nd Edn.) 715.]

Cases referred to:

- (1) *Re Etic, Ltd.*, [1928] Ch. 861; 97 L.J.Ch. 460; 140 L.T. 219; Digest Supp.
- (2) *Re Canadian Land Reclaiming & Colonizing Co., Coventry & Dixon's Case*, (1880), 14 Ch.D. 660; 42 L.T. 559; 9 Digest 453, 2944.
- (3) *Re Anglo-French Co-operative Society, Ex p. Pelly*, (1882), 21 Ch.D. 492; 47 L.T. 638; 9 Digest 511, 3347.
- (4) *Cavendish Bentinck v. Fenn*, (1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 10 Digest 902, 6161.
- (5) *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279; 65 L.J.Ch. 673; sub nom. *Re Kingston Cotton Mill Co., Ltd., Ex p. Pickering & Peasegood (No. 2)*, 74 L.T. 568; 10 Digest 904, 6173.
- (6) *Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151; 68 L.J.Ch. 90; 79 L.T. 541; 9 Digest 526, 3477.

Appeals.

These were appeals by the receiver and manager and a liquidator of B. Johnson & Co. (Builders), Ltd., pursuant to leave granted by the Court of Appeal on Apr. 6, 1955, from a decision of SIR LEONARD STONE, V.-C., at the Palatine Court of Lancaster, given on Mar. 30, 1955.

In the winding-up of B. Johnson & Co. (Builders), Ltd., Herbert Francis Granby, a contributory of the company, took out a summons for the following relief: (i) that under the Companies Act, 1948, s. 333, the court might examine into the conduct of the defendant Thomas Alan Aizlewood while acting as receiver and manager for Barclays Bank, Ltd., a debenture-holder of the company, during the period from Aug. 9, 1947, until a winding-up order in respect of the company was made in the Palatine Court of Lancaster on Jan. 27, 1948; (ii) that under that section the court might examine into the conduct of the defendant Eric Stevenson Browne as liquidator of the said company since the date of the said winding-up order; (iii) that such further and other order might be made as might seem to the court just. The grounds for the application were set out in thirteen paragraphs which, so far as relevant, appear in the judgment of SIR RAYMOND EVERSHED, M.R. SIR LEONARD STONE, V.-C., ordered on Mar. 30, 1955, (i) that the applicant should deliver his points of claim by Apr. 20, 1955, limited to certain items, (ii) that the respondents should deliver their points of defence by May 4, 1955, (iii) that the amended summons be adjourned to the witness list with liberty to any party to apply to fix a day, and (iv) that any interlocutory application was to be made to the Vice-Chancellor in person.

Sir Lynn Ungood-Thomas, Q.C., and *Joseph Turner* for the receiver and manager. *E. W. Griffith* for the liquidator.

G. G. Blackledge, Q.C., and *A. Owen Hughes* for the contributory.

A SIR RAYMOND EVERSLED, M.R.: These two appeals arise out of an order made by SIR LEONARD STONE, V.-C., in the Palatine Court of Lancaster, on Mar. 30, 1955, in the winding-up of a company known as B. Johnson & Co. (Builders), Ltd. Putting the matter very briefly, the order was made on an application on the part of a Mr. Granby (whom I will call for convenience hereafter "the plaintiff") under the Companies Act, 1948, s. 333. The nature
B of his claim was that two persons, namely, a Mr. Aizlewood (who had been appointed receiver and manager out of court by Barclays Bank, Ltd., as debenture-holders) and a Mr. Browne (who was the survivor of two joint liquidators) should be rendered accountable under that section on the ground of misfeasance. The order of the Vice-Chancellor, after a considerable hearing, was to the effect that the proceedings should go on against both these gentlemen, subject
C to certain limitations with which I need not deal; and he gave directions accordingly for points of claim, points of defence, and so forth.

Each of them, the receiver, Mr. Aizlewood, and the liquidator, Mr. Browne, has appealed to this court; but the cases which they have presented are not entirely the same, and for this reason. The receiver, Mr. Aizlewood, has put in the forefront of his appeal that, in any event, he (having been, as I say, receiver
D and manager appointed by the bank) is not within the category of persons to whom s. 333 (and, indeed, its predecessors) is applicable. He further says that, even if he is within the compass of the section, the conditions of the section are not satisfied in that the summons which the plaintiff took out does not, on the face of it, allege against the receiver such matters of fact as would bring the charges (if true) within the purview of the section—that they are not, that is,
E "misfeasances" as contemplated by the section. The receiver, thirdly, was prepared to argue (though in the event we have not thought it necessary to hear him on it) that, in the exercise of the court's discretion in this case, the proceedings under s. 333 ought not to be or to have been permitted to continue.

The liquidator was unable to raise a point corresponding to the first point put by the receiver, since there is no doubt that a liquidator is, nominatim, amongst
F the class of persons to whom s. 333 relates. He, however, followed the receiver in alleging that the matters of which he is accused were not misfeasances within the section; and he finally also contended that in any case the plaintiff ought not to be allowed to proceed by this section, having (inter alia) failed to avail himself (as he might have done) of the procedure open to the plaintiff, under
G s. 246 of the Act, for getting the court's directions by way of controlling the liquidation. All these matters that I have related were decided by the Vice-Chancellor adversely to the appellants; but I have come to a different conclusion from that of the Vice-Chancellor.

Before I read s. 333 I should, I think, state certain facts. The company, B. Johnson & Co. (Builders), Ltd., was incorporated in 1940. The plaintiff later
H in that year became one of its directors, and he was at all material times, and is, the holder of seven hundred out of the total issued share capital of one thousand shares of £1 each. In the same year, 1940, the company issued to Barclays Bank, Ltd., a debenture, in ordinary banker's form, containing (among other things) a floating charge on all the assets of the company, to secure the overdraft by means of which the company proposed to carry on its operations. At the
I end of 1947, the company having incurred (apparently) losses of a somewhat substantial character, there was owing to the bank approximately £29,000—a sum, I would observe, about twenty-nine times the issued share capital. The bank were no longer willing to allow their money to be made by the directors the means (as they hoped) of gaining ultimately great profits for their company; and the bank applied, in the month of August (as they had to do) under the Courts (Emergency Powers) Act, 1943, then in force, for leave to appoint a receiver and manager under the terms of their debenture. They obtained the

leave of the court, and the receiver, Mr. Aizlewood, was appointed as receiver and manager on Aug. 9, 1947. A

It is one of the points made on the plaintiff's part that the receiver forthwith did a very wrong thing: he "deliberately and wrongfully" (and I am quoting from the plaintiff's pleading) made up his mind to put an end to the active operations of this somewhat speculative company; and in fact he did so. The natural, perhaps inevitable, result of that was that in January, 1948, the unsecured creditors thought that they should look after themselves, and they presented a petition for the compulsory winding-up of B. Johnson & Co. (Builders), Ltd. A winding-up order was made on Jan. 27, 1948; and later, following the usual meeting of creditors, Mr. Browne and another gentleman who died in 1952, a Mr. Booth, were appointed joint liquidators. Mr. Aizlewood, the receiver, was, however, still in possession, and he was not discharged of his receivership and managership until May 19, 1949. B C

It is a feature of the case (and this is one reason why I have mentioned the dates) that when I come to look at the application made against the receiver the charges are limited to the period of time from the receiver's appointment in August, 1947, until Jan. 26, 1948; and on the face of the summons no complaint is made of him, or of his performances, after that latter date—a date which, it will now be appreciated, is some seven and a half years ago. I have no doubt that the plaintiff busied himself with making representations to the receiver during his period of office, and to the liquidators, and counsel for the plaintiff told us that considerable correspondence exists which we have not seen; but the fact is that no active step was taken by the plaintiff to assert any right which he alleges that he has until December, 1953, when the present summons was taken out, in the first place in the Liverpool District Registry. It is unnecessary to mention the detail of what happened to that summons, first as regards its transfer to the Palatine Court, and then when it came before the registrar. It is enough to say (as I have already done) that it was heard and determined on Mar. 30, 1955. D E

That is the bare outline; and I now will proceed to read s. 333 (1): F

"If in the course of winding-up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just." G H

Sub-sections (2) and (3) of the section are not relevant for present purposes.

The first point to which I propose to direct myself is the first point taken before us by counsel for the receiver, viz., that a receiver and manager, such as Mr. Aizlewood, appointed under the terms of a debenture, is not within that category of persons which I have read from the section. It will be unnecessary for me to read the terms of the debenture, because, having said that it was in a form usual for debentures of this character, I have perhaps said enough to make its nature recognised. Paragraph 8 of the debenture provided: I

"At any time after the bank shall have demanded payment of any moneys hereby secured the bank may appoint by writing any person . . . to be a receiver of all or any part of the property hereby charged in like manner in

- A every respect as if the bank were mortgagee within the meaning of the Law of Property Act, 1925 . . . ”

Then later in the same paragraph it is provided:

- “ . . . every receiver so appointed shall have power to do the following things namely: To take possession of . . . the property hereby charged . . . To carry on or concur in carrying on the business . . . To sell or concur in selling . . . the property hereby charged ” ;
- B

and other ancillary matters, including that of appointing “ managing officers and agents for the aforesaid purposes ”.

- Now the situation of someone appointed “ out of court ”, as it is said, by a mortgagee or a debenture-holder to be a receiver and manager is familiar. It has long been recognised and established that a receiver and manager so appointed is, by the effect of the statute law, or of the terms of the debenture, or both, treated as the agent of the company, in order that he may be able to deal effectively with third parties while in possession of the company’s assets and exercising the various powers conferred on him. In such a case as the present, at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realise the security: that is the whole purpose of his appointment; and the powers which are conferred on him and which I have to some extent recited are (as counsel for the receiver observed, and I think fairly observed) really ancillary to the main purpose of the appointment, which is the realisation by the mortgagee of the security (in this case, as commonly) by the sale of the assets.
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- D All that is perhaps elementary, but it bears on what I shall have to say later on as regards the charges made against the receiver, for it appears to me inevitably to negative the proposition that a person appointed, as Mr. Aizlewood was appointed, owes some duty to the company to carry on the business of the company and to preserve its goodwill. For the moment, however, I have mentioned these matters in order that I may consider what is the effect of the use of the word “ manager ” in s. 333 (1). It is to be noted that, by the definition section, s. 455 (1), the word “ officer ” in this Act, unless the context otherwise requires, “ includes a director, manager or secretary ”. It was, therefore, a point of some force put forward by counsel for the plaintiff that, since the word “ officer ”, which is used in the relevant places in this section, includes a manager, the express use also of the word “ manager ” must cover someone who was a manager but was not an officer.
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- If this Act had been the first enactment designed to regulate the affairs of joint stock companies, I can see that there might have been much force in that argument. But this, after all, was a consolidating Act; and it is of interest, and I think relevance, to observe that the so-called “ misfeasance ” section, which is now s. 333, has had a long history, having first formed part of the Companies Act, 1862, when its counterpart was s. 165. We have been referred by counsel for the receiver to that section, and to the sections of the later enactments of 1890, 1908 and 1929; and, though there are some variations in terminology and some change in the dispersal of the commas in the section, there is no doubt that the general formula, the list or category of “ promoter, director, manager, liquidator or officer ”, has consistently appeared in this section and its predecessors for close on one hundred years; and it is the fact that the definition of “ officer ” which I have read from s. 455 (1) is the first statutory definition that has appeared in those enactments.
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To my mind it is reasonably clear that in this Act (as in its predecessors) Parliament has taken up and followed a particular collocation of words which has acquired now a considerable sanctity by age. I cannot think, and am not prepared to hold, that, by giving to the word “ officer ” a precise definition which covers “ manager ”, Parliament intended to give to the word “ manager ” in the section a wider signification than it had previously possessed. I am the

more encouraged to that view by the fact that the word "officer" in the definition, it will be remembered, also includes the word "director", a word itself also included in the section and, on any view of it, capable of a very precise and well-understood meaning.

I am, therefore, able to reject, and do reject, the view that any help can be got from the definition of the word "officer". The question remains, however, whether any person of Mr. Aizlewood's position is a "manager" as that word is itself used in the sub-section. Contrary to the view of the Vice-Chancellor, and with all respect to him, I have come to the conclusion that he is not. I have already indicated (as is well-known) that a person in Mr. Aizlewood's position, though called a "receiver and manager", is in fact one who is appointed a receiver, not with any duties to carry on the business of the company, in the best interests of the company, but in order to realise, for the debenture-holders or mortgagees, the security which they have got; and only for that limited purpose is he given powers of management. The limit or special nature of his functions as manager is, I think, well illustrated in the Act itself. Counsel for the receiver directed our attention to the other sections of the Act (beginning at s. 366) which deal with receivers and managers. It would be taking undue time if I read them all, but those sections seem to me to state, in perfectly plain terms and deliberately, that a person appointed as receiver and manager is not, on any view, a manager of the company: he is (as these sections say over and over again) receiver and manager "*of the property of a company*".

The distinction may at first sight seem fine between a receiver and manager of the property of a company, on the one hand, and a manager of the company on the other, being the formula found in s. 333; but the logic of it and the substance of it is that which is to be found in what I have already said, viz., that a person appointed receiver and manager, so-called, is not managing on the company's behalf but is managing in order to facilitate the exercise by him, for the mortgagees, of the mortgagees' power to enforce the security. The point is further emphasised by the consideration that, if counsel for the plaintiff were right, a receiver and manager appointed by the court would equally have to be held to be a "manager" within s. 333, although in that case the receiver would not for any purpose be the agent of the company at all: he would be an officer of the court. In short, the word "manager" in this section, to my mind, does not include one who is only a manager, because he is, as receiver (which is his real capacity) endowed, for the purposes of his receivership, with certain powers of management.

I will add two further points, which have emerged in the course of a considerable and interesting argument, and which seem to me to emphasise the sense that I seek to give to this word. They really are two riders or corollaries of the general principle that I have stated. The first is this. It may well be that a mortgagee, a debenture-holder, who has, say, a fixed charge on the real property of the company and a floating charge on everything else, is not going to realise an amount by sales sufficient to discharge the indebtedness to him. I understand that in this case, by a small margin, that has been achieved. But it is elementary that a mortgagee seeking to realise his security has no duty of care to see that there is as much as possible left over for those who are interested in what is called the "equity". In other words, it may well be (as JENKINS, L.J., pointed out earlier, in the argument) that the company may have, in such a case as this, no equity whatever, in any real sense; and if that is so it would be indeed a strange use of language to describe one appointed as receiver and manager under the debenture as a manager of the company.

My second point is, in a sense, but a development of the first, but I mention it because it is of significance also to the liquidator's argument. Section 333, it has been many times said, is a purely procedural section. I do not in the least seek, by so stating, to lessen its significance: I mean that it does not create

- A any new cause of action; it only provides a method of litigating particular claims, and in providing a method it is not exclusive. Prima facie (though, as will be later seen, there are difficulties in the plaintiff's way in this case), if the procedure of s. 333 is not open against any person who is within the section, the claimant may proceed by ordinary action. But there is this procedural difference, which may, I think, indicate the kind of case to which it is intended to refer: where
- B in an ordinary action, it would be open to the person charged to bring in (if it were proper procedurally to do so) some third party whom that person might seek to make responsible, in this case, a case under s. 333, no such third-party procedure appears to be available. The receiver indicated, when he took possession, that he proposed to sell, and in so doing there can be no doubt at all that he was acting in accordance with the directions of the bank; and, in an action
- C which alleged that it was a wrongful act to refuse to carry on the business of the company, the receiver might well seek to bring in the bank to indemnify him if such an allegation were shown to be well founded. But no such possibility exists here; and having regard, therefore, to the position of the receiver vis-à-vis the mortgagee, I am encouraged, by considerations of that kind, to the view that, by "manager", Parliament in this section did not intend to refer to a receiver
- D and manager appointed either out of court or by the court.

Other matters were referred to, such as the question of remuneration and so forth, which I can pass over, because I think they add nothing more to what I have already said, though they do support, in my judgment, the conclusion at which I have arrived. On this point I come to the conclusion that Mr. Aizlewood was not a "manager" within the contemplation of s. 333, and, therefore, that

E the learned Vice-Chancellor should not have allowed the matter to proceed under that section against him.

That view of the case is sufficient to dispose, in Mr. Aizlewood's favour, of this appeal, but, since other matters have been raised and dealt with by the learned judge, and since indeed (as I think, rather unfortunately) this case has acquired mass by its momentum, it will be perhaps desirable that I should say

F something also as to the second point, viz., whether the allegations made against Mr. Aizlewood were allegations of "misfeasance", as that word is understood in the section. That point raises the problem of the scope of s. 333, not as regards the persons who are subject to the procedure ordained by that section, but as regards the nature of the claims which may be made under it. I repeat, that the section is a procedural section. There is no such distinct wrongful act known

G to the law as misfeasance. The acts which are covered by the section are acts which are wrongful, according to the established rules of law or equity, done by the person charged in his capacity as "promoter, director", etc. But it is clearly established that it is not every kind of wrongful act so done that is comprehended by the section. At one end of the scale it may, I think, be taken as prima facie clear that a wrongful act involving misapplication of property in the hands of

H the person charged would be covered by its terms. At the other end of the scale, a claim based exclusively on common law negligence, an ordinary claim for damages for negligence simply, would not be covered by the section. Nor is such a claim brought within the section by the mere expedient of adding epithets to the negligence charged, calling it "gross" or "deliberate". Nor, by that expedient, without more, can what in truth is mere negligence be converted into

I something else, namely, breach of trust. In between the two extremes that I have mentioned there is obviously a large range of conduct which may (or may not) be within the section. I shall follow others in not attempting any precise definition of what does or does not fall within it. I would like, however, to cite a passage from the judgment of MAUGHAM, J., in *Re Etic, Ltd.* (1) ([1928] Ch. 861). In that case the learned judge made reference to *Re Canadian Land Reclaiming & Colonizing Co., Coventry & Dixon's Case* (2) (1880) (14 Ch.D. 660) and certain other cases, and said this ([1928] Ch. at p. 873), of the language of SIR GEORGE

JESSEL, M.R., in *Re Anglo-French Co-operative Society, Ex p. Pelly* (3) (1882) A
(21 Ch.D. 492):

"The language of SIR GEORGE JESSEL in dealing with the matter in his decision in *Ex p. Pelly* (3) strongly tends to show that in his view s. 215 [now s. 333 of the Act of 1948] really only applies where there has been some wrongful act by the director, manager, liquidator, or other officer of the company, either of the nature of misfeasance, or of the nature of breach of trust in a wide sense, including no doubt a breach of trust by negligence, or something of that kind."

Then later the learned judge, after further references to cases, including that of *Cavendish Bentinck v. Fenn* (4) (1887) (12 App. Cas. 652) said ([1928] Ch. at p. 875):

"The conclusion at which I have arrived is that s. 215 is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company."

Counsel for the liquidator also referred to the case, in this court, of *Re Kingston Cotton Mill Co. (No. 2)* (5) ([1896] 2 Ch. 279), in support of the proposition that even a breach of trust, to be brought within the section, must involve a misapplication, in some form, by the officer charged, of the assets. He cited this passage from LINDLEY, L.J. (*ibid.*, at p. 283):

"I agree that the section does not apply to all cases in which actions will lie by the company for the recovery of damages against the persons named; it is easy to imagine cases of breach of contract, trespasses, negligences, or other wrongs to which the section is inapplicable, and some such have been the subject of judicial decision; but I am not aware of any authority to the effect that the section does not apply to the case of an officer who has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he could be made responsible by an action at law or in equity."

LOPES, L.J., said something to the same effect (*ibid.*, at p. 288):

"The learned judge in the court below held that misfeasance covered any misconduct by an officer of the company as such for which such officer might have been sued apart from the section. In my judgment this is too wide. It would cover any act of negligence—any actionable wrong by an officer of a company which did not involve any misapplication of the assets of the company. The object of this section of the Act is to enable the liquidator to recover any assets of the company improperly dealt with by any officer of the company, and must be interpreted bearing that object in view. It doubtless covers any breach of duty by an officer of the company in his capacity of officer resulting in any improper misapplication of the assets or property of the company."

Those passages may, I think, be taken as authority, or as included among the authorities, establishing that a simple case of negligence at common law would not be within the section. But in my judgment LINDLEY, L.J., and LOPES, L.J., did not intend to lay it down by inference that any breach of duty, including a breach of trust, which did not involve a misapplication of assets, was outside the section. What they were saying was the converse—that, where a breach of duty had been committed which did in fact result in a misapplication of the

A company's property, then such transactions would be within the ambit of the section.

With this introduction, I will turn to the summons in the case, which is an exceedingly elaborate document. I will, however, follow counsel for the plaintiff in taking three of the matters alleged in the summons and adopt his suggestion that, if none of these three is shown to be within the scope of the section, then none of the charges against the receiver will be so comprehended. The first instance he took was that indicated in para. 4 of the summons:

"On Aug. 12, 1947, the said Thomas Alan Aizlewood took over his duties as such receiver and manager as aforesaid and informed the plaintiff that it was his intention to stop immediately all building work. It was pointed out to him that this would entail great loss for the company having regard to money spent on road and sewerage work and building of then uncompleted houses but in spite of this all building work was stopped on Oct. 2, 1947."

In other words, the substance, the gist, of the charge (expanded in the points of claim, which I will mention in a moment) is that the receiver had a duty to the company and its contributories to preserve the goodwill and business of the company. In my judgment, that allegation rests on a fundamental misapprehension. There was not in this case, and there is not in similar cases, any such duty on a mortgagee or a receiver appointed by a mortgagee for the purpose of realising the mortgagee's security. I have no doubt that the plaintiff in this case is greatly disappointed. He has said that the transactions that the company entered into were of the happy sort that you cannot lose on them; but, unfortunately, the plaintiff and the company depended on the goodwill of Barclays Bank, which provided the whole of the money for the company's speculations. The bank (says the plaintiff) became altogether unduly alarmed at the effect of the Town and Country Planning Act, 1947. Whether they did or whether they did not, it is not necessary for me to determine; but the moral (as it seems to me) of the matter is this, that if you do depend, and depend exclusively, on borrowed money for the business you propose to carry on, you must at all costs retain the confidence of your lender. In this case, further, in so far as the charges against the receiver involve the proposition that the receiver did not get the best price he could have got and should have got, equally those charges, in my judgment, rest on a misapprehension of the elementary principle that a mortgagee, or a receiver exercising the mortgagee's powers of sale, is under no such duty to the mortgagor to obtain the best possible price for the property charged.

I return, however, to para. 4; and, as I have earlier indicated, some expansion of the rather general allegations in the paragraph is to be found in the document called the points of claim, which was in fact delivered on or about Apr. 20, 1955, about which I shall have something to say hereafter. The points of claim much expand and elaborate the subject-matter which I have already mentioned. They use the epithets I have quoted—that the action of the receiver in failing to continue to carry on the business was "deliberate and wrongful"; and, as an illustration of those allegedly deliberate and wrongful acts, it is said that he abandoned a contract with the Liverpool Warehousing Co., Ltd., the value of which was no less than £28,000. The answer, however, is quite simple: in order to complete the contract with the Liverpool Warehousing Co., Ltd. it would have been necessary to continue the business of the company, B. Johnson & Co. (Builders), Ltd., and the receiver appointed for the purpose of realising the debenture-holders' security was under no obligation to the company or its contributories to continue its business; nor could he continue it without, from some source or another, getting further finance. The result was that he had to discontinue it, and discontinue the building work for the Liverpool Warehousing Co., Ltd.

The other two cases taken by counsel for the plaintiff are intimated in paras. 10 and 11 of the summons. Paragraph 10 (so far as relevant) is:

"There is outstanding a claim against Central Land Board in respect of loss of development under the Town and Country Planning Act, 1947, in respect of the St. John's Road Huyton land before mentioned. An incorrect application was put in to Central Land Board in respect of this by the said Thomas Alan Aizlewood."

Then, in para. 11,

"The said Thomas Alan Aizlewood failed to make application under s. 80 of the Town and Country Planning Act, 1947, for a certificate of exemption in respect of forty-seven acres of land on the Royal Oak Farm at Whiston and to put in a claim for loss of development value in respect thereof."

On the face of those general allegations, it would appear to me that the claim amounts to no more than this, that the receiver incorrectly or unskilfully, or otherwise inaccurately, formulated the claims that the company had against the Central Land Board. The charges therefore look to me like charges of mere negligence, neither more nor less. In any case, however, it now appears quite clearly that the time at which the claims should have been put in (and they could not have been earlier put in) was a time outside the period for which the plaintiff is charging the receiver. It is made quite plain in the summons that the alleged wrongful acts of the receiver are confined to the period from his appointment in August, 1947, till the winding-up order in January, 1948; and when that latter event occurred the time for putting in the claims to the Central Land Board had not in fact arrived.

Counsel for the plaintiff referred us to the points of claim and has asked specifically for leave to amend his summons by incorporating the substance of what is found on these matters in the points of claim. I will take them in their reverse order. As regards the Royal Oak, or Whiston, land, mentioned in para. 11 of the summons, that matter is expanded in paras. 15 and following in the points of claim. It is said (for example) in para. 15 that the land was put up for sale on Dec. 18, 1947, that it contained forty-five odd acres, and that in the auctioneers' catalogue it was described as subject to a particular planning lay-out approved in 1931.

"Before the auction the [plaintiff] orally informed the receiver . . . that this description was inaccurate. The [plaintiff] further informed the receiver that it ought to have been described as having been the subject of planning approval . . . in 1946 . . . The said land was therefore within [certain sections of the Town and Country Planning Act, 1947] and if sold with the correct description would have then fetched a figure of approximately £23,000."

The plaintiff says that the error in description was not corrected and, therefore, that in December, the only bid being for £5,000, the property was withdrawn. The paragraphs go on further to say that the property was sold in February, 1948—as I have pointed out, outside the period for which the receiver is now charged—at a price of £6,250, as compared with the figure of £23,000 that I have already mentioned.

Then as regards para. 10 of the summons, the Huyton land, the paragraphs expanding that are paras. 18 and following of the points of claim, where they allege that the land was conveyed to the urban district council in October, 1948 (far outside the period charged) at the price named, being the price fixed by the district valuer as the existing use value. In para. 20 it says that the application to the Central Land Board was submitted by a firm of surveyors acting on behalf of the liquidator; that the original instructions to the surveyors were given by the receiver; that they were adopted and confirmed by the liquidator; that the instructions were inaccurate, and the result was that the application did not contain the correct facts; that the inaccuracy consisted (inter alia) of

- A wrong information being given with regard to the improvements carried out, and that it did not show that the land had been acquired before July, 1948, in pursuance of a certain notice to treat. It is said that in consequence of that (putting it quite briefly) the figure for compensation, instead of being £8,600 plus some further figure for loss of development profit, was only £4,500. What counsel for the plaintiff said (putting it picturesquely) was that this receiver had sold or
- B offered for sale as brass that which he knew was gold, and that that was something more than mere negligence. I am, I must say, far from satisfied, even with the elaboration I have made, that there is in any case any more in these charges than ordinary claims for negligence at law.

- I have already said that the dates when the sales took place were outside the period for which the receiver was charged; but even if I am wrong in thinking
- C that the claims are of the nature I have mentioned, I am satisfied that it would be wrong now to allow a substantial amendment of the summons which would (in effect) raise quite new cases against the receiver. In particular it would be of the essence of both cases that the wrongful acts alleged were done at a period after the winding-up order. As counsel for the receiver pointed out, it is now June, 1955, and therefore there would be apparently available, or might be
- D available, to a charge made based on negligence in or before May, 1948, a defence arising out of the Statute of Limitations; and I do not think it would be right, in the circumstances, to allow an amendment which would deprive the receiver of a defence which would or might otherwise be available to him. I therefore do not think it would be right to allow the amendments. For reasons that I have already given, I do not think that, on the face of the summons, the charges
- E made in paras. 10 and 11 are charges which could be sustained or prosecuted under the section.

- I add only, that in para. 9 of the summons there is also an allegation that the receiver, having received certain sums of money on sales, failed to account to the plaintiff for £482. The answer to that again is short and simple: The receiver is not, and never was, an accounting party to the plaintiff. I am therefore
- F disposed to think (if it were necessary) that counsel for the receiver is right also on this, his second, point. He had (as I have said) a third point, namely, that it was discretionary in the court to allow or not to allow the matter to proceed under s. 333, and that in any event it would not be right to allow the proceedings to continue against the receiver under this section. I do not find it necessary to go into that matter. For the reasons I have given, particularly my view that
- G Mr. Aizlewood is not a "manager" within s. 333 at all, I think the receiver's appeal must be allowed.

- I turn now to the case of the liquidator. The first point, on which counsel for the receiver succeeds, is not, of course, available to the liquidator, for a liquidator is *eo nomine* within the class of persons who may be charged under that section. Counsel for the liquidator, therefore, relied principally on what I
- H have called counsel for the receiver's second point, and he says that the charges made against the liquidator are not charges of so-called "misfeasance" within the ambit of the section. On the face of the summons, the only charge made against the liquidator is the continuation of what I have already read in para. 10, about the Huyton land. It will be recalled that against the receiver it was
- I alleged that he had made an incorrect application to the Central Land Board. The summons continues:

"On the liquidation of the said company on Jan. 26, 1948, the said claim was taken over by the said joint liquidators. The incorrectness was pointed out by the plaintiff and the said Eric Stevenson Browne has been requested by the committee of inspection appointed in the said liquidation to combine with the plaintiff in putting in a proper application of his but he has failed to do so."

As it stands, it seems to me, quite plainly, that that allegation cannot be sustained under the section, and we must therefore look once more at the paragraphs in the points of claim, paras. 18 and following, to which I have already, I think, made a sufficient allusion. It will be noticed again that the nature of the charge, so elaborated, has undergone considerable change. There is no mention at all in the points of claim of the alleged request by the committee of inspection to combine with the plaintiff in doing anything. But in this case, as counsel for the liquidator conceded for the purposes of the argument, it is not possible for the liquidator to say that an amendment would deprive him of a defence (viz., a defence under the Statute of Limitations) which would be otherwise available to him.

There is, on the other hand, in my judgment, another answer which is fatal to the plaintiff as against the liquidator. It will be recalled that the alleged consequence of the various wrongful acts, so called, done by the receiver and the liquidator was that the Huyton land claim produced £4,500 when it should have produced £8,600 plus some further sum for loss of development profit. As the summons stands, that is the only claim made against the liquidator. It is, I think, tolerably clear that an applicant under s. 333 must establish that he has a real interest in the subject-matter as to which he proposes to claim: see, for example, the judgment of MAUGHAM, J., in *Re Etic., Ltd.* (1), which I have already read. The facts in this case show that, by an extremely narrow margin, £83 or so, there was just sufficient to pay the secured creditors; but that, on the facts before us, there are claims of unsecured creditors in addition (for whom only the £83 is available) amounting to over £10,000. It is obvious, therefore, that the difference between £8,600 and £4,500, even with some further sum for loss of development profit added, would be quite insufficient to provide in full for the creditors and leave anything at all for the contributories.

On that ground, therefore, I think it quite clear that the plaintiff has failed to show a sufficient interest in the subject-matter of his claim, and that it would not, therefore, be right to permit any amendment which might reconstitute or make somewhat more convincing (if I may say so) the charges made against the liquidator in para. 10 of the summons. I should, however, say, having referred to the points of claim, that at their end, in para. 27, there appear to be added some further general and rather sweeping allegations. It is said that:

“ . . . the liquidator has been guilty of misfeasance or non-feasance . . . in that he (a) failed to take over the affairs of the company (in conjunction with his colleague Parkin Stanley Booth) from the receiver within a reasonable time of being appointed liquidator and when the said affairs were so taken over not checking all the accounts and transactions of the receiver before he was finally discharged.”

As regards the main part of that charge, it is quite clear that the liquidator could not take over the property and assets of the company until the receiver had been discharged, for the receiver was in possession and exercising his powers of sale. As regards the alleged failure to check, I think I need say no more than that I do not entirely follow what is thereby contended. Paragraph 27 continues:

“(b) failed in his duty to preserve the assets and goodwill of the company for the benefit of the creditors and members thereof . . . ”

and then the plaintiff refers to certain paragraphs. I think again the answer is simple: The receiver was in possession: the receiver was in process of exercising the mortgagee's power of sale; and it would have been quite impossible for the liquidator to do other than he did. Paragraph 27 continues:

“(c) failed to investigate the complaints repeatedly made to him concerning the acts and omissions of the receiver . . . ”

On that, the answer appears to me to be (I do not quite follow what really is

A intended) that the charge made would appear to be at best a charge of negligence simpliciter.

Finally: "Failed to produce for the benefit of the applicant" certain accounts and information. In my judgment, the liquidator was not, in the circumstances, accountable to the plaintiff in the way alleged. I think, therefore, in the result, that this is not a case which is proper to be brought under the section against the liquidator any more than against the receiver.

I only add two points. In considering the propriety of amendment or the possibility of pursuing the claim about the Huyton land against the liquidator, it will be recalled that (as the plaintiff alleges) the liquidator was acting on the advice and directions of expert surveyors. In so far, therefore, as it might be said or alleged that he should not have accepted the surveyors' advice, it is obvious that a person so charged might desire to bring in as third parties the professional advisers. As I have earlier pointed out, it is not possible, in proceedings under this section, to bring in third parties; and that is, perhaps, another ground for not permitting this matter to go on by amendment.

Finally (and, as I think, this perhaps is the real answer to many of the plaintiff's complaints), he has, in my judgment, throughout misapprehended his proper remedy. If he was dissatisfied with the way in which the liquidator was carrying on his duties as liquidator, he was entitled, under s. 246, to make an appropriate application to the court, and the court would then have looked into the matter and, where necessary, have controlled and regulated the activities of the liquidator. I add also in that connection: it may well be that, as against the receiver, the plaintiff could have more profitably turned to s. 268. That, however, is another matter.

The last thing I want to say is in reference to the points of claim. I said earlier that the misfortune in this case has been the considerable expenditure of energy and, I am afraid, costs, in bringing into existence large quantities of documents. Although an appeal had been lodged, the plaintiff thought it appropriate to put in a long points of claim by the date fixed by the Vice-Chancellor. The two appellants, the receiver and the liquidator, although they were appealing against the Vice-Chancellor's order for the delivery of pleadings, then thought it appropriate to put in elaborate points of defence. Among the documents with which we have been supplied is an affidavit of Thomas Alan Aizlewood, the receiver, with seventeen exhibits. They still remain bound up together, it will be observed, and fortunately we have not had to look at any of them, though I can well see that they may have been relevant had we had to go into the question of discretion. I am not casting blame on anyone, but it is very unfortunate that so much costs have been incurred; and the court is reluctant, naturally, when costs have been incurred, pleadings prepared and so on, then to hold that the proceedings are misconceived and to inform the plaintiff that, if he desires to pursue his journey, he must go by a different road. But in all the circumstances, and bearing those matters in mind, I do not think it would be right here to permit the proceedings, by amendment (because amendment would be inevitable) to be carried on under this section against the receiver or against the liquidator; and, though I do not wish to prejudge any of the matters of fact which have been alleged, I am bound to say that I feel some comfort in my mind which is occasioned by the strong opinion I hold that if the plaintiff, unfortunately, has lost an opportunity for making what I dare say would have been very substantial profits, he has allowed his disappointment to blind his judgment, and has seriously and substantially misinterpreted the remedies or rights which he thinks he has against quite independent and professional people who were appointed respectively receiver and liquidator of a company.

For the reasons I have given, and subject to any question of costs occasioned by the documents, which we can deal with when my brethren have delivered

judgment, I think that both appeals must be allowed; and that the proceedings ought now to be stayed against both the receiver and the liquidator. A

JENKINS, L.J.: I agree. As to counsel for the receiver's preliminary objection, to the effect that a receiver and manager for debenture-holders (such as the defendant Aizlewood was in the present case) is not amenable to the summary procedure provided in s. 333 of the Companies Act, 1948, the persons to whom that section applies are: B

"any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company . . ."

Turning to the definition contained in s. 455 (1) of the Act, one finds that "'officer', in relation to a body corporate, includes a director, manager or secretary". The incorporation of that definition in s. 333 (1) produces a strangely tautologous result, for one has an express reference to a "director" and an express reference to a "manager", and the list of persons specified concludes with the words "or any officer", which, by force of the definition, includes a director or manager. C

Reference to earlier enactments on the same subject shows that in s. 10 of the Companies (Winding-up) Act, 1890, which dealt with the same subject-matter as s. 333, the persons made liable, so far as material, were described as "any past or present director, manager, liquidator, or other officer of the company", while, later in the section, the provision for examination of the conduct of the person concerned used the words "director, manager, liquidator, or other officer". The Act of 1862, s. 165, had, in the earlier part of the section, the formula "director, manager, official or other liquidator, or any officer", thus resembling s. 333 in that respect; but in dealing with the proceedings to be taken against any of the persons enumerated it had the phrase "or other officer." D

These statutory materials make possible a number of ingenious arguments. It is arguable that s. 333 only applies to a manager of a company if he is an officer of the company, having regard to the definition of "officer" in s. 455 and to the use of the words "or other officer" in s. 10 of the Act of 1890 and s. 165 of the Act of 1862. On the other hand, it may be argued that the section provides that the manager of a company is, for this purpose, to be considered as an officer. Finally, it may be argued that, on its true construction, the section, referring specifically, as it does, to a manager of the company, includes in its scope any manager of the company, whether he is an officer of the company or not. E

I find it unnecessary to assess the relative merits of these arguments. For the purposes of the present case, it is enough to say that proceedings under s. 333 cannot lie against Mr. Aizlewood unless it can be held, either that his appointment as receiver and manager for the debenture-holders in itself made him an officer of the company within the meaning of the section, or alternatively, that such appointment made him a manager of the company within the meaning of the section. As to the former alternative, I think it reasonably plain that a receiver and manager for debenture-holders of a company, appointed by them under powers contained in their debenture (as in the present case), is not an officer of the company within s. 333 of the Act of 1948—apart, that is, from the question whether he is a "manager of the company" within the meaning of the section and on that ground to be treated for the present purpose as an officer of the company. Some support for this view can, I think, be derived from the case of *Astley v. New Tivoli, Ltd.* (6) ([1899] 1 Ch. 151). In that case, the articles of association of a company provided that the office of a director should be vacated if (inter alia) he held any other office or place of profit under the company, and the question was whether a director who had become a trustee of a debenture trust deed, nominated and paid by the company, was disqualified by this provision. He was held to be so disqualified, on the ground that, although a trustee F

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A of such a deed might not be an officer of the company, he was the holder of a place of profit under the company and therefore disqualified by the terms of the article. Mr. Swinfen Eady, Q.C., said in argument for the excluded director ([1899] 1 Ch. 153):

B "A trustee of a covering deed can in no sense be said to be an officer of the borrowing company. Nor can he be said to be the holder of a place of profit under the company. His principal duty is to the debenture-holders; to some extent he is a trustee for both parties; but he is subject to the directions of no one, and therefore under no one."

NORTH, J., said (*ibid.*, at p. 154):

C "In my opinion it is reasonably clear that the trusteeship is a place of profit under the company. I feel a little more difficulty in saying that it is an office under the company for this reason. The covering deed with which we have to deal is in the ordinary form to secure debentures. There are two trustees, as is generally the case, and those persons are trustees for the debenture-holders, though to a certain extent also, as Mr. Buckley says, they are trustees for the company, which remains the owner of the equity of redemption; but those trustees might be nominated, as they often are, or selected by the persons who are going to lend their money, and be wholly foreign to the company and its directors. I do not think that it can be said that the trustees of a covering deed—a deed primarily for the benefit of creditors—are necessarily officers of the company. I do not think that merely as such trustees they are officers of the company, or could have been held responsible for misfeasance under s. 165 of the Companies Act, 1862, or under s. 10 of the Act of 1890. They hold a position in which they are trustees of the property vested in them first of all for the debenture-holders, and subject to the claims of the debenture-holders, they hold it for the company; but I do not think they can properly be said to be officers under the company."

F The learned judge then went on to consider the question whether a debenture trustee held a place of profit under the company, and came to the conclusion that he did. This reasoning seems to me to apply with added force to the case of a receiver and manager for debenture-holders appointed by the debenture-holders under a power in their debenture, as opposed to being appointed by the company, as were the debenture trustees in *Astley v. New Tivoli, Ltd.* (6).

G The question whether a receiver and manager for debenture-holders, such as the defendant Aizlewood was in this case, is a manager of the company within s. 333 presents more difficulty. Little light on the meaning of the phrase "manager of the company" is to be derived from the language of s. 333 or from the definition in s. 455, or from the slight differences in the language of the earlier enactments to which I have already referred. More significant, to my mind, is H the special treatment of receivers and managers under Part 6 of the Act of 1948, where they are consistently called receivers or managers of the property of a company and not managers of a company, and are put under special obligations as to accounts. My Lord has already referred to some of the sections, which begin with s. 366. I would note the obligations to account imposed by s. 372 and s. 374 of the Act; and I would note, as particularly apposite in the present I case, the provisions of s. 375 as to the enforcement of the duty of receivers and managers to make returns, etc. Section 375 (1) provides:

"If any receiver or manager of the property of a company—(a) having made default in filing, delivering or making any return, account or other document, or in giving any notice, which a receiver or manager is by law required to file, deliver, make or give, fails to make good the default within fourteen days after the service on him of a notice requiring him to do so; or (b) having been appointed under the powers contained in any instrument,

has, after being required at any time by the liquidator of the company so to do, failed to render proper accounts of his receipts and payments and to vouch the same and to pay over to the liquidator the amount properly payable to him; the court may, on an application made for the purpose, make an order directing the receiver or manager, as the case may be, to make good the default within such time as may be specified in the order."

That section thus gives the court a measure of control, exercisable in a summary manner, against a receiver or manager of the property of a company, and thus it could not be said that, on the footing that such receivers and managers are not within the provisions of s. 333, there is no summary method of compelling them to discharge their duties and to render proper accounts.

Finally, on this group of sections, I would refer to s. 370. That section provides, by sub-s. (1):

"Where a receiver or manager of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company . . . shall contain a statement that a receiver or manager has been appointed."

The significant part of the section for the present purpose is sub-s. (2), which says:

"If default is made in complying with the requirements of this section, the company and any of the following persons who knowingly and wilfully authorises or permits the default, namely, any officer of the company, any liquidator of the company and any receiver or manager, shall be liable to a fine of £20."

It is to be observed that express separate reference is there made to "any receiver or manager", although the list of persons liable also includes "any officer of the company", which expression, as I have already mentioned, is defined in s. 455 as including "a director, manager or secretary". That suggests that a receiver or manager is treated as distinct from a manager of the company, at all events so far as s. 370 is concerned.

These indications, for what they are worth, suggest that the Act regards the receiver and manager of the property of a company as in a special category, distinct from that of a manager of a company. But the decisive consideration, to my mind, is that the phrase "manager of the company", *prima facie*, according to the ordinary meaning of the words, connotes a person holding, whether *de jure* or *de facto*, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realise the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.

In determining whether a receiver and manager for the debenture-holders of a company has broken any duty owed by him to the company, regard must be

A had to the fact that he is a receiver and manager—i.e., a receiver, with ancillary powers of management—for the debenture-holders, and not simply a person appointed to manage the company's affairs for the benefit of the company. A receiver without powers of management would, I apprehend, clearly be outside s. 333, and it is difficult to see why superadded powers of managing the property comprised in the security should bring him within it.

B The duties of a receiver and manager for debenture-holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture-holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture-holders, the terms might be regarded as disadvantageous.

C In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture-holders' security to be preserved and realised. That seems to me to be an issue wholly outside the scope of s. 333.

D Accordingly, I agree with my Lord that the proceedings under s. 333 cannot lie against Mr. Aizlewood in respect of his receivership and managership of the company, and that on that ground he is entitled to succeed in his appeal. As to the other matters which have been dealt with by my Lord in the case of Mr. Aizlewood, and as to the claim against the liquidator, I entirely agree with all that my Lord has said, and find nothing further that I can usefully add. Accordingly, I agree that both appeals should be allowed.

E
G **PARKER, L.J.:** I also agree that these appeals should be allowed, and would only add a few words on the first point, as to whether a receiver with powers of management is within the class of persons whose conduct can be the subject of an examination under s. 333 of the Companies Act, 1948. One thing at any rate is clear, and that is, that this section, like corresponding sections in earlier Acts, gives no new rights: it merely enables certain claims to be dealt with summarily in the winding-up. Accordingly, one would not expect to find a class of persons included whose duty, like that of a receiver and manager, is primarily, at any rate, to a third party, the mortgagee, when there is no means of bringing in the mortgagee as a party.

H
I Turning to the wording of the section itself, if a receiver and manager is included it can only be because he comes within the words "any officer of the company" or the word "manager". So far as the expression "officer" is concerned, this is defined by s. 455 (1) of the Act as including "a director, manager or secretary". No doubt a person who in fact manages is a "manager" within that definition, provided, and provided always, that he does so by virtue of some office which he holds in the company. But any work of management done by a receiver, though done as agent, is not done by virtue of any office that he holds in the company; and this is so whether he is appointed by the court or out of court. Moreover, the contrary was but faintly argued. Indeed, the main

argument raised by counsel for the plaintiff was based on an acceptance of the view that a receiver and manager is not within the definition of "officer". Granted that he is not (so runs the argument), yet "manager" in s. 333 itself must be used in a different and wider sense than where it appears in the definition, namely, as meaning someone who manages in the widest sense, even though not an officer. Looked at in this way, the word is wide enough, so it is said, to embrace a receiver and manager.

However plausible this argument may be at first sight, it must, I think, fail when the history of the section is considered. Thus, the wording of s. 333 is to be found in very similar form persisting in successive Acts since 1862; whereas the definition of "officer" appears for the first time in the Act of 1948. Further, the argument for a distinction between the meaning of "manager" in the section and in the definition goes when it is realised that "director" also appears in both places. What, however, in my judgment, is decisive of the case is that any work of management done by a receiver is not done as manager of the company. The powers of management are ancillary to his position as receiver, and in exercising those powers he is not acting as manager of the company but as manager of the whole or part of the property of the company. This distinction is, as it were, underlined by the Act itself. (See the group of sections in Part 6 of the Act, where the expression "receiver or manager of the property of the company" is used throughout.) In my judgment it is clear that a person occupying the position of Mr. Aizlewood in the present case is not a "manager" or "officer" within the section.

Appeals allowed. Summons dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Weightman, Pedder & Co.*, Liverpool (for the receiver); *Field, Roscoe & Co.*, agents for *Arkle & Darbishire*, Liverpool (for the liquidator); *J. Frodsham & Sons*, Prescott (for the contributory, the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A BOCK v. BOCK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 21, 1955.]

*Legal Aid—Costs—Taxation—Attendance fee for petitioner in divorce suit**Petitioner's evidence disbelieved by trial judge—Expenses of attendance at court—Whether vexatious and improper charge—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 4 (1).**Divorce—Costs—Taxation—Petitioner's expenses of attendance as a witness—Petitioner's evidence disbelieved—Whether expenses allowable—Legally assisted petitioner.*

The wife, who had obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, presented a petition for divorce on the ground of the husband's cruelty. The petition was dismissed. On taxation of the wife's bill of costs under Sch. 3 to that Act, the registrar refused to allow the wife any expenses for attending court, on the ground that the trial judge had disbelieved her evidence, and that since she must have known that what she said in evidence was false her conduct was wanton and vexatious. Objections were lodged by the wife and on a summons to review taxation,

Held: an unsuccessful litigant in matrimonial suits was not of necessity a vexatious and wanton litigant; and although the wife had been disbelieved, she did not automatically lose her right to recover costs in respect of her attendance as a witness; accordingly, since the registrar had misdirected himself on a question of principle, the bill would be referred to him or another registrar to allow such costs as he thought proper: observations of HAVERS, J., in *Gibbs v. Gibbs* ([1952] 1 All E.R. at p. 962) applied; observations of SIR CRESSWELL CRESSWELL in *Allen v. Allen & D'Arcy* (1860) (2 Sw. & Tr. at p. 110) distinguished.

[**Editorial Note.** Apart from the decision on the question of principle stated above the court intimated the desirability of ensuring that the registrar was informed on taxation of any sanction given by an area committee under the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 14 (5), for the incurring of the expenses of fees of expert witnesses (see p. 795, letter C, post).

As to the principles applicable to taxation of costs generally, see 26 HALSBURY'S LAWS (2nd Edn.) 102, para. 192; and for cases on the subject, see 3rd DIGEST Supp. (Practice) 1322 *cc-chd*; as to costs in matrimonial causes, 10 HALSBURY'S LAWS (2nd Edn.) 812, para. 1296; and for cases, see 27 DIGEST (Repl.) 671, 6376-6378.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 488.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.

For the Legal Aid (General) Regulations, 1950, reg. 14 (5), see 5 HALSBURY'S STATUTORY INSTRUMENTS 214.]

Cases referred to:

(1) *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332; 3rd Digest Supp.

(2) *Harbin v. Gordon*, [1914] 2 K.B. 577; 83 L.J.K.B. 322; 109 L.T. 794; 42 Digest 213, 2375.

(3) *Allen v. Allen & D'Arcy*, (1860), 2 Sw. & Tr. 107; 30 L.J.P.M. & A. 9; 3 L.T. 480; 164 E.R. 933; 27 Digest (Repl.) 671, 6378.

Summons.

The wife applied by summons for a review of taxation.

The parties were married in 1944 and there was one child of the marriage. On Apr. 10, 1952, the wife presented a petition for divorce on the ground of the husband's cruelty. By his answer the husband denied the alleged cruelty and cross-prayed for a decree on the ground of the wife's cruelty. The wife had

obtained a civil aid certificate, and application was made to the appropriate area committee under the Legal Aid (General) Regulations, 1950, reg. 14 (5), for authority to obtain a report from a doctor and to call him as a witness on behalf of the wife. The committee gave its authority and stated that the maximum fee to be paid to the doctor for his attendance at court was £10 10s. and for his report £3 3s. A

The suit was heard by Mr. Commissioner EDGEDALE, Q.C., who on Feb. 12, 1954, found that neither charge of cruelty had been established; he accordingly rejected the prayer of the answer and dismissed the wife's petition, and made no order as to costs save that the wife should have an order for taxation for the purposes of the Legal Aid and Advice Act, 1949, Sch. 3. On taxation of the wife's bill of costs, Mr. Registrar TOWNLEY MILLERS reduced the fee allowed to the doctor to £7 7s. for his attendance and £3 3s. for his report, and allowed nothing for the item "Petitioner's expenses of attending court". On July 2, 1954, the wife lodged objections which referred to the area committee's authority. C
In answer the registrar allowed £10 10s. and £3 3s. for the doctor's fees, but refused to allow anything for the wife's attendance and referred to the observations of HAVERS, J., in *Gibbs v. Gibbs* (1) ([1952] 1 All E.R. at p. 962, letter F; printed in the footnote at p. 795, post) and of SIR CRESSWELL CRESSWELL in *Allen v. Allen & D'Arcy* (3) (1860) (2 Sw. & Tr. at p. 110), stating that though normally a fee was allowed yet in the present case the expenses were wantonly incurred by the wife as she must have known that her evidence was false and therefore her conduct was wanton. The wife now applied by summons for a review of taxation, and KARMINSKI, J., adjourned the matter so that the Law Society could be represented and then adjourned it into court for judgment. D E

P. R. Hollins for the wife.

R. J. S. Harvey for the Law Society.

KARMINSKI, J. : This is an application by an unsuccessful petitioner, a wife, for a review of taxation of costs made by Mr. Registrar TOWNLEY MILLERS. There are three items which are or were queried, of which the first two relate to the doctor's fees for attendance at court and for his medical report. The third matter relates to the expenses of the wife herself for attending court in what turned out to be a prolonged hearing of cross-charges of cruelty. It was a case where both the wife and the husband cross-charged each other with cruelty, and after a long and full hearing Mr. Commissioner EDGEDALE, Q.C., found that they had both failed to establish cruelty, rejected the prayer in the answer and dismissed the petition. The wife's charges of cruelty were largely though not entirely based on sexual matters. She complained that the husband had against her will indulged in the practice of flagellation and had made a number of attempts to commit sodomy on her. Those complaints or charges were rejected by the learned commissioner who pointed out that they were not proved to his satisfaction and that they were in substance largely, so far as the attempted sodomy was concerned, uncorroborated. There was some corroboration that the husband had in his possession at one time a whip, but the learned commissioner had the correspondence before him which had a negative importance at least in that it made it clear that the wife at the material times was not in any way complaining of the husband's conduct. The learned commissioner seems to have formed a very poor opinion of the credibility of the evidence of both parties. He disbelieved the wife even more than he did the husband, but in the end he came to the conclusion on the evidence that both had failed to establish their charges. I
A doctor gave evidence on behalf of the wife and, in accordance with the practice under the Legal Aid and Advice Act, 1949, the doctor was called and his fee approved under the regulations made by the area committee. Under reg. 14 (5) of the Legal Aid (General) Regulations, 1950, the practice is laid down whereby the assisted person's solicitor submits the matter in effect to the area

A committee who sanction the calling of an expert and also approve a maximum fee to be paid to him.

In the present case the area committee sanctioned the payment of ten guineas to the doctor for his attendance together with three guineas for the report. At first the learned registrar in the course of taxation found those figures too high but on objection he allowed the figures claimed, namely, ten guineas and three guineas, so that in effect the present appeal is not concerned with the amounts which the learned registrar has now seen fit to allow in taxation. When this matter came before me originally I appreciated that it might be one of some importance to the Law Society, who are charged by statute with the administration and carrying out of the legal aid scheme*, and I, therefore, adjourned it so that they should have the chance, if they so desired, to appear. They have taken advantage of that offer, and I would like to say at once that I have had very great assistance from counsel who appeared as amicus curiae on the instructions of the Law Society. I say no more about the amount of the doctor's fees, because in fact there is now no dispute between the wife and her solicitors on the one hand and the learned registrar on the other. It is, however, desirable, and I say no more than this, that when fees of this kind go for taxation the attention of the learned registrar or taxing officer should be drawn not only to the regulations under the Act, with which he is no doubt familiar, but also to any direction under reg. 14 (5) of the Legal Aid (General) Regulations, 1950, made by the area committee concerned in sanctioning the attendance of medical or other expert witnesses and also stipulating the maximum fee to be paid for that professional work. I say that only for this reason: that I do not know in the present case whether or not the attention of the learned registrar was drawn to what had been done in pursuance of its duties by the area committee when the matter first came before him.

I now turn to what I may call the live element of complaint in this summons. The wife attended court throughout the hearing and was of course the most important witness on her own behalf. The learned commissioner did not accept, at any rate, the major part of her story, and the learned registrar disallowed her expenses for attending the court. It appears that when the matter was before the learned registrar on taxation he had not the advantage, which I have now, of being able to study a transcript of the judgment given at the trial by Mr. Commissioner EDGE DALE, Q.C. The learned commissioner found that the wife told a false story, and that she had deceived her solicitors, though he did not for a moment suggest that the solicitors' conduct was in the slightest degree to be the subject of examination or criticism: nobody has suggested that they have acted throughout otherwise than perfectly properly. The learned registrar said that the commissioner disbelieved her and his attention was called to a recent judgment of HAVERS, J., on the question of taxation, in *Gibbs v. Gibbs* (1). HAVERS, J., made it clear ([1952] 1 All E.R. at p. 962) that the petitioner's fee for attendance in court and expenses was a permissible item,† and he referred to an older case, *Harbin v. Gordon* (2) which was a common law action and in which BUCKLEY, L.J., had pointed out ([1914] 2 K.B. at p. 586), that the plaintiff,

“as a party litigant, was not entitled to any allowance, but as a witness he was entitled to an allowance like any other witness, and none the less because he was also a party litigant.”

In the course of his judgment in *Gibbs v. Gibbs* (1) HAVERS, J., referred

* Legal Aid and Advice Act, 1949, s. 8.

† I.e., attendance in court as a witness. In *Gibbs v. Gibbs* ([1952] 1 All E.R. at p. 962, letter F) HAVERS, J., said: “. . . as in this case, and, indeed, in every petition for divorce, the petitioner is a necessary witness . . . [the fee] is, in my view, normally permissible and the learned registrar should grant a proper fee in respect of it.”

[[1952] 1 All E.R. at p. 946) to *Allen v. Allen & D'Arcy* (3) (1860) (2 Sw. & Tr. 107). That was a case where the facts were very different from those of the present case. It was tried in 1859 soon after the creation of the Divorce Court. The jury had found a wife guilty of adultery in the face of her denials, and had also found that the petitioner had been guilty of connivance, a verdict with which I understand that the court (SIR CRESSWELL CRESSWELL, Judge Ordinary, WATSON, B., and HILL, J.) concurred. In dealing with the question on review of taxation whether or not the expenses of the wife could be taxed, the learned Judge Ordinary pointed out that the court in which he was then presiding had only recently come into existence, and, seeing that the question of the principle on which costs were to be taxed in matrimonial suits had not yet been settled, but apprehending that he must adopt the principles of the ecclesiastical courts, said this (*ibid.*, at p. 110):

"I think that the only limit which can with propriety be put upon the allowance of the costs of the different issues raised in this court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue. The party guilty of putting such an issue on the record must take the consequences and lose his costs; but that is the only limit."

The learned registrar applied those words to the present case and expressed the view that the wife must have known that what she said was false, and thus, he says, her conduct was wanton. He also added with complete accuracy that the case had already cost the public a lot of money. In my view the cost to the public is a separate consideration which should not affect the discretion in deciding whether or not she was, in the words of the Judge Ordinary in *Allen v. Allen & D'Arcy* (3), presenting her case "vexatiously and improperly", that is, putting on the record an improper charge so as to occasion "a wanton and unnecessary increase in the amount of costs."

I follow entirely that the learned commissioner who tried the present case disbelieved the wife, and having regard to the nature of the charges it is of course obvious that the wife was telling a great deal less than the truth and in some matters was guilty of invention, but that is not the same as raising an issue wantonly and vexatiously. As counsel for the Law Society pointed out, the word "vexatious" has indeed a statutory meaning: see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1), where the word "vexatious" is preceded by the words

"has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings."

I have come to the conclusion that the learned registrar in the present case misdirected himself in expressing his view in those terms of the wife's conduct in raising these matters and in proceeding to trial on them. It is not every unsuccessful litigant in matrimonial suits who is of necessity because of his failure, "a vexatious and wanton litigant". I do not in any way desire to be thought to be criticising the expressions which the learned commissioner used in respect of the wife's unreliability as a witness. I have not the slightest doubt that she was very unsatisfactory, but I do not think that the present is a case where because her evidence was disbelieved on those charges she must, as it were, automatically be deprived of any chance of recovering costs in respect of her attendance as a witness.

I have come to the conclusion that the present is a case where the learned registrar has gone wrong in principle. If this was a case only of an exercise of his judicial discretion I could not, nor indeed would I, interfere with it; but in my view he has misdirected himself on the question of principle and I think the matter must go back to him or to some other registrar with a direction to review

A the matter and to allow such sum by way of costs on this issue as he may think right and proper.

Order accordingly.

Solicitors: *M. A. Jacobs & Sons* (for the wife); *T. G. Lund* (for the Law Society).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

B

GREEN v. ROZEN AND OTHERS.

[QUEEN'S BENCH DIVISION (Slade, J.), June 16, 17, 1955.]

C *Practice—Compromise of action—Settlement agreed before hearing of action—Terms of settlement not made an order of the court—No order for proceedings to be stayed—Breach of agreed terms—Jurisdiction of court to enforce settlement—Methods of disposing of action where terms of settlement agreed before or during hearing.*

D

The plaintiff brought an action to recover £500 money lent by him to the defendants jointly, and a further sum of £50, alleged to be due from the first defendant as consideration for making the loan to the three defendants jointly. When the action came on for hearing on Jan. 11, 1955, counsel informed the court that the action had been settled and what the terms of settlement were. By the agreed terms, which were set out on the backs of counsels' briefs and signed by counsel for both parties, the defendants were to pay to the plaintiff a sum of £450 by instalments, on the dates stated, and the taxed or agreed costs with the final instalment, and, if any instalment was in arrear, the whole debt and costs became due and payable at once. On the front of the briefs was written: "Before—, J. By consent, all proceedings stayed on terms indorsed on briefs. Liberty to either side to apply". The court was not asked to make any order whatever, and no order was made staying all further proceedings. The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action asking for judgment for the amount of the final instalment and an order for the costs.

E

F

Held: the application must be refused because, the court having made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action.

G

Per CURIAM: the plaintiff's only remedy was to bring an action on the agreement of compromise.

Observations on the different methods of disposing of an action where terms of settlement were agreed by the parties before or during the hearing.

H

[As to the compromise of action, see 26 HALSBURY'S LAWS (2nd Edn.) 82-84, paras. 146-152; and for cases on the subject, see DIGEST (Practice) 623, 2594, 2595, and 624, 2600, 2601.]

Cases referred to:

(1) *Re Hearn*, (1913), 108 L.T. 452; *affd.* C.A., 108 L.T. 737; Digest (Practice) 623, 2595.

(2) *Practice Note*, [1927] W.N. 290; Digest (Practice) 624, 2600.

I

(3) *Dashwood v. Dashwood*, [1927] W.N. 276; Digest (Practice) 624, 2601.

Application.

This was an application by the plaintiff for judgment to enforce agreed terms of settlement. In the action the plaintiff had claimed certain sums of money alleged to be due to him from the defendants in respect of a loan. When the action was called on Jan. 11, 1955, counsel had told the court that the case had been settled on terms indorsed on counsels' briefs, and the court was not asked to make any order. The plaintiff now asked, among other things,

for judgment for the sum of £68 ls. 9d., alleged to be due to him under the terms of the settlement. The facts appear in the judgment. A

J. B. Frankenburg for the plaintiff.

The defendants did not appear.

SLADE, J.: This short cause came before me for hearing on Jan. 11, 1955. It consisted of a claim by the plaintiff against the three defendants jointly for the return of moneys lent amounting to £500 and of a claim against the first defendant for a further £50, which, it was alleged, the first defendant had agreed to pay as the consideration for the making by the plaintiff of the loan to the three defendants jointly. When the action was called on, both parties being then represented by counsel, counsel—I think it was counsel for the plaintiff—told me that the action had been settled. Perhaps it is not surprising that I should have no recollection of the circumstances of the case. Counsel appearing for the plaintiff today, who was not here on Jan. 11, tells me now, and I accept it, that I was, in fact, informed what the agreed terms of settlement were. Again, I have no recollection of them at all. I have before me, however, a brief of counsel who then appeared for the plaintiff, and on the front of the brief it says: “Before SLADE, J. By consent, all proceedings stayed on terms indorsed on briefs. Liberty to either side to apply”. On the back of the brief are the agreed terms, which read in this way: B C D

“By consent Dt. [which, as I understand, is intended to refer to the defendants in the plural] to pay plaintiff £450 as follows: (i) £100 forthwith; (ii) £100, Feb. 20, 1955; (iii) balance of £250 by three equal monthly instalments, the first payable on Mar. 25, 1955; (iv) costs to be taxed or agreed and added to the balance of £250 and paid [that means to be paid] with the third and last instalment; (v) if any instalment in arrear whole debt and costs become due and payable at once.” E

Those terms are signed by counsel on both sides. Although, no doubt, it was the intention of the parties that all further proceedings should be stayed in the light of that compromise, I am informed by the learned associate, who was present on that day, and counsel for the plaintiff on his instructions agrees (as I have said he was not there himself), that, in fact, I made no actual order staying all further proceedings although, no doubt I should have contemplated, as the parties did, that all further proceedings would be stayed on the basis of what I shall call “the new agreement”. Nor did I make any order for taxation of costs, which was a term of the agreed terms in default of the costs being agreed, and I am confirmed in that view because I have since been shown the taxing master’s certificate as to when the costs were taxed. That is dated May 10 and says: F G

“In pursuance of an order herein bearing date Mar. 24, 1955, I have been attended by solicitors for the plaintiff and for the defendants and I certify I have taxed the costs.” H

Therefore, the order for taxation was not made by me on Jan. 11, 1955, but, no doubt, by one of the masters on Mar. 24, 1955.

That being the position, counsel for the plaintiff applied to me here yesterday for relief in those circumstances. He said that the defendants, or one of them, had paid £100 forthwith, had paid the £100 payable on Feb. 20, 1955, had paid the first two instalments of one-third of £250 on the due dates, but had failed to pay the third instalment of one-third of £250, that is to say, £83 6s. 8d., and the sum of £68 ls. 9d., which, by the time when the third instalment became due, had been shown by the taxing master’s certificate to be the taxed costs which the defendants had agreed to pay. Counsel asked me to give judgment for the plaintiff for the one-third which had not been paid, namely, £83 6s. 8d., and to give him an order for the costs in the figure at which they had already been I

A taxed. He further asked me to give him an order for the costs of the present application.

There are various ways in which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial or in the course of the hearing. I myself have had experience of at least five methods of disposing of an action in such circumstances, and those five methods are not exhaustive. One
B can, in an appropriate case, as was done in *Re Hearn* (1) (1913) (108 L.T. 452), to which counsel for the plaintiff referred, have the terms of the compromise made a rule of court, provided it appears that one of the terms of the compromise is that the terms shall be made an order of the court. I am dealing, however, with methods of disposing of an action of a less formal character than that. The first one which I have found to be very useful where the terms of compromise consist of
C an agreement by the defendant to pay a specified sum of money by specified instalments on specified dates is to give judgment for the total amount agreed to be paid coupled with a stay of execution so long as the instalments are paid in accordance with the terms agreed. I am sometimes asked to give judgment by consent and sometimes by the defendants submitting to it, and I have pointed out, when invited to give it by consent, that the Debtors Act, 1869, s. 27, requires that a consent judgment shall be registered at the Central Office within
D twenty-one days and, if it is not so registered, it will be void against the defendant's creditors. This requirement is also stated in the ANNUAL PRACTICE, 1955*. In the result, therefore, the form usually adopted is for the defendant to submit to judgment in open court. That is the first way.

The second way, which is, no doubt, more appropriate when the terms of
E settlement are not so straightforward as the mere payment of an agreed sum of money by specified instalments, is to secure an order of the court, made by consent, that the defendant, and, it may be, also the plaintiff, shall do the things which they have respectively engaged themselves to do by the terms of settlement. In such a case the order would take this form. There would be the title and the preamble and then the order would recite, the terms having been agreed
F between the parties: "It is ordered that (a) the defendant do", etc., "(b) the plaintiff do", etc., making each of the agreed terms an order of the court that it should be carried out.

The third method which I have known is what has become known as "the TOMLIN form of order", a form of order suggested by TOMLIN, J., and set out as a practice direction: see *Practice Note* (2) ([1927] W.N. 290). In the ANNUAL
G PRACTICE, 1955, p. 2007, under the heading "Drawing up and entering Consent Order", it is stated:

"Where an action is stayed by consent on terms scheduled, the terms cannot be enforced on an application to commit or attach, but an injunction or an order for specific performance must first be obtained."

H *Dashwood v. Dashwood* (3) ([1927] W.N. 276) is cited as the authority for that statement of practice. The ANNUAL PRACTICE, 1955, p. 2007, goes on to say:

"After this decision TOMLIN, J., stated that in future when an action was proposed to be stayed on agreed terms to be scheduled to the order, the order should be as follows: And the plaintiff and defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all
I further proceedings in this action be stayed except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect."

That is "the TOMLIN form of order", and the important words are those which follow "action be stayed". I understand from the chief associate that some

* See the ANNUAL PRACTICE, 1955, (i) note, at p. 762, under the heading "Consent Order", to R.S.C., Ord. 42, r. 23; and (ii) note, at p. 2007, under the heading "Filing consent order for judgment under Debtors Act", in the chapter on Judgments and Orders, in Part II, Div. I.

doubt exists as to how far the TOMLIN form of order will enable the terms set out in the order to be enforced by the court, at all events without first obtaining some further order, such as a four-day order in the Chancery Division, or an order of a judge in chambers in the Queen's Bench Division. This is possibly because it could be said that the schedule to the TOMLIN form of order is not part of the order, and because, in any event, all that the court has ordered in the TOMLIN form of an order, which does not contain any positive order of the court that the terms shall be carried into effect, is a stay of all further proceedings, with a qualification by implication that they shall not be stayed so far as is necessary for carrying the agreed terms into effect. Those are difficulties which occurred to me, and I was invited to endeavour to clear up the doubt which may exist. However, I have not had the advantage of argument on behalf of the defendants. Counsel for the plaintiff has helped me in every way possible, but I think that I should limit myself to dealing with the point which actually arises in the present case, where there was no TOMLIN form of order. All I can hope to do is to indicate the methods which have come before me of disposing of an action which has been settled, in the hope that parties in future may choose the one which they think is least open to controversy in the event of default being made in the carrying out of the agreed terms.

The fourth method which I have come across is an order of the court made by consent staying all further proceedings in the action on the terms agreed on counsels' briefs, that is, an order of the court staying all further proceedings. The fifth method, which was followed in the present case, is where there is no order of the court at all, the court merely being told by counsel that the case has been settled on the terms indorsed on counsels' briefs. I have known that method to be supplemented by a request for leave to withdraw the record, and, in the case of a trial by jury, by a request for the withdrawal of a juror, although I believe that, in the case of a trial by jury, the action can be set down and reheard if the terms are not complied with. However, I am not concerned at the moment with actions tried by juries.

It will perhaps emphasise which is the easiest method of disposing of an action if consideration is given to the steps which can be taken in each of those cases to enforce the terms, if default is made in compliance with them. The first one seems to be simplicity itself. The court has already given judgment and the stay of execution lasts only so long as the agreed terms are complied with. If there is a failure to comply with them, the party who suffers merely has to proceed to levy execution. In the second case, the court has made an order in the terms which I have indicated, that the plaintiff do certain things, the defendant do certain things, and, if the plaintiff or the defendant, as the case may be, fails to carry out the court's order, it is only necessary for application to be made to the court and the court will enforce the order, the court having clearly ordered, in the order itself, what each party is to do or to refrain from doing. The third case is the TOMLIN form of order with which I have already dealt, and, if that form of order is chosen and the terms are not complied with, contentions, the nature of which I have already indicated, may be raised against the enforcement of the order. The fourth case is where the court, at the request of the parties, has made an absolute and unqualified order for a stay of all further proceedings. I say "absolute and unqualified" in contradistinction to the common form of order where the stay of all further proceedings is qualified by the words "save and for the purpose of carrying the terms into effect". Before adopting the fourth method, it would be wise to read the note which appears in the ANNUAL PRACTICE, 1955, p. 3182, under the rubric "Effect of a stay of proceedings":

"Two views may be taken: first, that it is a discontinuance, and therefore cannot be removed; secondly, that it is not equivalent to a discontinuance, but may be removed if proper grounds shown . . ."

- A If one is anxious to resolve an interesting point of law as to which of those two schools of thought is correct, one could not do better than adopt the fourth method.

The fifth method, which is the only one I propose to adjudicate on, is the one which was adopted in the present case. The court made no order of any kind whatsoever, and, having considered such authorities* as I have been able to find,

- B I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement. I mentioned to counsel for the plaintiff what
- C I thought were one or two of the difficulties in his way. He is asking me to give him judgment for £83 6s. 8d., as well as the costs. The sum of £83 6s. 8d., which is one-third of £250, arises only under the terms of the new agreement. Counsel cannot ask me to remove the stay because I have made no order for the stay: there is nothing to be removed. In my judgment, therefore, the plaintiff's remedy in this case to enforce the sum of £83 6s. 8d., plus the taxed costs which
- D the defendants agreed to be paid, must be by action on the new agreement. I am sorry to have to come to that conclusion, because it may mean starting a new action, under R.S.C., Ord. 14, but, in my judgment, I have no jurisdiction—this is not a matter of discretion—to give to the plaintiff the relief which she seeks. In those circumstances the application must be refused. If I am asked for it, and if it is necessary, as to which I express no opinion, I shall give leave to
- E appeal. The point is by no means an easy one.

Application refused.

Solicitors: *Israel, Joslin & Co.* (for the plaintiff).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

F

Re CROSSLEY'S SETTLEMENT TRUSTS. CHIVERS AND ANOTHER v. CROSSLEY AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), June 28, 1955.]

Settlement—Entailed interest in personality—Disposal of income pending birth of person entitled—Accumulation—Subsequent gift to carry intermediate income—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 130 (1).

G

By a deed of appointment and settlement dated May 21, 1949, personal property called the baronetcy fund was settled “ (i) Upon trust for [F.P.I.C.] (the grandson of [Sir K.I.C.] and being the next in line of succession to the baronetcy of [C.]) during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of s. 31 of the Trustee Act 1925 to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section shall apply as regards the presumptive interest of the said [F.P.I.C.] in the baronetcy fund and with remainder (ii) Upon trust for the first and other sons of the said [F.P.I.C.] successively according to seniority in tail male with remainder (iii) Upon trust for the second third and other subsequently born younger sons of [Sir K.I.C.] successively according to seniority in tail male with remainder (iv) Upon trust for [C.J.C.] . . . during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of s. 31 of the Trustee Act 1925 to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section shall

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* *Cristel v. Cristel*, [1951] 2 All E.R. 574; *Selig v. Lion*, [1891] 1 Q.B. 513; *Bennett v. Gamgee*, (1876), 2 Ex.D. 11; *Bean v. Flower*, (1895), 73 L.T. 371; and *MacCabe v. Joynt*, [1901] 2 I.R. at p. 129.

apply as regards the presumptive interest of the said [C.J.C.] in the baronetcy fund . . . " A

In 1953 F.P.I.C. died leaving no issue. At that date, Sir K.I.C. was living but his only son (the father of F.P.I.C.) was dead. C.J.C. was living and of full age. On the question who pending the birth of sons of Sir K.I.C. was entitled to the income of the baronetcy fund, ✓

Held: (i) the income was not to be accumulated because by virtue of the Law of Property Act, 1925, s. 130 (1), the creation of interests in tail in personalty was to have "like results" as the creation by deed before 1926 of a similar estate tail in freehold land, one result of which was that intermediate income, pending the birth of a person who, on being born, would be entitled in possession, would not be accumulated. B

Bective v. Hodgson (1864) (10 H.L. Cas. 656) and *Re Mowlem* (1874) (L.R. 18 Eq. 9) applied. C

(ii) on the true construction of the deed C.J.C. was entitled to the intermediate income during his life because the terms of the trust stated in para. (iv) above were apt to refer back to the death of F.P.I.C. without issue and to carry the income to C.J.C. subject to the divesting of his interest therein on the birth of a son to Sir K.I.C. ✓ D

[For the Law of Property Act, 1925, s. 130 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 704.]

Cases referred to:

(1) *Bective v. Hodgson*, (1864), 10 H.L. Cas. 656; 33 L.J.Ch. 601; 10 L.T. 202; 11 E.R. 1181; 44 Digest 741, 5982.

(2) *Re Mowlem*, (1874), L.R. 18 Eq. 9; 43 L.J.Ch. 353; 44 Digest 757, 6163. E

Adjourned Summons.

The plaintiffs as the present trustees of a settlement constituted by a memorandum of agreement dated Jan. 2, 1934, and a deed of appointment and settlement dated May 21, 1949, applied to the court by originating summons under R.S.C., Ord. 55, r. 3 and r. 4, for the determination, among others things, of the following questions: (i) whether in the event which happened of the death of Francis Patrick Irwin Crossley without issue the trust for the second, third and other subsequently born younger sons of Sir Kenneth Crossley successively in tail male in the deed of appointment and settlement contained carried the intermediate income of the baronetcy fund (as defined in the said deed of appointment) from the death of Francis Patrick Irwin Crossley until the birth of a second son to Sir Kenneth Crossley or his death (which should first happen) so far as permitted by the law relating to accumulations; (ii) if question (i) were decided in the negative, whether, during the period aforesaid, the income (a) was and would be payable to the fourth defendant, Christopher John Crossley, if he so long lived and after his death (if he died during the said period) to the persons for the time being entitled to the income of the baronetcy fund in remainder immediately expectant on the failure of the trust for the subsequently born sons of Sir Kenneth Crossley or (b) resulted to Sir Kenneth Crossley and the estate of Eric Crossley in equal shares or in some and what other proportions. F

E. G. Wright for the plaintiffs, the present trustees of the settlement.

J. A. Brightman for the first defendant, the present baronet.

G. A. Rink for the second and third defendants, personal representatives of Eric Crossley, deceased. G

W. J. C. Tonge for the fourth defendant, a grandson of Eric Crossley and heir presumptive to the baronetcy. H

WYNN-PARRY, J.: This summons raises a question of construction of a settlement constituted by two documents, first a memorandum of agreement dated Jan. 2, 1934, and signed by Sir Kenneth Irwin Crossley, who is the first defendant, and his brother Eric Crossley; secondly, a deed of appointment I

- A dated May 21, 1949, and made between Sir Kenneth and Mr. Eric Crossley of the one part and Felix James Chivers and Elizabeth Shenton, as trustees, of the other part. I am not, for the purposes of this summons, really concerned with the provisions of the memorandum of agreement, because what happened was that, pursuant to a power reserved in that document, Sir Kenneth and his brother declared by the deed of appointment and settlement the trusts which
- B they wished finally to apply to a sum of £50,000 which they had contributed out of their father's estate and which had become subject to the trusts of the memorandum of agreement. I observe in passing that the original fund had increased in value by May, 1949, and by arrangement between the two brothers what might be regarded as the profit or the capital appreciation was paid over to Sir Kenneth leaving funds the market value of which at that time were approximate-
- C ly £50,000. The object of the whole transaction was to constitute a fund which in the second document is described as the baronetcy fund and to provide, so far as possible, that the benefit of that fund should go with the baronetcy of Crossley.

- It will be, I think, convenient, before going on to deal with the terms of the second document, to refer, so far as may be material, to the pedigree forming
- D exhibit F.J.C.3 to the affidavit in support of this summons. This pedigree is designed to show the male descendants of Sir William John Crossley, Baronet. He was the first baronet, and he died on Oct. 12, 1911, leaving three sons; first, Sir Kenneth, the first defendant, who is still living and is of the age of seventy-eight; secondly, Mr. Eric Crossley, to whom I have referred, who died on May 23, 1949, and whose personal representatives are the second and third defendants;
- E and a third son, Brian Crossley, who died in May, 1915, leaving no issue. Sir Kenneth had a son, Anthony Crommelin Crossley, who died on Aug. 15, 1939, leaving a son Francis Patrick Irwin Crossley, who was born on Mar. 17, 1929, and died on Aug. 26, 1953, leaving no issue, and it is that death which has given rise to the question raised by this summons. Mr. Eric Crossley left three sons.
- F The second and third are living; the first, Nigel John Crossley, died on Nov. 27, 1939, leaving a son, Christopher John Crossley, who was born on Sept. 25, 1931, and is therefore of full age. He is the heir presumptive and is the fourth defendant.

The question which arises on the death of Francis is as to the destination of the income of the baronetcy fund pending it being ascertained whether Sir Kenneth, who has married again, will or will not have further children.

- Now, the relevant part of the second document, the deed of appointment and
- G settlement, is part of cl. 4, which reads as follows:

- “The trustees shall stand possessed of the investments set forth in the second schedule hereto and the property for the time being representing the same (hereinafter called ‘the baronetcy fund’) upon the trusts following that is to say:—(i) Upon trust for the said Francis Patrick Irwin Crossley (the grandson of the said Sir Kenneth Irwin Crossley and being the next in line of succession to the baronetcy of Crossley) during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of s. 31 of the Trustee Act 1925 to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section shall apply as regards the presumptive interest of the said Francis Patrick Irwin Crossley in the baronetcy fund and with remainder (ii) Upon
- H trust for the first and other sons of the said Francis Patrick Irwin Crossley successively according to seniority in tail male with remainder (iii) Upon trust for the second third and other subsequently born younger sons of the said Sir Kenneth Irwin Crossley successively according to seniority in tail male with remainder (iv) Upon trust for the said Christopher John Crossley (grandson of the said Eric Crossley) during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of s. 31 of the Trustee Act 1925 to carry the intermediate
- I

income of the baronetcy fund and accordingly the provisions of that section shall apply as regards the presumptive interest of the said Christopher John Crossley in the baronetcy fund . . . ”

I need not read, for present purposes, the rest of that clause.

It so happens that it is in the interest, for various reasons, of all the defendants to contend that in the events which have happened the intermediate income ought not to be accumulated and that the interest of Christopher John Crossley in the baronetcy fund should be treated as having been accelerated. In those circumstances, counsel for the plaintiffs argued in favour of the contrary view on behalf of the unborn children of Sir Kenneth Irwin Crossley.

Two points have been argued, one a question of law and the other a question of fact. So far as the question of law is concerned, counsel for the first defendant submitted that the Law of Property Act, 1925, s. 130, applies to and governs this case. That section appears at the beginning of Part 4 under the heading “Equitable interests and things in action”, and deals with the creation of entailed interests in real and personal property. Sub-section (1), so far as material, provides:

“An interest in tail or in tail male or in tail female or in tail special (in this Act referred to as ‘an entailed interest’) may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.”

It is quite clear that the interest, under the deed of appointment and settlement, of a second son of Sir Kenneth is an entailed interest in personality. It is, therefore, covered by sub-s. (1). The effect of s. 130 (1) is that since 1926 the same rules cover an entailed interest of personality as previously governed an estate tail in realty. One result of creating an estate tail in realty before 1926 was that, pending the birth of a person who, on being born, would be entitled in possession, the intermediate income was not accumulated, and that rule was based on the principle that at common law a freehold estate could never be in abeyance. If authority be wanted for that proposition, it is to be found in the two cases that counsel for the first defendant cited: *Bective v. Hodgson* (1) (1864) (10 H.L. Cas. 656) and *Re Mowlem* (2) (1874) (L.R. 18 Eq. 9).

Against that it was submitted by counsel for the plaintiffs that the construction which counsel for the first defendant sought to place on s. 130 (1) was too wide and that the words “with the like results”, when considered in the context provided by sub-s. (1) as a whole, meant no more than “with the like statutory results”, and in support of that submission he submitted that, to take the contrary view, would involve that there was a conflict between s. 130 and s. 175 of the Law of Property Act, 1925. Section 175 is the first section of Part 10, and appears under the heading “Wills”. It deals with contingent and future testamentary gifts which are to carry the intermediate income. For my part, I do not see that there is any conflict between the two sections even if I give to the words “with the like results” the extended meaning that counsel for the first defendant contends for. It appears to me that the contrast to be drawn is between testamentary dispositions, dealt with under s. 175, on the one hand and dispositions inter vivos under s. 130 on the other hand, and that, as counsel for the first defendant submitted, the design of s. 130 (1) is to assimilate the rules dealing with both real and personal property. Under s. 130 it seems to me that the old common law rule is preserved and is made applicable to personal property,

A though a different rule applies where the property is the subject of a testamentary disposition, when s. 175 will apply.

Turning back to s. 130 (1), and construing it, as I feel I am entitled to do, on the basis that there is no conflict between that sub-section and s. 175 (1), what is the scope of this section? The words "with the like results" *prima facie* mean "with all the like results". They are followed by the words "including the right to bar the entail", words obviously not designed to cut down the scope of the words "the like results". Then follow the words "and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property". I find nothing in those words which can be said to have the effect of cutting down. They are merely, to my mind, declaratory and on one view they are unnecessary. To my mind their usefulness lies in including them *ad majorem cautelam* and for the purposes of making clear beyond doubt that statutory provisions as well as pre-existing rules of law shall apply to entailed interests. I am, therefore, with counsel for the first defendant on his first point.

The other point that was argued was a point of construction on cl. 4. It is to be observed that in cl. 4 (i), which deals with the life interest given to Francis Patrick Irwin Crossley, there is an express provision that the trust shall be deemed for the purposes of s. 31 of the Trustee Act, 1925, to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section should apply as regards his presumptive interest. When, however, the draftsman comes to deal with the case of the first and other sons of Francis, no mention is made of the intermediate income; nor is any mention made of the intermediate income in the creation of interests for the second, third and other subsequently born younger sons of Sir Kenneth Irwin Crossley; but when one comes, in cl. 4 (iv), to the interest of Christopher John Crossley, which is again a life interest, if and when he shall attain the age of twenty-one years, there is again an express reference to s. 31 of the Trustee Act, 1925, and a direction that the trust shall, for the purpose of that section, be deemed to carry the intermediate income of the baronetcy fund.

Counsel for the plaintiffs submitted that the only reason why, in para. (i) and para. (iv) there was any express reference to the intermediate income was to give Francis in para. (i) and Christopher in para. (iv) that which otherwise they would not have been entitled to, *viz.*, the income during minority; but, to my mind, that does not conclude the matter. On the death of Francis in 1953 it became necessary to find the destination of the intermediate income pending some person being born who would qualify under para. (iii). I say "under para. (iii)", because obviously on the death of Francis para. (ii) could no longer have any possible effect; but it seems to me that, on the true construction of the clause, that very event is adequately provided for by cl. 4 (iv), which is apt to refer back to the death of Francis and to carry the immediate intermediate income from that date unless and until someone comes into existence qualified under para. (iii) when the interest in the intermediate income of Christopher will be liable to be divested.

The last point that was adumbrated was one which was not developed, because it was agreed at all hands that if I should take the view which I have expressed, the interest of Christopher must be accelerated. Authority for that proposition was cited, but I do not consider it necessary to refer to it, as the principle is so clearly established.

Order accordingly.

Solicitors: *Taylor & Humbert* (for the plaintiffs and the first defendant);
Eland, Hore, Pattison, Nettleship & Butt (for the second and third defendants);
Ridsdale & Son (for the fourth defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister at-Law.*]

R. v. DENT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Donovan, JJ.), June 20, July 4, 1955.]

Criminal Law—False pretences—Statement of intention about future conduct does not constitute a false pretence.

A statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law (see p. 808, letter A, post).

The appellant and his father carried on a business as pest destructors. The appellant had entered into contracts with farmers to destroy the vermin on their land over the period of a year and had asked for and obtained payment in advance of half the annual charge. In some cases he did no work at all in fulfilment of the contract. He was convicted at quarter sessions for obtaining cheques by false pretences. The indictments, which were all in similar form, alleged that he obtained the cheques "by falsely pretending that he . . . was then bona fide entering into a contract for the destruction of moles . . . for a period of twelve months, and that he . . . then bona fide intended to carry out [his] obligations under the said contract, and that he . . . then bona fide believed that [he] would be able and willing to carry out [his] said obligations". The jury were directed that the prosecution had to prove that the appellant entered into the contracts without any genuine intention of carrying them out and that he falsely pretended that he had such an intention.

Held: the direction was wrong in law and the conviction must be quashed.

Dictum of BOWEN, L.J., in *Edgington v. Fitzmaurice* (1885) (29 Ch.D. at p. 483) distinguished; dictum of LORD ALVERSTONE, C.J., in *R. v. Bancroft* (1909) (3 Cr. App. Rep. at p. 21) explained.

R. v. Jones (1853) (6 Cox, C.C. 467) disapproved.

Appeal allowed.

[**Editorial Note.** In the light of this decision the authority of the saying that "the state of a man's mind is as much a fact as the state of his digestion" (see per BOWEN, L.J., in *Edgington v. Fitzmaurice* (1885), 29 Ch.D. at p. 483) recedes from the realm of criminal law; and although its application to the civil action of deceit is left open by the judgment in the present case, yet in the civil law also a misrepresentation which is to found an action of deceit must be a representation of existing fact. Representations, apparently of intention, may still maintain a charge of false pretences, if the statement of intention is accompanied by one of existing fact or if the representation is in truth one of existing readiness in fact (see p. 808, letter F, p. 809, letter B, post).

As to false pretence of fact, see 10 HALSBURY'S LAWS (3rd Edn.) 824, para. 1593; and for cases on the subject, see 15 DIGEST 990-992, 11,069-11,090.]

Cases referred to:

- (1) *R. v. Gordon*, (1889), 23 Q.B.D. 354; 58 L.J.M.C. 117; 60 L.T. 872; 53 J.P. 807; 15 Digest 988, 11,059.
- (2) *Edgington v. Fitzmaurice*, (1885), 29 Ch.D. 459; 55 L.J.Ch. 650; 53 L.T. 369; 50 J.P. 52; 15 Digest 990, 11,069.
- (3) *R. v. Goodhall*, (1821), Run. & Ry. 461; 15 Digest 991, 11,084.
- (4) *R. v. Jennison*, (1862), Le. & Ca. 157; 31 L.J.M.C. 146; 6 L.T. 256; 26 J.P. 294; 15 Digest 990, 11,074.
- (5) *R. v. Bates & Pugh*, (1848), 3 Cox, C.C. 201; 15 Digest 990, 11,070.
- (6) *R. v. Johnston*, (1842), 2 Mood. C.C. 254; 169 E.R. 101; 15 Digest 991, 11,087.
- (7) *R. v. Bancroft*, (1909), 3 Cr. App. Rep. 16; 26 T.L.R. 10; 15 Digest 991, 11,082.
- (8) *R. v. Jones*, (1853), 6 Cox, C.C. 467; 15 Digest 991, 11,077.

A Appeal against conviction.

This was an appeal by the appellant against his conviction on Apr. 30, 1955, at the Lincolnshire (Parts of Lindsey) Quarter Sessions on an indictment containing nine counts of obtaining cheques by false pretences and one of conspiracy to defraud. The facts of the case and the grounds of appeal appear in the judgment.

B *G. D. Lane* for the appellant.

J. M. G. Griffith-Jones for the Crown.

Cur. adv. vult.

C July 4. **DEVLIN, J.**, read the judgment of the court: On Apr. 30, 1955, at the Lincolnshire (Parts of Lindsey) Quarter Sessions the appellant was convicted of a number of offences of obtaining cheques by false pretences and sentenced to twelve months' imprisonment. The deputy chairman who presided over the court by which he was tried certified that the case was fit for appeal to this court on the ground that it raised an important point of law, namely, whether the particulars of the offences as laid in counts 2, 4, 5, 6, 7, 8 and 9 of the indictment were sufficient false pretences within the Larceny Act, 1916, s. 32. The false pretence alleged in each of these counts is the same and is in the following terms:

D "By falsely pretending that he, on behalf of C. Dent & Sons, was then bona fide entering into a contract for the destruction of moles on land in the occupation of Joseph Watson Lawson for a period of twelve months, and that he and the said C. Dent & Sons then bona fide intended to carry out their obligations under the said contract, and that he and the said C. Dent & Sons then bona fide believed that they were and would be able and willing to carry out their said obligations."

E As appears from these particulars the appellant had on behalf of himself and his father, who were together carrying on business as pest destructors, entered into contracts with a number of farmers to undertake the destruction of vermin on their land over the period of a year; and had asked for and obtained payment in advance of half the annual charge. In a number of cases besides those enumerated in the indictment they had done no work at all, and the jury, as shown by its verdict, was satisfied that in those cases they never had any intention of doing the work for which they took payment and had not entered into the contract in good faith and in short were doing business dishonestly. Dishonesty is not per se a criminal offence; and the point that has been argued before us and which is the subject of the deputy chairman's certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purposes of the criminal law. As the deputy chairman said, the authorities are not easy to reconcile, and in 1889 **WILLS, J.** (*R. v. Gordon* (1) (1889), 23 Q.B.D. at p. 360), considered the point still to be doubtful.

H The case for the prosecution is that when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out whereas in fact he had no such intention. It is of course undisputed that to constitute a false pretence the false statement must be of an existing fact. The prosecution contend that a statement of present intention, although it relates to the future, is a statement of existing fact. That was the view expressed by **BOWEN, L.J.**, in his celebrated dictum in *Edgington v. Fitzmaurice* (2) (1885) (29 Ch.D. at p. 483):

"There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

Edgington v. Fitzmaurice (2) was an action for deceit. Whatever the position may be in civil cases, we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law. A

The first case cited to us on the point is that of *R. v. Goodhall* (3) (1821) (Run. & Ry. 461). In this case the prosecution alleged that the prisoner procured the delivery of goods to himself by falsely pretending that he would pay for them on delivery. The jury found the prisoner guilty and added that they found that at the time he applied for the goods and promised to send back the money he did not intend to return the money, but to obtain the goods and cheat the prosecutor. GARROW, B., resited the judgment and the judges thereafter met and held the conviction wrong, being of opinion that it was not a pretence within the meaning of the Statute 30 Geo. 2 c. 24 s. 1, but merely a promise for future conduct. We do not propose to go through all the other authorities which were cited to us to the same effect for we are of opinion that the common law was accurately stated in the Summary Jurisdiction Act, 1899*, s. 3, which gave directions to a court of summary jurisdiction about the manner in which it was to explain the charge of false pretences. The court was to say B C D

" . . . that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed, and that a promise as to future conduct not intended to be kept is not by itself a false pretence . . . "

We are unable for the purposes of this principle to distinguish between a promise and a statement of intention. Every promise by a person as to his future conduct implies a statement of intention about it, though not every statement of intention amounts to a promise; but it would manifestly be absurd to hold that when such a statement of intention does amount to a promise, the accused has committed no offence, and that when it does not amount to a promise, he has. No distinction can be drawn for this purpose between "I will do it" and "I intend to do it". E F

There are two qualifications to be noted. The first is that a promise as to future conduct may be coupled with a false statement of existing fact, and that the words in the statutory definition are "A promise . . . is not *by itself* a false pretence". This point is illustrated by several of the cases, for example, by *R. v. Jennison* (4) (1862) (31 L.J.M.C. 146), where the prisoner obtained money from a woman by saying falsely that he was an unmarried man and that he intended to marry her. The court held that while the false promise to marry could not be the subject of an indictment, the false pretence that he was an unmarried man could be, and that the prisoner was properly convicted. In the type of case which this court is now considering, it is very often possible to allege and prove that the prisoner either expressly or by implication falsely pretended that he was carrying on a bona fide business. If this fact can be proved in addition to the false promise, the conviction can be sustained. The distinction is clearly illustrated in *R. v. Bates & Pugh* (5) (1848) (3 Cox, C.C. 201), where the false pretence alleged was that the prisoner was then intending to open a shop and that he was a provision dealer, and was possessed of a certain sum of money, viz., £1 7s. 1½d., and so had the means of paying the price of the cheese which he sought to buy. PLATT, B., said (3 Cox, C.C. at p. 203): G H I

"It was objected, on behalf of the prisoner, that the pretences resolved themselves into a mere intention to do a future act. If all the pretences together were of that import, then the objection ought to prevail. If the intention to open a shop related simply to futurity, that would not do. But the pretence alleged that the prisoner 'was then a provision dealer', and that was a pretence of an existing fact; so also was the pretence that the

*The Summary Jurisdiction Act, 1899, was repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6.

- A prisoner had then the means of paying, and was ready and willing to pay. In *R. v. Johnston* (6) (1842) (2 Mood. C.C. 254) the substance of the pretence was, 'If you will give me the money, I will apply it in a particular way',—a mere promise, the breach of which was remediable by a civil remedy. If that were a false pretence within the statute, all breaches of contract would expose a man to an indictment."
- B The words "ready and willing to pay" indicate the second qualification. Readiness and willingness to pay may suggest a statement about future conduct. It is clear from the authorities that the law does not seek to divide the future meticulously from the present. If a man says: "If you give me the goods now, I will hand over £10," while as a matter of chronology payment follows after delivery, as a matter of business it is all one transaction. It has so far not been
- C necessary to determine just where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promisor's readiness to perform, that is that he has as an existing fact the power and the means to perform his promise. If a
- D man promises to pay £10 forthwith, he must imply that he has the money to hand; if he promises to pay in a week, his promise is consistent with the mere hope that he will within that period obtain the means to honour it. These considerations explain, we think, two cases much relied on by the prosecution. In *R. v. Gordon* (1) (the case in which WILLS, J., expressed the doubt to which I have already referred) the prosecution alleged that the prisoner obtained a promissory note by falsely pretending that he was prepared to pay £100 in
- E exchange for it. LORD COLERIDGE, C.J. (23 Q.B.D. at p. 359), said that it was objected

- "... that we must interpret the allegation that he was prepared to advance £100, as if it meant that he was ready to do so at some future time, and that it was a mere statement of his intention that at some time afterwards he would deliver the £100. I do not think that is the true interpretation of the pretence which is stated to be false . . . It appears to me that the ordinary meaning of the allegation is: 'I am *now* prepared to give you £100 if you will sign this paper. Here is £100, and when you sign that paper, which you will do in a moment, the £100 is yours'. That, apart from all question of existing state of mind, seems to me to be a false pretence of an
- G existing fact—the existing fact stated being that the money was ready for the prosecutors on their signing the paper."

- This point about readiness depends of course on the circumstances of the case. It is not inevitably excluded by the fact that the promise is to do an act some time ahead, for the act may be one which makes it necessary to get ready some time before. The publication of a book, for example, requires preparation. Thus in
- H *R. v. Bancroft* (7), the prisoner, representing that he was about to publish a directory, started to canvass for advertisements, and in March and April obtained money in advance on the statement that the book was to be published in May. At the time of this statement he had made no arrangements for publication. LORD ALVERSTONE, C.J., said (1909) (3 Cr. App. Rep. at p. 21):

- "... It was for the jury to say whether it was a statement made of an
- I existing state of facts that he intended to get it published in May, and that the thing was in order for publication in May . . ."

This dictum must be read as a whole and cannot be cited as an authority for the view that a mere statement of intention is enough; for the Lord Chief Justice had earlier in his judgment adopted as the governing principle the statement in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (now set out in the 33rd Edn. at p. 722) that "a promise to do a thing in futuro may involve a false pretence that the promisor has the power to do that thing". Without the

implication that "the thing was in order for publication in May" the statement would not have amounted to a false pretence. A

In the long series of authorities there is only one case in which a bare statement of intention was left to the jury as sufficient. In *R. v. Jones* (8) (1853) (6 Cox, C.C. 467), COLERIDGE, J., left to the jury the question whether the accused intended to carry out his agreement, though he expressed himself as doubtful on the point. The prisoner was convicted, but, as he was also convicted on another count about which there could be no argument, the point was not further considered. In the view we take of the law this case can no longer be considered as authoritative. B

We adhere to the view expressed in the older authorities. We need not determine whether it is a rule peculiar to the criminal law or how far, if at all, it extends to the civil law; nor need we determine the reason that lies behind it. In some of the earlier cases it is suggested that it is the credulity of the promisee that is really to blame. In the passage quoted from the judgment of PLATT, B., in *R. v. Bates & Pugh* (5) the reason which attracted the learned baron is the danger that any breach of contract might expose a man to an indictment. It would not be surprising if the law was more careful of the interests of the defendant in criminal frauds than in civil. However this may be, we think that the rule is so well settled that it ought not now to be departed from. C D

The case before this court was a simple case of a promise as to future conduct implied from the entry into a contract. It is not suggested that the appellant and his father were not carrying on a genuine business as pest destructors. It is significant that when they were charged before the magistrates the false pretence alleged was the pretence that they were carrying on a bona fide business. The evidence did not support the allegation that this representation was false and so it finds no place in the indictment. It was not suggested that the appellant had not the means to do the work if he wanted to. Nor is this a case in which there is any difficulty about drawing the line between the present and the future, or where there was any representation about immediate readiness to do the work; the appellant said he would do the work in the course of the year, and what is put against him is simply that he did not mean to do it. It was this simple issue that the deputy chairman left clearly to the jury in accordance with the view that he took of the law; he told them that what the prosecution had to prove was that the appellant at the time of entering into the contracts had no genuine intention of carrying them out and that he falsely pretended that he had. For the reasons we have given we do not think that this is a correct view of the law, and we have therefore quashed the conviction. E F G

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions.*

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A
ISAACS v. ISAACS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), July 4, 1955.]

Legal Aid—Costs—Taxation—Counsel's fee—Divorce petition heard outside London—Undefended suit—Counsel appearing in two cases on same day—
B *Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 4 (1)—*
Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3).

The husband, who had obtained a civil aid certificate under the Legal Aid and Advice Act, 1949, petitioned for divorce on the ground of the wife's desertion. The suit was heard undefended by a special commissioner sitting at Bournemouth, and a decree nisi was made in the husband's favour. On
C taxation of the husband's bill of costs under Sch. 3 to the Act the registrar reduced the fee on counsel's brief from seven guineas to five guineas. The husband lodged an objection and in answer the registrar stated that if counsel were engaged in one case only a brief fee of seven guineas was allowed in an undefended suit, but that in the present case counsel was engaged in two cases on the same day. On review of taxation,

D **Held:** the fact that counsel was engaged in two cases on the same day was not a matter to be considered in determining the amount of the fee; the registrar had, therefore, erred on a matter of principle, and since he would, apart from that consideration, have allowed seven guineas, the sum of two guineas would be restored so that the fee allowed would be seven guineas.

E [As to solicitor and client costs, see 31 HALSBURY'S LAWS (2nd Edn.) 212, para. 236; and for cases on the principle of taxations as between solicitor and client, see DIGEST (Practice) 948, 4879-4881.

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.

For the Legal Aid (General) Regulations, 1950, reg. 18 (3), see 5 HALSBURY'S STATUTORY INSTRUMENTS 218.]

F Cases referred to:

- (1) *Self v. Self*, [1954] 2 All E.R. 550; [1954] P. 480; 3rd Digest Supp.
- (2) *Alsop v. Oxford (Lord)*, (1833), 1 My. & K. 564; 2 L.J.Ch. 174; 39 E.R. 794; 42 Digest 214, 2390.
- (3) *Parkinson v. Hanbury*, (1865), 12 L.T. 624; 29 J.P. 692; Digest (Practice) 933, 4728.
- (4) *Coon v. Diamond Tread Co. (1938), Ltd.*, [1950] 2 All E.R. 385; 2nd Digest Supp.

G **Summons.**

This was a summons by the husband to review taxation. The summons was
H adjourned into court for judgment and the facts appear in the judgment.

R. J. A. Temple, Q.C., and *T. G. Guest* for the husband.

Cur. adv. vult.

I July 4. COLLINGWOOD, J., read the following judgment: This is a summons for review of taxation of the petitioner's bill of costs in a suit in which a decree nisi was granted on Jan. 17, 1955. The review is sought in respect of one item, namely, the fee to counsel with brief and clerk, as to which the sum of two guineas was taxed off the charge of £7 12s. The summons was heard in chambers, but counsel intimated that the issue raised is one of general importance, and invited me to deliver judgment in open court.

The petition is that of the husband, filed on Nov. 3, 1954, and asking for dissolution of the marriage on the ground of the wife's desertion. The petitioner was legally aided under a certificate dated Nov. 26, 1954, under the Legal Aid and Advice Act, 1949, and the cause was heard, undefended, by a special commissioner

at Bournemouth, on Jan. 7, 1955. The decree included an order that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949, Sch. 3. On Mar. 30, 1955, the petitioner's bill of costs was taxed by the district registrar, who reduced the brief fee from seven guineas to five guineas. Objection to this reduction was lodged by counsel for the petitioner on the ground that the usual fee when counsel has to appear out of London is seven guineas, and he referred to the judgment of SACHS, J., in *Self v. Self* (1) ([1954] 2 All E.R. 550). To this objection the registrar's reply was:

"If counsel is engaged in *one case only* I allow a brief fee of seven guineas in an undefended suit. In *this case* counsel was engaged in *two cases* on the *same day*."

It was submitted by counsel that in reducing the brief fee in the way he did the registrar had misdirected himself, and had erred on a question of principle.

It is well settled that on a question of quantum the decision of the taxing master is, generally speaking, final.

"... he is the sole judge of the fact whether the business has been done, and of the proper charge to be made for it."

Per SIR JOHN LEACH, M.R., in *Alsop v. Lord Oxford* (2) (1833) (1 My. & K. at p. 566). In *Parkinson v. Hanbury* (3) (1865) (12 L.T. at p. 624), TURNER, L.J., pointed out that if the court were called on to adjudicate on the amount of fees paid to counsel, and whether these fees were to be ten guineas, or fifteen, or twenty, the vexation and injury to suitors would be infinite. These matters, said the lord justice, had always been left to the discretion of the taxing master, and it was proper that they should still be so. And the rule that, so far as the question of quantum is concerned, the court will not interfere with the taxing master's decision, except when the master has misdirected himself, or proceeded on a wrong principle, was again emphasised by WYNN-PARRY, J., in *Coon v. Diamond Tread Co. (1938), Ltd.* (4) ([1950] 2 All E.R. 385).

In the present case, however, the disallowance of the item in question is not merely a question of quantum; it involves a question of principle. The registrar concedes that the normal fee in an undefended divorce suit, where counsel has to appear out of London, is seven guineas, and justifies the reduction to five guineas in this particular case by reason of the fact that counsel had *two cases on the same day*. This gives rise to the question of principle: Is that a matter properly to be taken into consideration in determining the amount of the fee? Counsel in the course of his argument pointed out some of the questions which would arise from the application of such a rule. These included: (i) Are the fees in all the cases in which counsel is so engaged to be reduced, or only in the second or subsequent cases which come up for taxation? (ii) Is the rule confined to two or more cases in the same court, or does it extend—for example—to another case in the local county court? (iii) And is the solicitor who brings in the bill for taxation under a duty to provide a list of counsel's other engagements for the day, in case any of them should be such as to call for the application of the rule? (iv) Further, is it to be applied to all cases, irrespective of whether the litigant is legally aided or not, with the result that a guilty respondent or co-respondent would automatically benefit from its application, at the expense of the successful petitioner?

I have come to the conclusion that, in determining the amount of the fee by reference to counsel's other professional engagements on the day of the hearing, the registrar has taken into consideration a matter which is not relevant to the question before him. Apart from that consideration, the registrar considers seven guineas to be the proper amount. That being so, in taxing off the two guineas for the reason which he assigns, he has, in my opinion, acted on a wrong principle,

A and it is necessary, therefore, for me to review the taxation. In so doing I restore the sum of two guineas which has been disallowed by the registrar.

Order accordingly.

Solicitors: *Gillhams*, agents for *G. T. Richards & Morgan*, Bournemouth (for the husband).

B [Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

C SOUTH DEVON WATER BOARD v. GIBSON.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), June 10, 13, 29, 1955.]

Water Supply—Rates and charges—Whether supply should be gratuitous—

D *Water board's main in village street—Ancient right to water from standpipes free of charge—Houses connected to main by pipes—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 49), s. 124 (1)—Water Act, 1945 (8 & 9 Geo. 6 c. 42), Sch. 3, s. 46 (1).*

E Water from a drowned mine was carried by an artificial channel to a tank at the end of a village and thence by a two-inch main along the village street, in which there were three public standpipes, from which villagers were entitled to fetch water in buckets to their houses free of charge. Under s. 64 of the Public Health Act, 1875,* this system vested in the rural district council. In 1912 the water had become polluted and the council, under powers contained in that section and in pursuance of an agreement with the local landowner conferring on them the right to take the water from the existing channel, so far as they did not in fact already possess that right, put in a fresh tank and filter and a three-inch main, again with three standpipes in the village street, the cost being met out of a special rate. From 1920 onwards, sometimes by permission or sometimes without permission of the rural district council, many inhabitants connected their houses by pipes to the three-inch main. In 1950 a water board, the successors to the water undertaking of the rural district council, sought to charge a water rate on inhabitants whose houses were so connected with the main. The board contended that s. 46 of Sch. 3 to the Water Act, 1945, entitled them to charge a water rate as they were undertakers who supplied water to premises.†

H **Held:** the water board were entitled to charge a water rate for the water delivered to houses in pipes under s. 46 of Sch. 3 to the Water Act, 1945, since they "supplied" water to the houses within the meaning of the section by delivering it through their pipes, tank and filter, notwithstanding that the inhabitants had an immemorial right to use the water gratuitously if they chose to carry it away from the standpipes.

Appeal allowed.

I [Editorial Note. The original water system, enabling a gratuitous supply to be had from standpipes, vested in the rural district council by virtue of s. 64 of the Public Health Act, 1875. That section was repealed and became replaced by s. 124 of the Public Health Act, 1936. In one respect the wording of s. 124 was different from that of s. 64. Section 64 had empowered a local authority to construct works for supplying pure water for the gratuitous use of inhabitants

* The relevant terms of s. 64 of the Public Health Act, 1875, are printed at p. 815, letter B, post.

† Section 46 (1) of Sch. 3 to the Water Act, 1945, provides "Undertakers who supply water to any premises . . . may charge in respect thereof a water rate, . . ."

"who choose to carry the same away". For these words s. 124 of the Act of 1936 substituted "who desire to take it not for sale". Section 46 of Sch. 3 to the Water Act, 1945, which became applicable to the board by virtue of the South Devon Water Order, 1950, contains no comparable words but entitles undertakers to charge a water rate if they "supply water to any premises", not, therefore, if they supplied it merely to standpipes. That section is derived from s. 56 of the Public Health Act, 1875, which was replaced by s. 126 of the Public Health Act, 1936. Local authorities have power to charge for water supplied to a standpipe by virtue of s. 128 of the Act of 1936 if they have provided the standpipe or a cistern from which the water might be obtained, but that section expressly excepts standpipes and cisterns used for gratuitous supply under s. 124 of the Act of 1936.

As to charges for a supply of water, see 33 HALSBURY'S LAWS (2nd Edn.) 468-470, paras. 765-768; and for cases on the subject, see 43 DIGEST 1087-1091, 204-228.

For the Public Health Act, 1936, s. 124 (1), see 19 HALSBURY'S STATUTES (2nd Edn.) 397; and for the Water Act, 1945, Sch. 3, s. 46 (1), see 26 HALSBURY'S STATUTES (2nd Edn.) 889.]

Case referred to:

- (1) *Ferens v. O'Brien*, (1883), 11 Q.B.D. 21; 52 L.J.M.C. 70; 47 J.P. 472; 15 Digest 911, 10,026.

Appeal.

The defendant was the owner and occupier of Holne Court Farm in the parish of Holne in the county of Devon which was situate within the limits of supply of the plaintiff water board, who were authorised water undertakers.* Article 4 of the South Devon Water Order, 1950 (S.I. 1950 No. 1031) applied s. 46 of Sch. 3 to the Water Act, 1945, among other provisions of that schedule, to the water board. The water board brought an action in Newton Abbot County Court, claiming sums totalling £10 ls. in respect of a supply of water which they alleged had been provided by them to the defendants' premises and had been consumed by the defendant for domestic and agricultural purposes in the half-yearly periods ending on Mar. 31, 1954, Sept. 30, 1954, and Mar. 31, 1955. The defendant did not admit that the water board had provided a supply of water to his premises and submitted that he was an inhabitant of the parish of Holne and that the water which he used at his premises was taken by him from a public conduit and other works used for the gratuitous supply of water to the inhabitants of the parish. On Mar. 17, 1955, His Honour JUDGE PRATT dismissed the water board's claim, holding that the board had not supplied water to the defendant's premises under s. 46 of Sch. 3 to the Water Act, 1945 (replacing s. 56 of the Public Health Act, 1875). The water board appealed.

Harold Willis, Q.C., and *H. S. Ruttle* for the plaintiff water board.

G. D. Squibb for the defendant.

Cur. adv. vult.

June 29. The following judgments were read.

DENNING, L.J.: In Devon there is a village called Holne, which has received its water for a great many years from a moor called Holne Moor on Dartmoor. There is a drowned mine on the moor called Ringleshute Mine. Water rises from the shaft of the mine and is then carried by an artificial channel

* The existing water undertakings were transferred to the South Devon Water Board on July 1, 1950, by the South Devon Water Order, 1950, of which art. 12 (2) provided that "the existing undertakings shall by virtue of this order be transferred to and vest in the board . . . and shall be carried on, used, exercised and enjoyed by the board for the purpose and according to the provisions of [certain local Acts and the order] in like manner (subject to those provisions) as they would or might have been carried on, used, exercised and enjoyed by the constituent authorities [i.e., the authorities from whom they were transferred] respectively if this order had not been made".

A down to the village of Holne. This channel is called the Ringleshute stream. It used at one time to carry the water to a collecting tank at the end of the village called Playcross. From this tank there was a two-inch main running along the village street. On this main there were three public standpipes from which the villagers could fetch water in buckets to their houses. None of the houses was then connected up with the main.

B In 1875 the whole of this water system became vested in the Totnes Rural District Council under the provisions of s. 64 of the Public Health Act, 1875, which said that:

C “All existing public cisterns pumps wells reservoirs conduits aqueducts and works used for the gratuitous supply of water to the inhabitants of the district of any local authority shall vest in and be under the control of such authority . . .”

In 1912 the stream was polluted and the rural district council determined to take steps to purify the water as the Act gave them power to do: for s. 64 said that the authority

D “may cause the same to be maintained and plentifully supplied with pure and wholesome water, or may substitute maintain and plentifully supply with pure and wholesome water other such works equally convenient . . .”

E In order to cure the pollution the rural district council determined to put in a tank and filter at a point in the stream some distance above Holne and to carry the water thence by a new three-inch main down to the village and into three standpipes in the village street. They made an agreement with the local land-owner who gave them permission for the work and they borrowed the money from the Public Works Loan Commissioners. They carried out the work and recovered the cost by a special rate charged on the inhabitants. The inhabitants thenceforward for a few years still took their water from the standpipes and not by F pipes leading into the houses.

In 1920 some of the inhabitants sought permission to connect up their houses by pipes to the three-inch main, and the rural district council gave them permission. Many of them have now done it, and from that time to this they have not paid anything for the water they have drawn through the pipes.

G In 1950 the South Devon Water Board took over the water undertaking from the Totnes Rural District Council, and the board now seek to charge a water rate on all the inhabitants of Holne who have connected up their premises with the main. The inhabitants claim that they are entitled from time immemorial to have their water free from the Ringleshute stream, and that this is so whether they fetch it in buckets from the standpipes or direct by pipes from the main. The board admit that they are entitled to take it free from the standpipes but H say that they must pay a rate if they connect up their houses with the main.

The board seek to justify the rate by reason of s. 56 of the Public Health Act, 1875, as now replaced by s. 46 (1) of Sch. 3 to the Water Act, 1945. Section 56 says that:

I “Where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises . . .”

Section 46 (1) says that

“Undertakers who supply water to any premises for domestic purposes may charge in respect thereof a water rate . . .”

The whole question depends, therefore, on whether the board “supply water to any premises” within the meaning of those sections. I think that they do. When the board collect the water into *their* tank and pass it through *their* filter

and thence into *their* main, the board thereby reduce the water into their possession; so much so that, if anyone tapped the main without their authority, the board would have sufficient property in the water to maintain larceny at common law: see *Ferens v. O'Brien* (1) (1883) (11 Q.B.D. 21). Seeing that the board have this special property in the water, it follows that, when they permit a householder to connect up his house with the main, they supply water to his premises and are entitled to charge a water rate for it. A

Counsel for the defendant argued that this water was all part of a supply to which the inhabitants were entitled free of charge. It was all covered, he said, by s. 64 of the Act of 1875 (as now replaced by s. 124 (1) of the Public Health Act, 1936): and s. 56 of the Act of 1875 (as now replaced by s. 46 (1) of Sch. 3 to the Act of 1945) had no application. The board, he said, could control the gratuitous supply to the inhabitants but could not charge for it. They could give or refuse permission to the inhabitants to connect up their houses with pipes, instead of using buckets, but could not charge for the water. B

I do not agree with this contention for the simple reason that s. 64 is only concerned, I think, with the supply of water C

“for the gratuitous use of any inhabitants who choose to carry the same away . . .” D

It does not apply to supply to houses through connecting pipes. This is shown by the final words of s. 64 and I do not think that s. 124 (1) of the Act of 1936 alters the position. I would therefore allow the appeal and hold that the board are entitled to charge a water rate to those householders in Holne who connect up their premises to the main. E

BIRKETT, L.J. : This was an appeal from a judgment of His Honour JUDGE PRATT given at the Newton Abbot County Court on Mar. 17 of this year. The South Devon Water Board had brought a claim against the defendant in order to settle a dispute between the board and the inhabitants of a village named Holne in the county of Devon. This dispute was of long standing and aroused considerable local feeling, quite understandable local feeling in the circumstances of the case. The defendant was really a representative defendant, and he asserted the right of the villagers to a supply of free water. Plans were before the learned county court judge and before this court, and an agreed statement of facts was put in. For a great number of years the village of Holne had received its water from the neighbouring moor through a leat, or open watercourse, called Holne Town Leat. For many years also the water had been brought to a collecting tank at a place called Playcross. From this tank a two-inch main was laid which ran along the village street. There were no private pipes connected with this two-inch main, but there were three public standpipes connected with the main at positions shown on the plans before us, and the villagers could come to these standpipes and take away such water as they required. Then in 1912 a three-inch main was laid and a tank and filter erected and the tank at Playcross was no longer used, and the three standpipes were connected with the three-inch main. In 1920 a pipe was laid by the Dawson Trustees to the three-inch main to give a supply of water to some cottages in Village Row and this was done with the permission of the Totnes Rural District Council. In 1926 the defendant's predecessor in title, without any permission being sought or obtained, laid a pipe to the Dawson pipe to give a supply of water to certain other cottages. F

Attempts had been made from time to time to charge the villagers for the water delivered to their premises by means of the pipes connected to the main; but the right of the villagers to take as much water as they want from the public standpipes free of all charge had never been challenged, and is not challenged now. The question to be decided is simply this: Can the board charge for the water delivered to the houses through the connecting pipes? or is the water the “gratuitous supply” referred to in s. 64 of the Public Health Act, 1875, G H I

A and subsequent statutes, e.g., s. 124 (1) of the Public Health Act, 1936 ? My Lord has already read the terms of the statute and it is to be observed that s. 64, dealing with the gratuitous supply of water, uses the important words

“ for the gratuitous use of any inhabitants *who choose to carry the same away . . .* ”

B Counsel for the defendant submitted that the laying of the three-inch pipe in 1912 and the erection of the tank and filter were the mere carrying out of the powers granted by s. 64 of the Act of 1875 “ substituting others equally convenient ”, to use the words of the section, and the legal position of the villagers was in no way affected, for the rural district council were merely substituting water in pipes for the water which had formerly come in the open leat. He

C further submitted that there was no distinction to be made between inhabitants who go to the public standpipes for their water and carry the same away, and those who obtain their water through a connecting pipe.

The South Devon Water Order, 1950, brought the plaintiff board into being, and the authority of the Totnes Rural District Council came to an end. By s. 56 of the Public Health Act, 1875, the rural district council were empowered

D to make a charge in respect of any water which they might supply to any premises. I do not think that any useful purpose would be served by a close examination of the various Acts and orders. For example, s. 46 (1) of Sch. 3 to the Water Act, 1945, is incorporated into the Order of 1950 but this s. 46 (1) merely reproduces s. 56 of the Act of 1875. The board have no more power

E under the order than the rural district council had under the Act. It would appear from the minutes of the parish council that in 1946 the rural district council did try to impose water charges on the inhabitants of Holne, but it would also appear that they withdrew their claim on legal advice. I agree with my Lord that the question we have to determine is the question the learned county court judge put to himself: Can the board on the facts of this case be said to be supplying water to the defendant's premises within the meaning of s. 46 of

F Sch. 3 to the Water Act, 1945 ?

The learned county court judge said that the word “ supply ” involved (i) bringing water to the consumer and (ii) bringing him water to which he would not otherwise be entitled. He held that the actions of the rural district council in 1912 did not involve either of those things, and that the actions of 1920 in

G making the connections did not involve the first. He held that the board were not entitled to charge this water rate and he entered judgment for the defendant.

In my opinion the distinction lies between the carrying away of the water from the standpipes, and the supply of water to the premises through the connecting pipes. I think, with great respect to the learned county court judge, that to make one of the elements of “ supplying ” that it must be “ bringing water to

H him to which he would not otherwise be entitled ” is to confuse the true issue. Nobody has ever denied the right of the defendant or any of the villagers to go to the public standpipes and carry the water away. The rural district council for many years, and the water board since 1950, have brought this water to the public standpipes. But when, instead of carrying the water away, the water is delivered to the defendant in his home through the pipes, it seems to me quite

I impossible to say that is not a “ supplying ” of water by the board, in the proper use of that word. The immemorial right to take and carry away the water from the public standpipes has tended to obscure the real issue in this case. For the main, the tank, the filter, the upkeep of the works generally are all necessary for the gratuitous supply to the public standpipes. But I am of opinion that, when pipes are laid to take the water from the board's main to the houses of the villagers, then the board can properly be said to be “ supplying ” and are entitled to make the charge which they have made in this case. I would allow the appeal.

ROMER, L.J. : It is agreed between the parties that at all material times before 1912 the villagers of Holne had the right to the free use of water which originated in the Ringlesthute Mine and passed from there down an artificial open leat to a tank in Playcross in which it was collected. From that tank there was a two-inch main running along the village street and this served three public standpipes. This supply constituted a "gratuitous supply of water to the inhabitants" of the village and accordingly the works used in connection therewith vested in and came under the control of the Totnes Rural District Council by virtue of s. 64 of the Public Health Act, 1875. Under the powers conferred by the same section the rural district council might

"construct any other such works for supplying water for the gratuitous use of any inhabitants who choose to carry the same away, not for sale, but for their own private use."

By the deed dated Jan. 5, 1912, and made between Mr. Richard Dawson of the one part and the Totnes Rural District Council of the other part, it was recited (inter alia) that the inhabitants of Holne had from time immemorial enjoyed the use gratuitously of the water hereinbefore referred to, that

"Ringlesthute Mine shaft and Holne Town Leat are stated to be vested in [the rural district council] for the purpose of supplying Holne with pot water",

that certain pollution had occurred and that, with a view to obviating it, the rural district council had submitted a scheme for laying a new water main, and that the Local Government Board had approved the scheme but had suggested that a formal agreement should be entered into with Mr. Dawson

"for the acquisition of such water rights (if any) as may be necessary in addition to those already vested in"

the rural district council. By the operative part of the deed Mr. Dawson granted to the rural district council first, the liberty and right of laying mains or pipes for carrying and conducting water for the benefit of the inhabitants of the village of Holne under certain lands of Mr. Dawson and secondly

"the liberty and right (if and so far as the grantees do not already possess the same and as the grantor has power to grant the same) of carrying water in by and through the mains and pipes aforesaid in such directions as the grantees may desire for the purpose of supplying water for domestic purposes to the inhabitants of Holne village and of inspecting maintaining cleansing repairing renewing and enlarging such pipes valves manholes and surface boxes as aforesaid and taking by means of such pipes water from the said Ringlesthute shaft and stream."

It would appear from this deed that the rural district council already possessed certain rights in relation to the water which emanated from the mine shaft and that certain further rights, somewhat indefinite in character, were being granted by the deed. It also appears that the rural district council was at that time putting forward the view that the shaft itself and the leat were vested in the council. It is clear, however, that such rights and interests as it already possessed in relation to the water and the shaft and the leat were only held by the rural district council for the purpose of facilitating the enjoyment by the villagers of their ancient right to use the water; and at the date of the deed of 1912 the inhabitants were exercising that right by means of the three public standpipes which the rural district council had provided in the village street.

Following the execution of the deed of 1912 the rural district council constructed a three-inch main, in substitution for the lower part of the open leat, into which the water was taken by means of a tank and filter. At the same time

A the tank at Playcross was discarded and there was laid in substitution for the two-inch main a three-inch main to which the three public standpipes were connected. These new or substituted works were presumably carried out by the rural district council in pursuance of the rights which it acquired from Mr. Dawson and under the authority which was vested in it by s. 64 of the Public Health Act, 1875.

B It is quite clear, in my opinion, that after 1912 the rural district council had no right—nor indeed did it claim any right—to levy any water rate on the inhabitants for the water which they took from the standpipes, notwithstanding that the pipes and the main which led thereto had been provided by the rural district council; for in carrying away the water for their own private use the villagers were merely exercising their immemorial right so to do in the only way that it was then possible for them to exercise it, namely, by taking the water from the standpipes. It is, however, important to notice that the water was being provided for the inhabitants to carry away and use; no water was being supplied to their premises.

C In 1920 the Dawson Trustees, who owned a row of cottages in the village, laid a pipe at their own expense to connect up with the three-inch main which served the standpipes in order to provide the cottages with water. They obtained the permission of the rural district council before doing so. In 1926 the defendant's predecessor in title, without obtaining the permission of the rural district council, laid a pipe at his own expense to connect with the pipe which had been laid by the Dawson Trustees; and the question now in issue is whether the Totnes Rural District Council became entitled to levy a water rate under s. 56 of the Public Health Act, 1875, on the defendant's predecessor in title in respect of the supply of water which he thus obtained to his premises and whether the plaintiff board, as successors to the rural district council, are entitled to levy such a rate on the defendant under s. 46 (1) of Sch. 3 to the Water Act, 1945. Section 56 of the Act of 1875 provided that:

F “Where a local authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises . . .”

Section 46 (1) of Sch. 3 to the Act of 1945 provides that:

G “Undertakers who supply water to any premises for domestic purposes may charge in respect thereof a water rate . . .”

G So far as the present controversy is concerned, the only issue, whether under the Act of 1875 or the Act of 1945, is whether the water which the premises of the defendant enjoy as a result of the connection which his predecessor made, is “supplied” by the plaintiffs.

H The defendant contends that the water which he receives into his premises is not “supplied” by the plaintiffs. The water, he says, is water which he is entitled to receive gratuitously as an inhabitant of the village of Holne and, although for practically the whole of its journey from the mine shaft, from which it emanates, it passes through works which are vested in the board, it is not supplied, but merely conveyed, by the board. His argument is that, on the passing of the Public Health Act, 1875, the matter became governed by s. 64 of the Act and that s. 56 of that Act therefore had no application; and that nothing has since happened to affect the position as it then existed, with the result that the board have no power to charge him with a water rate under s. 46 (1) of Sch. 3 to the Water Act, 1945.

I In my opinion these submissions of the defendant cannot be supported. It is true that the water which is conveyed from the mine shaft to the village has never been acquired by the board or their predecessors for their own absolute disposal. Nor indeed could it have been, in the absence of statutory authority, for they could only have acquired it subject to the villagers' immemorial right to

use it. The fact, however, that the board are not the owners of the water does not, in my judgment, in itself displace the operation of s. 46 of Sch. 3 to the Act of 1945. In the first place, the section is not in terms confined to water which has been acquired by and belongs to the undertakers and I see no sufficient reason for implying this qualification. Secondly, it seems to me that, in any case, the board do possess rights and interests in the water, albeit as trustees, in a sense, for the inhabitants of the village. As stated earlier, the recitals of the deed of 1912 indicate that the rural district council already had, or claimed that it had, such rights and interests; but, be that as it may, one of the recited objects of that deed was the acquisition by the rural district council of such water rights (if any) as might be necessary in addition to those already vested in the council and by cl. 2 of the schedule to the deed there was granted to the council (inter alia) the liberty and right of taking by means of the pipes therein mentioned water from the Ringlesthute shaft and stream. It would accordingly appear that, from at least Jan. 5, 1912, the rural district council had a sufficient property and interest in the water to entitle it to an injunction restraining its diversion or any abstraction of the water other than the use of the water by the villagers in exercise of their ancient rights.

A further reason, in my opinion, why the defendant's contention cannot be accepted is that the effective cause of a supply of water reaching the defendant's premises is the provision by the board of the pipes and main which they or their predecessors installed. It is true that the premises would not receive the water were it not for the mine shaft from which it emanates. It is equally true, however, that the water from the shaft would not be available for use at the defendant's house but for the board's pipes and mains which bring it there. It seems to me, therefore, that it is not an unreasonable distortion of language to say that the provision and maintenance of the board's works constitute a supply of water by the board to the defendant's premises.

For the above reasons, s. 46 of Sch. 3 to the Water Act, 1945, applies, in my judgment, to the position and the defendant is, therefore, liable to the water rate which the board are seeking to impose. I accordingly agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.*, agents for *Rossetti & Peppercorn*, Kingsbridge, Devon (for the board); *Smith & Hudson*, agents for *Harold Michelmore & Co.*, Newton Abbot, Devon (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

THOMAS BOOKMAN, LTD. v. NATHAN AND ANOTHER.

[COURT OF APPEAL (Denning, Birkett and Romer, L.J.J.), June 20, 1955.]

Landlord and Tenant—Lease—Assignment—Landlords' consent—Withholding of consent—Reasonableness—Prevention of creation of statutory tenancy—Seven and a half months of term unexpired—Intention of tenant and assignee.

B

A lease of a flat within the Rent Restrictions Acts prohibited any assignment of it "without the consent of the landlord, such consent not to be unreasonably withheld". Having bought a house of his own, the tenant agreed to assign the remainder of his term, seven and a half months, to an assignee who had been married recently and was living in a furnished room and who undertook to buy some of his furniture. On the landlords' refusing their consent to the assignment on the ground that it was "an attempt to assign the fag-end of a tenancy" and would "give to the assignee the statutory protection" which the tenant did not want, the tenant made the assignment. In an action for possession on the ground of breach of covenant brought by the landlords, the county court judge found as a fact that, in the making of the assignment, there was no intention of creating a statutory tenancy under the Rent Restrictions Acts, but that, as such a tenancy was a necessary consequence of the assignment, the landlords' consent to it had not been unreasonably withheld and there was a breach of covenant justifying an order for possession. On appeal,

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Held: the assignment ought to be regarded as a perfectly normal assignment, having regard among other factors particularly to the fact that there were seven and a half months of the term still to run, and in the circumstances the landlords had unreasonably withheld their consent and were not entitled to possession.

Swanson v. Forton ([1949] 1 All E.R. 135) and *Dollar v. Winston* ([1949] 2 All E.R. 1088, n.) distinguished.

F

Appeal allowed.

[**Editorial Note.** The Court of Appeal did not go to the length of deciding in the present case that, if an assignment is not prompted by an intention to secure for the assignee the benefit of the Rent Restrictions Acts at the end of the tenancy, therefore it cannot be an assignment to which a landlord can reasonably object on the ground that the assignment will have that consequence. ROMER, L.J., is careful to state (see p. 826, letter E, post) that this question did not have to be determined. The present case affords an illustration of an assignment which had nothing abnormal about it in the sense of neither being prompted by an ulterior motive nor having any special feature of fact, as a reasonably substantial period of the term remained unexpired.

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As to unreasonable withholding of consent to an assignment, see 20 HALSBURY'S LAWS (2nd Edn.) 349-352, paras. 421, 422; and for cases on the subject, see 31 DIGEST (Repl.) 420-427, 5491-5534.]

Cases referred to

- (1) *Swanson v. Forton*, [1949] 1 All E.R. 135; [1949] Ch. 143; [1949] L.J.R. 632; 31 Digest (Repl.) 426, 5527.
- (2) *Dollar v. Winston*, [1949] 2 All E.R. 1088, n.; [1950] 1 Ch. 236; 31 Digest (Repl.) 426, 5528.
- (3) *Lee v. Carter (K.), Ltd.*, [1948] 2 All E.R. 690; [1949] 1 K.B. 85; [1949] L.J.R. 7; 31 Digest (Repl.) 426, 5529.

I

Appeal.

The landlords brought an action in the Croydon County Court for possession of a flat, No. 21 Melbourne Court, Anerley Road, London, S.E.20, against

the two defendants on the ground that, in breach of covenant, the tenant, the first defendant, had assigned the unexpired portion of the term of his lease, comprising seven and a half months, to the second defendant without the landlords' consent. The defendants contended that the landlords' consent had been unreasonably withheld. His Honour JUDGE TUDOR REES on Mar. 31, 1955, found as a fact that there was no intention of creating a new statutory tenancy of the flat in effecting the assignment, but that its consequence was to give the second defendant such a tenancy as against the landlords at the termination of the lease and, therefore, that the landlords' consent to the assignment was not unreasonably withheld. He made an order for possession against both defendants. The second defendant appealed.

P. Panto for the second defendant.

J. E. S. Ricardo for the landlords.

DENNING, L.J.: In 1950 the plaintiffs, Thomas Bookman, Ltd., let a flat, No. 21 Melbourne Court, to a tenant, Mr. Nathan, for five years commencing from Aug. 1, 1950, at a rent of £6 14s. 9d. a month. That term would in the ordinary course of events expire on Aug. 1, 1955. In September, 1954, the tenant found a house and bought it because he wanted other accommodation for his family. He decided to assign the remainder of his lease which at that time had ten months to run. He looked in the newspaper and saw a Mr. Peter Diamond, the second defendant, advertising for rooms. He answered the advertisement and they had an interview. The second defendant agreed to take an assignment of the remainder of the lease, and he agreed to buy some of the tenant's furniture for £100. The tenant took up the references of the second defendant, which were all satisfactory. Then he applied in December, 1954, for the consent of the landlords to the assignment. The lease said the tenant was

"not to assign, transfer, underlet or part with possession of the said flat or any part thereof without the consent of the landlord, such consent not to be unreasonably withheld."

On Dec. 13, 1954, the tenant by his solicitors asked for consent, and the reply on Dec. 16 by the landlords was:

"In view of the fact that your client's tenancy expires in a matter of a few months, our clients are not prepared to grant their consent to an assignment, as this would appear to be merely an attempt to assign the 'fag-end' of a tenancy."

A few days later, on Dec. 20, 1954, they repeated their contention. They said:

"The sole purpose of the assignment is to give to the assignee the statutory protection which the assignor does not want and does not intend to get for himself."

So they refused their consent to the assignment. Notwithstanding the refusal, the tenant did assign to the second defendant, because he took the view that the landlords were unreasonably withholding their consent to the assignment. The question now is whether the landlords were justified in withholding their consent.

The matter came before the county court judge on a claim by the landlords for possession against the tenant and the second defendant on the ground that there had been a breach of covenant by the tenant. The important thing to notice is that, at the time when the request was made for consent, there were seven and a half months to run of the lease. The judge has found that, when the tenant assigned to the assignee, there was no intention or object of getting a Rent Restrictions Acts tenancy. The simple purpose was that the second defendant, the assignee, wanted accommodation. He was a young man recently married. He had been living in a furnished room with his wife. He parted with

A all his savings to get this flat and he paid full value for the furniture. He knew the lease had only seven and a half months to run but his hope was that at the end of the term he could arrange with the landlord to give him a new tenancy. The judge has found that that was his purpose. There was no purpose of creating a new statutory tenancy.

B The judge, however, said that he was not concerned with the object of the two gentlemen but with what the consequences were. He said that, having regard to the consequences, which would be that the landlords would be saddled at the end of the term with a tenant who would be protected by the Rent Restrictions Acts, the landlords did not unreasonably withhold their consent. Accordingly, he made an order for possession.

C There are two reported cases which have come before the court in which a landlord has been held to be entitled to withhold his consent. In *Swanson v. Forton* (1) ([1949] 1 All E.R. 135), there were only twelve days to run. In *Dollar v. Winston* (2) ([1949] 2 All E.R. 1088, n.) there were seven weeks to run. It was held in each of those cases that the landlord was entitled to withhold his consent because the object of the assignee was to get the benefit of a statutory tenancy: and the period was so short that it was not a normal assignment but an entirely abnormal one.

In the present case it seems to me on the judge's finding that there was a normal assignment with seven and a half months to run. The assignee had the simple purpose of entering into occupation for the seven and a half months in the hope thereafter of negotiating a new tenancy, but not with the object of getting a statutory tenancy, though that would indeed be the natural result.

E I think that the judge misdirected himself by saying that he had not to consider the object of the parties. The object of the assignment was a most important element to consider. It may not always be decisive. I can well imagine that, if there were an assignment of the last fortnight or three weeks of a term, a landlord could reasonably withhold his consent even though the parties had no intention in fact of creating a statutory tenancy.

F Here there is a respectable tenant against whom nothing has been said at all. There is no reason whatsoever, as far as I can see, for withholding consent except that the landlords want to select a new tenant themselves. They did not go into the witness-box to say why they wanted the premises. They did not say that they had a waiting list or that they intended to sell the premises or anything of that kind. For aught that appears, they simply wanted to let the flat to another tenant of their own choosing. They would not be able to get any more rent from such a tenant, because they would be limited to the standard rent. There seems to be no reason why they should refuse to have this tenant, the second defendant, when he will pay the same rent as anyone else. In my judgment the county court judge was wrong in holding that this was an abnormal assignment. I think it was a normal one and the landlord was not justified in refusing to assign. I would allow the appeal accordingly.

I BIRKETT, L.J.: I am of the same opinion. The real question in this case was whether the tenant could assign to the second defendant the unexpired portion of his term without the consent of the landlords: in other words, was the landlords' consent unreasonably withheld? If it was, then the tenant was entitled to make this assignment without their consent. That was the only issue fought before the county court judge. It has been a little difficult to appreciate all that must have been in the county court judge's mind. On the face of it this was a perfectly binding assignment. In the language which has been adopted in some of the cases, notably in *Swanson v. Forton* (1), it was a normal assignment as contrasted with an abnormal assignment on the face of it. There were seven and a half months unexpired of the term to go. Having got a house, the tenant was anxious to go into his house and be rid of the unexpired

portion. He had approached the landlords in that matter, though it would appear that the tenant wanted to sell some of his furniture and the landlords were not agreeable to that. Having seen an advertisement in the paper by the second defendant, the tenant got in touch with him. The second defendant was newly married and particularly wanted accommodation. He was ready and willing to pay £100 for certain furniture and willing to take over the unexpired portion of the term. He went into possession. The landlords' permission was asked but was refused. My Lord has read the correspondence showing the ground on which it was refused. It is quite plain from that correspondence that the landlords were saying "We refuse because the sole purpose of this assignment is to give the assignee the statutory protection which the assignor does not want". That was no doubt based on the passage which was cited in the correspondence from Mr. MEGARRY's book on the RENT ACTS. Mr. MEGARRY there deals with decided cases on the matter and says (7th Edn., at p. 179):

"Where a tenancy is subject to a provision against assignment without the landlord's consent, his refusal of consent may be reasonable if the assignment would instil into the contractual tenancy a capacity for producing a statutory tenancy which did not exist before . . ."

Secondly (*ibid.*):

"A refusal of consent to an assignment is also reasonable if the tenancy is nearly at an end (e.g., with but twelve days to run) and it is plain as a matter of fact, even though not of law, that in the absence of an assignment no statutory tenancy would arise, owing to the tenant being out of residence and most unlikely to return . . ."

Finally, on *Dollar v. Winston* (2) decided by ROXBURGH, J. (*ibid.*):

"Even if the contractual term has some seven weeks to run when permission to assign is sought, and the tenant is still in possession when he assigns the tenancy, the same principle applies if 'the sole purpose of the assignment is to give to the assignee statutory protection which the assignor does not want and does not intend to get for himself'."

It is fairly plain to me that, when this correspondence passed on this matter, those passages from MEGARRY were in the writer's mind. The further note of MEGARRY following those passages was this (*ibid.*, at p. 180):

"However, where this is not the object of the assignment, it is unreasonable to withhold consent (and there may be a withholding without an actual refusal) merely because the landlord wishes the choice of tenants to lie with him and not with the assignor, or wishes to obtain possession of the house."

Then he cites two cases which have been decided on those matters. It is a little difficult to understand quite what was in the judge's mind, because he was manifestly sympathetic to the second defendant and said that he would like to help him if he could. The judge then went on to say:

"This was not done for the deliberate purpose of creating a statutory tenancy, but it is not a question of intention but what would be the consequences of such an assignment to the landlords and what would be just to them."

Then a little later:

"Without the Acts, the landlords could have got possession next July. Is it right to penalise the landlords? How far can it go? It is impossible for me to say. One must look at all the circumstances and hardship to the tenant and to the landlords. Look at the *Swanson* case (1). The facts of this case would warrant me to say that the landlords' refusal to prevent a statutory tenancy arising was not unreasonable."

- A What appears to have been in the learned judge's mind was, because the tenant himself was not anxious at the expiration of his term to continue there, therefore no statutory tenancy would arise in that event, and therefore for the tenant to dispose of the seven and a half months' residue to the second defendant, which would mean that, at the end of the term, a statutory tenancy would arise in favour of the second defendant, was penalising the landlords in some way or other.
- B That situation was really dealt with by EVERSLED, L.J., in *Swanson v. Forton* (1) ([1949] 1 All E.R. at p. 141):

"It could not be suggested to be right that a landlord may always reasonably refuse his consent to an assignment (or an underlease) merely because his chances of dominion over his property at the end of the lease might thereby be enhanced or the chances of a continued right of personal occupation after the end of the term might be thereby diminished, for otherwise a landlord would, in effect, be justified in refusing his consent at any time to any assignment or any underletting of 'rent restricted' premises."

- C Therefore, I agree with what my Lord has said, that the county court judge in dealing with this matter has treated this assignment of the seven and a half months' term as being something abnormal, and as though it had as its purpose, not the mere assignment, but some further purpose either disclosed or not disclosed. I think myself it ought to be regarded as a perfectly normal letting, and that in all the circumstances of the case the landlords were not entitled to withhold their consent. It cannot therefore be said that they reasonably withheld their consent, as the learned county court judge seems to have found.
- E I would be in favour of allowing the appeal.

- ROMER, L.J.: I also agree. It seems to me that there are two distinct reasons why it cannot be said in the present case that the landlords' refusal of consent to the proposed assignment was reasonable. The first is that the only ground on which the landlords' solicitors refused to give their consent to the proposed assignment was that contained in the letter which my Lord has read, dated Dec. 16, 1954, in which they said that they would not grant their consent because the proposed assignment
- F

"would appear to be merely an attempt to assign the 'fag-end' of a tenancy."

- G That was the only ground they gave by letter and no further ground was suggested at the trial because no evidence was called on their behalf. That ground was negatived by the learned judge in express terms and, accordingly, was not a ground on which the landlords could rely. As they never suggested any other ground it appears to me that their refusal is therefore vitiated. The second ground on which I think it cannot be said that the consent was reasonably withheld was that the proposed assignment was a normal and not an abnormal assignment in the sense in which those phrases were used by LORD GREENE, M.R., in *Swanson v. Forton* (1), where he said in the course of his judgment ([1949] 1 All E.R. at p. 140):
- H

- "Nothing that I have said must be taken as applying to a case of what in the argument was sometimes referred to as 'normal assignment'. If that phraseology be adopted, the whole basis of fact in the present case is that the assignment proposed was an 'abnormal' one in that it was an assignment of the tail end of the term by the lessee, not for the purpose of conferring the right to occupy for the few remaining days of the term, but in order to enable the assignee to occupy thereafter under the Rent Restrictions Acts."
- I

It follows from the finding of the learned judge to which I have already referred, viz., that it was not the purpose of the parties to the assignment to attract the

operation of the Rent Restrictions Acts, that this suggested assignment was a "normal" one within the purview of what LORD GREENE says. I think the learned judge was in error in failing to appreciate that the assignment was a normal one, having regard to the unexpired residue of the term and as to the intention of the parties. As to that I would respectfully agree with what my Lord has said on the subject of the purpose or object that an assignor and assignee may have in mind. It seems to me that, if it is established that the object of the assignment is to enable the assignee to remain in occupation under the Rent Restrictions Acts, then it will almost inevitably follow that the landlord would be justified in withholding his consent, because the result of the assignment would be, and would be intended to be, to bring about what TUCKER, L.J., described in *Lee v. K. Carter, Ltd.* (3) ([1948] 2 All E.R. at p. 695) as: "a contractual relationship pregnant with future possibilities". On the other hand, it does not seem to me that it necessarily follows that a landlord can never reasonably refuse his consent where that object or purpose is not in the mind of the proposed assignor and assignee; because, as my Lord has pointed out, if a tenant and a proposed assignee know nothing about the Rent Restrictions Acts, and the assignor purports to convey the mere end of a contractual term to that assignee, the result would still be the same as though their object had been to attract the operation of the Acts, and the landlord would be subjected again to "a contractual relationship pregnant with future possibilities". I think that, in that case, the landlord might well be justified in refusing his consent, even though the application of the Acts formed no part of the object of the parties to the assignment. Usually it would be quite impossible for the landlord to find out, with reasonable certainty at all events, what object or purpose the intending assignor and the assignee had in mind. Therefore, it cannot always be said that the question of reasonableness or unreasonableness on the landlord's part depends on what is the object or purpose of the proposed assignment. In the present case the question does not really arise for decision, because on the two points to which I have already referred I am well satisfied that the consent here was unreasonably withheld, and I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Harry Rose* (for the second defendant); *E. B. V. Christian & Co.* (for the landlords).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A Re WOOL TEXTILE EMPLOYERS' MUTUAL INSURANCE CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), July 4, 8, 1955.]

Company—Winding-up—Costs—Taxation—Jurisdiction of chief clerk to registrar—Procedure to challenge jurisdiction—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 4 (3).

B On Jan. 13, 1949, a mutual insurance company purported to go into voluntary liquidation. On July 11, 1951, doubts having arisen whether or not the company had validly gone into liquidation, an order for its compulsory winding-up was made. On May 18, 1953, the liquidator, the Official Receiver, issued an originating summons joining as respondents representatives of the persons who might be regarded as being shareholders of the company at the date of the voluntary liquidation, and the Treasury Solicitor, to have decided who was entitled to the surplus assets. On Feb. 11, 1954, an order was made on the summons, and the costs of the liquidator and the respondents were ordered to be taxed as between solicitor and client and paid out of the assets of the company. The respondents lodged a bill of costs with the companies winding-up department. In accordance with the practice which had prevailed for the past sixty years and upwards the taxation was conducted by the chief clerk to the registrar in that department. On Dec. 16, 1954, on an attendance before the chief clerk, some of the respondents intimated that they proposed to challenge the jurisdiction of the chief clerk to conduct the taxation. The taxation proceeded *de bene esse*, and the registrar, having considered objections lodged by these respondents, made his certificate on Mar. 15, 1955. These respondents issued a summons to have the registrar's certificate taken off the file as invalid. To this summons the liquidator was made respondent.

E **Held:** (i) the said respondents were entitled to follow the procedure which they had adopted to have the present question decided.

F *Silkstone & Haigh Moor Coal Co. v. Edey* ([1901] 2 Ch. 652) followed.

(ii) there was no legal basis for the practice of the companies winding-up department under which the taxation of the costs had been conducted by the chief clerk, and, therefore, the chief clerk had no jurisdiction to conduct the taxation and the certificate must be taken off the file.

G **[Editorial Note.** The Companies (Winding-up) Rules, 1949, by r. 4 (3) confer on the registrar (companies winding-up) the powers of a taxing master of the Supreme Court, but no greater powers. A taxing master has no power to delegate the taxation of costs except to the limited extent conferred by the Taxation of Costs (Principal Clerks) Order, 1930, and the Bankruptcy Rules, 1952, r. 98, which do not extend to the present case. Accordingly the chief clerk, acting as the delegate of the registrar, had no jurisdiction to tax the bill, but the present case is not authority that the registrar could not have taxed it himself.

H As to the taxation of costs in a winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 727, para. 1462.

For the Companies (Winding-up) Rules, 1949, r. 4 (3), see 4 HALSBURY'S STATUTORY INSTRUMENTS 131.]

I Cases referred to:

(1) *Silkstone & Haigh Moor Coal Co. v. Edey*, [1901] 2 Ch. 652; 70 L.J.Ch. 774; 85 L.T. 300; 39 Digest 79, 924.

(2) *Re Defiant Cycle Co., Ltd.*, ante, p. 58.

Summons.

This summons was issued in the matter of the Wool Textile Employers' Mutual Insurance Co., Ltd., for an order (i) that the certificate dated Mar. 15, 1955, purporting to certify the costs to be allowed on taxation pursuant to an

order dated Feb. 11, 1954, be taken off the file as invalid and that it might be referred to the taxing officer under the winding-up rules to tax the costs of the action under the said order; or (ii) that objections of the applicants in the present summons to the taxation of the costs in the action under the order dated Feb. 11, 1954, might be allowed, and that it might be referred back to the registrar to vary his certificate accordingly. A.

The applicants in the present summons were respondents to an originating summons (which raised questions relating to the entitlement to the surplus assets of the said company) on which the said order dated Feb. 11, 1954, was made. B.

J. B. Lindon, Q.C., and Maurice Berkeley for the applicants.

M. J. Fox (with him *Raymond Walton*) for the respondent, the liquidator. C.

Cur. adv. vult.

July 8. **WYNN-PARRY, J.**, read the following judgment: The facts leading up to this summons may be shortly stated as follows. The company, which was a mutual insurance company, purported to go into voluntary liquidation on Jan. 13, 1949. In the course of the liquidation a doubt arose whether, having regard to certain provisions in the articles of association, there were any members at the date of the liquidation, and, therefore, whether the company had validly gone into liquidation. On July 11, 1951, I made an order for the compulsory winding-up of the company, and the Official Receiver became, and has remained, liquidator of the company. On May 18, 1953, an originating summons was issued by the Official Receiver, joining as respondents, in representative capacities, persons who might, according to what should be the true construction of the relevant articles of association, be properly regarded as shareholders of the company at the date of the voluntary liquidation, and the Treasury Solicitor, in whose interest it was to contend that there were no shareholders at all and therefore that the Crown was entitled to the available assets, a fund of approximately £20,000, as bona vacantia. On Feb. 11, 1954, I made an order on that summons declaring that the surplus assets were divisible between the persons who were entered on the register of members on Jan. 13, 1949, the date of the voluntary liquidation, in certain proportions. I also ordered that the costs of the Official Receiver, as applicant, and of the respondents should be taxed as between solicitor and client and paid out of the assets of the company. D.

In due course a bill of costs was lodged with the companies winding-up department on behalf of the applicants in the present summons, who were the respondents to the originating summons on which the order of Feb. 11, 1954, was made, other than Wormalds and Walker, Ltd., and the Treasury Solicitor. The taxation was conducted by the chief clerk to the registrar in the companies winding-up department, and on the occasion of an attendance before him on Dec. 16, 1954, the applicants' solicitors intimated that they proposed to challenge the jurisdiction of the chief clerk to conduct the taxation. The chief clerk very properly pointed out that such a point should be taken as a preliminary point, and I think it is a pity that such a course was not followed. In the event, the taxation proceeded de bene esse. E.

Certain items in the bill of costs were disallowed, either wholly or partially: objections were lodged by the applicants and answered by the registrar, who made his certificate on Mar. 15, 1955. In that certificate he says: F.

"I have reviewed my taxation with reference to the said objections and the grounds of my decision are stated thereon."

The whole matter, however, was argued before me on the basis that the taxation was conducted by the chief clerk, and indeed it is common ground that it has G.

A been the practice in the companies winding-up department for upwards of sixty years for the chief clerk to conduct taxations of costs.

On Mar. 28, 1955, the summons now before me was issued on behalf of the applicants, asking (as amended) (a) that the registrar's certificate be taken off the file as invalid or alternatively (b) that the objections of the applicants be allowed. At the hearing it was accepted that I should hear argument and give
B judgment on the question of jurisdiction, and that the rest of the summons should stand over to await that judgment.

Counsel for the Official Receiver (who is the respondent to the present summons) took a preliminary point as to the procedure adopted by the applicants. His point is put thus. If, as the applicants say, there has in fact been no valid taxation, then they should present their bill for taxation to the person who they say is the
C proper officer, namely, the registrar in the companies winding-up department. He, says counsel, would no doubt refuse the request that he should tax. Then the applicants should apply for a writ of mandamus directing him to conduct the taxation. Such a procedure, says counsel, would have procedural advantages. The Official Receiver, as respondent, is placed in an embarrassing position in having to conduct an argument on a point involving the practice of the companies
D winding-up department. If the suggested procedure had been adopted the registrar would have been represented by the Official Solicitor, and thus he could have been adequately heard in defence of the long-established practice of the companies winding-up department. Further, says counsel, the result of the present procedure must be that if the applicants succeed on the question of jurisdiction there cannot be an appeal, because, as I understand him, the Official
E Receiver could not properly be pressed to appeal on such a question as this.

I think that counsel's objections are more apparent than real. Although he appeared for the Official Receiver, I had the advantage of a full argument from him in support of the validity of the present practice, and whatever embarrassment may have been felt by the Official Receiver because of the procedure adopted, it did not communicate itself to counsel. Counsel was unable to cite any
F authority in support of his submission that the wrong procedure was adopted: on the other hand, in my view *Silkstone & Haigh Moor Coal Co. v. Edey* (1) ([1901] 2 Ch. 652) appears to me to indicate that the applicants are entitled to proceed as they have done. The headnote to that case reads as follows:

G "Under an order directing the taxing master to tax the plaintiffs' costs of an action, including the remuneration of the receivers and managers appointed in the action, and to certify the balance after deducting certain costs of the defendants, the taxing master has no power to make a separate certificate for the costs alone."

It was argued that that was a case where a person, the taxing master, clearly had jurisdiction to conduct the taxation: his fault was merely that he exercised that jurisdiction otherwise than in accordance with the established practice.
H But the judgment proceeded on the basis that he had no power, which to my mind is the same in the context as jurisdiction, and the court, taking this view, ordered that the certificate be taken off the file. I therefore overrule the preliminary objection and turn to consider the challenge to the jurisdiction.

In his opening, counsel for the applicants was at pains to say, and I myself desire to emphasise, that no criticism whatever can be levelled at the registrar or his chief clerk for taking the course which they did in this matter.
I In doing so they were doing no more than following a long-established practice, a practice which, as I have said, has obtained for upwards of sixty years. Indeed, I cannot see that they could have acted otherwise than they have. But as the jurisdiction of the chief clerk to conduct a taxation of costs is challenged, I must investigate the challenge. It does not matter that, as was recognised by the Royal Commission on the Civil Service in its 6th Report, published in 1915,

"in the Lunacy Masters' Office and the Companies Department the whole

work of taxation is performed by clerks, and, on the information before us, quite satisfactorily ”;

nor is it material that the practice has continued for so long. If no authority for the practice can be found in the relevant statute or statutory instrument, then there is no legal basis for it and the applicants must succeed.

As in the case of the jurisdiction in bankruptcy, the jurisdiction in the case of companies is entirely statutory and is to be found either in the relevant Companies Act or the Winding-Up Rules made pursuant thereto. For present purposes the relevant provisions are to be found in the Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), made pursuant to the Companies Act, 1948. Rule 1 contains the following definitions:

“ ‘ Judge ’ means in the High Court the judge who for the time being exercises the jurisdiction of the High Court to wind-up companies, and in any county court the judge thereof. ‘ Registrar ’ means in the High Court any of the registrars in bankruptcy of the High Court, and any person who shall be appointed to fill the office of registrar under these rules . . . ‘ Taxing officer ’ means the officer of the court whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction.”

These definitions are followed by this paragraph:

“ Unless the context otherwise requires words or expressions contained in these rules shall bear the same meaning as in the Act or any statutory modification thereof.”

Rule 4 (3) reads:

“ In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act, or by transfer, or otherwise, the registrar shall, in addition to his powers and duties under the rules, have all the powers and duties of a master, registrar, or taxing master.”

Rules 183 to 193 deal with taxation of costs, and provide in effect that taxation of costs is to be conducted by the taxing officer as defined in r. 1. It may be observed that under r. 188 it is the taxing officer who, on completion of the taxation, is to issue his certificate.

Before proceeding to construe the relevant provisions of the Companies (Winding-up) Rules, 1949, it will be desirable to consider quite shortly the previous history relating to the jurisdiction to conduct a taxation in the winding-up of companies. Rule 72 of the General Order and Rules made under the Companies Act, 1862, provided as follows:

“ Where an order is made in court or chambers for payment of any costs, the order shall direct the taxation thereof by the taxing master; except in cases where a gross sum in lieu of taxed costs is fixed by the order, in accordance with the 37th rule of the 40th of the Consolidated General Orders.”

There is no rule corresponding to r. 4 (3) of the Companies (Winding-up) Rules, 1949. It is clear, therefore, that under the General Order and Rules made under the Companies Act, 1862, the taxing masters had exclusive jurisdiction to conduct a taxation of costs in the liquidation of a company. It may be observed in passing that a taxing master has no power to delegate the conduct of a taxation, subject to the provisions of an order* of the Lord Chancellor dated Apr. 1, 1930, by which a very limited jurisdiction was conferred on principal clerks of the Supreme Court Taxation Office.

Rule 1 of the Companies Winding-Up Rules, 1890 (S.R. & O., Vol. for 1890, p. 232), introduced for the first time the definition “ taxing officer ”, which is in the same terms as in the Companies (Winding-up) Rules, 1949. These rules,

*Taxation of Costs (Principal Clerks) Order, 1930.

- A however, contained no provision similar to r. 4 (3) of the Companies (Winding-up) Rules, 1949, giving the registrar the same powers as a taxing master: nor did the Companies Winding-up Rules, 1892 (S.R. & O., Vol. for 1892, p. 49), so provide. The first mention that the registrar is to have all the powers and duties of a taxing master occurs in the Companies Winding-up Rules, 1892, the validity of which may be said to be doubtful, because they were not signed by the President of the Board of Trade.

In December, 1901, a rule of the Supreme Court was introduced, para. 1 of which reads as follows:

- C "There shall be amalgamated with the Central Office the following offices, namely: the Chancery Taxing Office; the Bankruptcy Taxing Office; the Taxing Department of the Office of the Masters in Lunacy; the Taxing Department of the Office of the Registrar in Companies Winding-up";

and para. 3 says:

- D "The two preceding rules shall come into operation as regards the Chancery Division on Jan. 11, 1902, and as regards the other offices mentioned at the dates hereafter prescribed by rules to be made under the Acts applicable to those offices."

The attempted amalgamation was abortive because the necessary rule under para. 3 was never made. The Companies (Winding-up) Rules, 1903 (S.R. & O. 1903 No. 1103), however, contain the definitions which I have read from the Companies (Winding-up) Rules, 1949, and r. 4 (3) of the Rules of 1903 and r. 4 (3) of the Rules of 1949 are the same. Thereafter all the Companies Winding-up Rules which have from time to time been promulgated up to the Companies (Winding-up) Rules, 1949, have contained similar definitions and have expressly conferred on the registrar the powers and duties of a taxing master.

- F It is against that historical background that I now turn to consider what will be seen to be a comparatively short question of construction, namely, what is the meaning of the phrase "taxing officer" in r. 1 of the Companies (Winding-up) Rules, 1949. He is defined as "the officer of the court whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction". The word "court" in that definition means, in my view, the Chancery Division of the High Court. This conclusion I think must follow from the provision at the end of the rule, the effect of which is that the word "court" in the rule is to have the same meaning as in the Companies Act, 1948. Section 455 defines "the court" as the court having jurisdiction to wind-up the company. Section 218 (1) provides that the High Court shall have jurisdiction to wind-up any company registered in England; and that jurisdiction is exercisable by the judges of the Chancery Division of the High Court.

- H It was argued by counsel for the Official Receiver that "court" in r. 1 meant the Companies Court. The phrase "Companies Court" is a modern term introduced into the forms made pursuant to the Companies Act, 1929, in place of the phrase in the previous forms "Companies Winding-up", in order to soothe the susceptibilities of those who desired to apply to the court for some relief in the case of entirely solvent companies (as, for instance, confirmation of the reduction of the capital of a company by the return of surplus capital to its members) and who disliked that the title to the necessary proceedings should contain a reference to winding-up. There is in fact no Companies Court separate and distinct from the court, viz., the High Court, on which jurisdiction in winding-up matters is conferred by the Companies Act, 1948. The phrase is only a convenient way of describing the relevant division of the High Court when exercising a particular jurisdiction, viz., the jurisdiction conferred on it by the Companies Act, 1948. This phrase "the Companies Court" was unknown when the earlier Winding-up Rules were introduced containing the definition of

"taxing officer" in the same language as in r. 1 of the Companies Winding-up Rules, 1949, and in my view no argument can be founded on it. A

There is a further objection to the argument of counsel for the Official Receiver on this point which he himself very fairly declared, and that is created by the qualification "whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction". The words "under its ordinary jurisdiction" point a contrast between that jurisdiction and the jurisdiction conferred by the Companies Act, 1948; but once that is appreciated it must follow that "court" cannot mean "Companies Court" or any court whose sole jurisdiction arises under the Companies Act, 1948. B

Now in the case of the High Court the person whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction can only be one of the taxing masters of the Taxing Office. The registrar is not included in the definition "taxing officer"; but by r. 4 (3) he is given the powers and duties of a taxing master, so that in effect for all purposes of the Companies (Winding-up) Rules, 1949, he is, or is in the position of, a taxing officer (see *Re Defiant Cycle Co., Ltd.* (2) (ante, p. 58)). I can find no ground for holding that he or any of his clerks have any greater jurisdiction than the taxing masters and their principal clerks in the matter of conducting taxations. It follows, therefore, that no legal basis exists for the practice which has for so long obtained in the companies winding-up department. C D

I come to this conclusion with regret. The practice had apparently worked well up to 1915, and so far as I know (and I speak, if I may say so, with considerable experience, both at the Bar and on the Bench, of the working of the department) the practice has worked well ever since: but what is to happen for the future is a matter of policy with which I am not concerned. If it is desired to validate and perpetuate the practice, no doubt that can be done by an appropriate statutory instrument. All I have to do is to decide the dry question of jurisdiction; and for the reasons which I have given I decide in favour of the applicants, and, following the course taken by BYRNE, J., in *Silkstone & Haigh Moor Coal Co. v. Edey* (1), I direct that the certificate of Mar. 15, 1955, be taken off the file. E F

Order accordingly.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the applicants); *Slaughter & May* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A **GOVINDAN SELLAPPAH NAYAR KODAKAN PILLAI v.
PUNCHI BANDA MUDANAYAKE AND OTHERS.**

[PRIVY COUNCIL (Lord Normand, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), March 16, 17, 18, 19, 23, May 11, 1953.]

B *Privy Council—Ceylon—Citizenship—Franchise—Validity of legislation as to qualifications for citizenship—Ceylon (Constitution and Independence) Order in Council, 1946 (as amended to 1947), s. 29 (2) (b)—Citizenship Act, No. 18 of 1948, s. 4, s. 5—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 4 (1) (a), as amended by Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949.*

C By the Ceylon (Constitution and Independence) Order in Council, 1946 (as amended), s. 29: “(1) Subject to the provisions of the order, Parliament shall have power to make laws for the peace, order and good government of the island. (2) No such law shall— . . (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable . . .”

D The appellant, an Indian Tamil living in Ceylon who was born in India, whose application to have his name entered on the register of electors was rejected on the grounds that he was not a citizen of Ceylon within the meaning of the Citizenship Act, No. 18 of 1948, contended that s. 4 and s. 5 of that Act (which laid down the qualifications necessary for a person born outside Ceylon to become a citizen of Ceylon), and the Ceylon (Parliamentary Elections) Order in Council, 1946, s. 4 (1) (a), as amended by the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 (which provided, inter alia, that no person should be qualified to have his name entered in any register of electors in any year if he was not a citizen of Ceylon), were ultra vires s. 29 (2) (b) of the Ceylon (Constitution and Independence) Order in Council, 1946, in that they imposed a disability or restriction on the Indian Tamil community in Ceylon.

F **Held:** the Acts in question were intra vires of the Ceylon legislature since the legislation concerned was legislation on citizenship, and it was a natural and legitimate function of the legislature of a country to determine the composition of its nationals; standards of literacy, of property, of birth or of residence were standards which a legislature might think it right to adopt in legislation on citizenship and did not create disabilities in a community as such, since the community was bound together by its race or its religion and not by its illiteracy, its poverty or its migratory character.

G Appeal dismissed.

[**Editorial Note.** In reaching their conclusion in the present case the Judicial Committee applied to the problem before them the same test as had been applied to determine the validity of legislation in Canada and Australia, viz., what was the pith and substance, the true character, of the legislation challenged (see p. 838, letter B, post). A consequence of the application of this principle in relation to provincial legislation in Canada has been that if the legislation challenged is truly within a description of legislative power ascribed to a provincial legislature it is immaterial that incidentally it affects a matter assigned to the central legislature (see 5 HALSBURY'S LAWS (3rd Edn.) 498). Regard is had to what is the true essential character of the legislation in issue. In reaching their conclusion, the Judicial Committee considered that, as regards evidence, they ought to take judicial notice of such matters as reports of parliamentary commissions and such other facts as should be assumed to be within the contemplation of the legislature when the legislation was passed (see p. 837, letter D, post).]

I As to the legislative power of parliaments within the commonwealth, see 5 HALSBURY'S LAWS (3rd Edn.) 474 et seq.]

Cases referred to:

- (1) *Ladore v. Bennett*, [1939] 3 All E.R. 98; [1939] A.C. 468; 108 L.J.P.C. 69; Digest Supp.
- (2) *A.-G. for Ontario v. Reciprocal Insurers*, [1924] A.C. 328; 93 L.J.P.C. 137; 130 L.T. 738; Digest Supp.
- (3) *Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna*, (1947), 74 L.R. Ind. App. 23; A.I.R. (34) 1947 Privy Council 60.

Appeal.

Appeal from an order of the Supreme Court of Ceylon, dated Sept. 28, 1951, granting a mandate in the nature of a writ of certiorari quashing an order made by the third respondent dated July 2, 1951, that the appellant's name be included in the register of electors for the Electoral District 84, Runwanwella, for the year 1950. The first respondent, Punchi Banda Mudanayake, was the assistant registering officer, the second respondent, Victor Lloyd Wirasingha, was the Commissioner of Parliamentary Elections and the third respondent, Namaswayampillai Sivagnanasunderam, was the revising officer. The facts appear in the judgment.

D. N. Pritt, Q.C., Frank Gahan, Q.C., S. Canagarayar and S. Amerasinghe (of the Ceylon Bar) for the appellant.

Sir Hartley Shawcross, Q.C., Sir Frank Soskice, Q.C., Dingle Foot, Q.C., W. Jayawardene (of the Ceylon Bar) and *P. B. D. Ashbrooke* for the respondents.

LORD OAKSEY : This is an appeal from the judgment of the Supreme Court of Ceylon dated Sept. 28, 1951, granting a mandate in the nature of a writ of certiorari quashing an order made by the third respondent dated July 2, 1951, that the appellant's name be included in the register of electors for the Electoral District 84, Runwanwella, for the year 1950. The issue for determination in this appeal is whether the Supreme Court of Ceylon were right in holding that s. 4 and s. 5 of the Citizenship Act, No. 18 of 1948 (hereinafter referred to as the Citizenship Act), and s. 4 (1) (a) of the Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 (hereinafter referred to as the Franchise Act), were valid, or whether, as contended on behalf of the appellant and as held by the third respondent (hereinafter referred to as the revising officer), these sections were made in contravention of s. 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

It is convenient to set out here the provisions of s. 29 of the Constitution Order in Council, s. 4 and s. 5 of the Citizenship Act and s. 4 (1) (a) of the Franchise Act. The Ceylon (Constitution and Independence) Order in Council, 1946, as amended, provided:

"29. (1) Subject to the provisions of the order, Parliament shall have power to make laws for the peace, order and good government of the island. (2) No such law shall—(a) prohibit or restrict the free exercise of any religion; or (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or (d) alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body. (3) Any law made in contravention of sub-s. (2) of this section shall, to the extent of such contravention, be void . . ."

The Citizenship Act provided:

"4. (1) Subject to the other provisions of this Part, a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon

- A by descent, if—(a) his father was born in Ceylon, or (b) his paternal grandfather and paternal great grandfather were born in Ceylon. (2) Subject to the other provisions of this Part, a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent, if—
- B (a) his father and paternal grandfather were born in Ceylon, or (b) his paternal grandfather and paternal great grandfather were born in Ceylon.

“ 5. (1) Subject to the other provisions of this Part, a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon. (2) Subject to the other provisions of this Part, a person born outside Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon and if, within one year from the date of birth, the birth is registered in the prescribed manner—(a) at the office of a consular officer of Ceylon in the country of birth, or (b) where there is no such officer, at the appropriate embassy or consulate in that country or at the office of the Minister in Ceylon.”

The Franchise Act, as amended in 1949, reads as follows:

- D “ 4. (1) No person shall be qualified to have his name entered or retained in any register of electors in any year if such person—(a) is not a citizen of Ceylon, or if he is by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to any foreign Power or State which is not a member of the Commonwealth; . . . ”

- E On Jan. 22, 1951, the appellant filed a claim in the prescribed form pursuant to the Ceylon (Parliamentary Elections) Order in Council, 1946, to have his name inserted in or retained on the register of electors for the Runwanwella electoral district. In a letter annexed to his claim, he averred that he was a resident in the said electoral district and had been so resident for a continuous period of over six months in the eighteen months immediately prior to June 1, 1950; that
- F he was, and had at the relevant period been, a British subject; that he was in no way disqualified to be an elector; and that his name had been included in the register prepared in the year 1949. His letter also included the following passages:

- G “ 9. I claim that the alternatives in the qualification to be an elector effected by Act 48 of 1949 are not valid and are of no effect in law inasmuch as the said Act was ultra vires the legislature.

“ 10. I claim that the qualifications to be an elector should be determined according to the Ceylon (Parliamentary Elections) Order in Council, 1946, without the same being modified or amended by Act 48 of 1949. According to the said Order in Council as unamended by the said Act 48 of 1949 I am qualified to be an elector.”

- H On Feb. 26, 1951, the first respondent, as assistant registering officer, held an inquiry into the appellant's claim at which the appellant gave oral evidence. In answer to the first respondent, he stated (*inter alia*) as follows:

- I “ I was born in British India. Both my parents and all my other relations were born in British India. All my wife's relations are in India except my brother-in-law, who lives with me. I have not sought registration under the Citizenship Act, No. 18 of 1948, or under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. I do not own any property in India . . . I do not own any property in Ceylon either.”

At the end of the inquiry, the first respondent made the following order:

“ I have rejected this claim as the [appellant] is not a citizen of Ceylon within the meaning of the Citizenship Act, No. 18 of 1948. . . . I accept the statements of fact made by the [appellant] before me at this inquiry.”

On Mar. 8, 1951, the appellant filed a petition of appeal to the revising officer praying that the order of the registering officer be set aside and that the appellant's name be included in the register of electors. By an affidavit dated May 15, 1951, the appellant deposed (*inter alia*) as follows:

"9. The vast majority of the present Indian immigrant population came to Ceylon long after the year 1852, and though a large number of the members of the community have been born in Ceylon yet their parents were not born in Ceylon. In the case of the Indian community, unlike in the case of the Singhalese and Ceylon Tamil communities, the fathers of the persons who belong to this community have not been born in Ceylon as immigration of Indian labour commenced only in 1852. Hence the Ceylon Citizenship Act, while it confers the status of a Ceylon citizen on all members of the Singhalese and Ceylon Tamil communities, fails to confer that status on by far the vast majority of the members of the Indian community settled in Ceylon."

The revising officer held an inquiry on May 16, 29 and 30, 1951, at which the appellant was represented by Mr. Advocate Nadesan and Mr. Advocate Kanagarayar, and the second respondent by the Attorney-General and Mr. Walter Jayawardene, Crown counsel. On May 16, Mr. Advocate Nadesan moved to file the appellant's aforesaid affidavit dated May 15, 1951. The Attorney-General objected, *inter alia*, to para. 9 thereof. He raised, however, no objection to the affidavit being filed provided that, if in the course of the argument it became necessary for him either to lead evidence or to file a counter-affidavit, he should be allowed to do so. Mr. Advocate Nadesan had no objection, and the revising officer accordingly admitted the affidavit subject to those conditions. Mr. Advocate Nadesan stated that he did not propose to call any evidence at this stage of the inquiry, and that it would be a matter of legal argument. No further evidence was called. At the resumed hearing on May 29, the Attorney-General tendered an affidavit dated May 28, 1951, sworn by the registering officer for the Runwanwella Electoral District, but did not contradict the allegations of para. 9 of the appellant's affidavit. On July 2, 1951, the revising officer gave judgment holding the Acts in question *ultra vires* on the ground that the Citizenship Act was in no true sense legislation to create the status of citizenship, but was, with the Franchise Act, part of a legislative plan to reduce the electoral power of the Indian community.

On July 16 the Attorney-General applied to the Supreme Court of Ceylon for a mandate in the nature of a writ of certiorari quashing the decision of the revising officer. The appellant tendered three affidavits sworn on Aug. 21, 1951, which purported to deal (*inter alia*) with the history of Indian immigration into Ceylon and the position of Indian residents under the Citizenship Act and the Franchise Act, but these affidavits were not admitted by the Supreme Court. The Supreme Court of Ceylon unanimously granted the application for certiorari and quashed the order of the revising officer, holding, firstly, that the evidence tendered to them ought not to be admitted and in any event was irrelevant; secondly, that a court should not search among State papers and other political documents for the substance or the true nature and character of an impugned statute without permitting the language of the statute to speak for itself where such language is clear and unambiguous; and, thirdly, that the statutes in question do not, on the face of them, make the Indian Tamil community liable to any disability to which other communities are not liable.

At their Lordships' Board, it was contended on behalf of the appellant that the Citizenship Act and the Franchise Act make persons of the Indian Tamil community, of which the appellant is a member, liable to a disability or restriction within the meaning of s. 29 (2) (b) of the Constitution Order in Council and are, therefore, *ultra vires*. It was conceded for the appellant that these Acts do not, on their faces, discriminate against the Indian Tamil community, but it

A was argued that they indirectly have that effect since, on the evidence before the court and as was conceded by the Attorney-General, a large number of Indian Tamils cannot become citizens of Ceylon because neither their fathers nor their grandfathers were born in Ceylon. It was further argued for the appellant that the Acts were what was called colourable, and that they disclose, when their pith and substance or their true character is ascertained, the intention of the legislature to do indirectly what admittedly it cannot do directly, namely, to make persons of the Indian Tamil community liable to a disability to which persons of other communities are not made liable.

B The appellant's counsel at first submitted that further evidence ought to be admitted as to the effect of the Acts on the Indian Tamil community, but in reply he expressly withdrew his application to introduce further evidence and no further evidence was referred to.

C In these circumstances, and in view of the admission before the revising officer of the affidavit of the appellant dated May 15, 1951, without objection, their Lordships do not find it necessary to decide if, and how far, evidence is admissible of facts which go to show the actual effect of an Act after it has been passed. It was common ground between the parties, and is, in their Lordships' opinion, the correct view, that judicial notice ought to be taken of such matters as the reports of parliamentary commissions, and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed (cf. *Ladore v. Bennett* (1) ([1939] 3 All E.R. at p. 101), and both parties have referred their Lordships to a number of paragraphs in the report of the Soulbury Commission of 1945.

D With much of the reasoning of the Supreme Court of Ceylon, their Lordships find themselves in entire agreement, but they are of opinion that there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that, in such circumstances, the legislation would be ultra vires. The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes. But the maxim omnia praesumuntur rite esse acta is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a statute which is, on its face intra vires, that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.

E It was argued that s. 4 and s. 5 of the Citizenship Act made it impossible that the descendants, however remote, of a person who was unable to attain citizenship himself could ever be able to attain citizenship in Ceylon no matter how long they resided there, but their Lordships' attention was subsequently drawn to the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, by which an Indian Tamil could, by an application, obtain citizenship by registration and thus protect his descendants, provided he had a certain residential qualification. It was suggested on behalf of the appellant that this Act might itself be ultra vires as conferring a privilege on Indian Tamils within s. 29 (2) (c) of the Constitution Order in Council and that, therefore, it was inadmissible to rebut the inference that the legislature had intended by the Citizenship and Franchise Acts to make Indian Tamils liable to disabilities within the meaning of s. 29 (2) (b), but their Lordships cannot accept this argument. If there was a legislative plan the plan must be looked at as a whole, and when so looked at it is evident, in their Lordships' opinion, that the legislature did not intend to prevent Indian Tamils from attaining citizenship, provided that they were sufficiently connected with the island.

The cases which have been decided on the British North America Act, 1867, and the Australian Constitution have laid down the principle which their Lordships think is applicable to the present case, although it is true that in those cases the question was as to the construction of legislative subjects assigned to the Dominion or Commonwealth Parliaments on the one hand, and to the legislatures of the provinces or States on the other, whereas in the present case the question is as to the construction of a constitutional limitation on the general sovereign power of the Ceylon legislature to legislate for the peace, order and good government of Ceylon. But, in their Lordships' opinion, the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged: see *A.-G. for Ontario v. Reciprocal Insurers* (2) ([1924] A.C. at p. 337), and *Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna* (3) (1947) (74 L.R. Ind. App. 23).

Is it in the present case legislation on citizenship, or is it legislation intended to make and making Indian Tamils liable to disabilities to which other communities are not liable? It is, as the Supreme Court observed, a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence are, as it seems to their Lordships, standards which a legislature may think it right to adopt in legislation on citizenship, and it is clear that such standards, though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, do not create disabilities in a community as such, since the community is not bound together as a community by its illiteracy, its poverty or its migratory character, but by its race or its religion. The migratory habits of the Indian Tamils (see para. 123 and para. 203, Soulbury Report) are facts which, in their Lordships' opinion, are directly relevant to the question of their suitability as citizens of Ceylon, and have nothing to do with them as a community.

For all these reasons, their Lordships have come to the conclusion that the Citizenship and Franchise Acts are intra vires of the Ceylon legislature, and they therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Lee & Pembertons* (for the appellant); *Burchells* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A BEST v. BEST.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 20, 21, July 1, 1955.]

Variation of Settlement—Ante-nuptial settlement—Adoption of child after marriage—Subsequent birth of child of marriage—Whether settlement ought to be varied to include adopted child—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 13 (2)—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.

By an ante-nuptial settlement made on Jan. 18, 1935, the husband brought into settlement investments and a life policy, and covenanted to pay the premiums on the policy. The whole of the income of the settled funds was payable to the wife during her life and after her death to the husband for his life; and after the death of both the husband and the wife the funds were to be held on trust for the issue of the marriage as the husband and wife should appoint and subject thereto on trust for the children of the marriage.

The husband and wife were married on Jan. 19, 1935. In June, 1945, by an order of a county court they adopted a boy, T. born in 1944. In 1947 a boy, A., was born to them. In December, 1954, a decree absolute was made, dissolving the marriage on the ground of the husband's adultery. The wife applied under s. 25 of the Matrimonial Causes Act, 1950, to vary the settlement by extinguishing all the rights, powers and interests of the husband as from the date of the decree absolute. Subsequently the wife issued a summons for maintenance claiming £2,000 a year for herself, £250 a year for A. and £500 for T.; the husband agreed to pay these sums. In his report on the wife's application to vary the settlement the registrar submitted that the application be dismissed. The wife applied to vary the registrar's report by (i) extinguishing the interest of the husband as though he were now dead, alternatively (ii) accelerating the interests of the child A. under the settlement and postponing the interests of the husband, and/or alternatively (iii) providing that the adopted child T. should benefit under the settlement as though he were issue of the body of the wife and of the husband. T. did not rank as a beneficiary under the settlement by virtue of the Adoption Act, 1950, s. 13 (2) (a),* since the adoption order was made after the date of the settlement.

Held: (i) proper provision had been made for the injured spouse and the children of the marriage and there was no reason either to extinguish the husband's interest or to accelerate A.'s interests and postpone the husband's, since to punish the wrongdoer was not the object of varying settlements.

Observations of LORD HANWORTH, M.R., and of HILL, J., in *Prinsep v. Prinsep* ([1930] P. at p. 47 and [1929] P. at p. 236) applied.

(ii) in the absence of any accompanying substantial pecuniary benefit to the child of the marriage it would not be proper for the sake of financial equality between A. and T. to cause A. to suffer the large financial sacrifice which would result from varying the settlement so that T. should benefit as if he were issue of the marriage; accordingly, the registrar's report would be confirmed and the wife's application dismissed.

[As to the principles relating to variation of settlements, see 10 HALSBURY'S LAWS (2nd Edn.) 803, para. 1280; and for cases on the subject, see 27 DIGEST (Repl.) 646, 6097, 6098.

For the Adoption Act, 1950, s. 13 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 477.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.]

* The terms of s. 13 (2) of the Adoption Act, 1950, are printed at p. 842, letter B, post.

Cases referred to:

- (1) *Prinsep v. Prinsep*, [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; *varying*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; 27 Digest (Repl.) 643, 6059.
- (2) *Atkins v. Atkins & Urquhart*, [1913] P. 211; 83 L.J.P. 18; 109 L.T. 640; 27 Digest (Repl.) 642, 6046.
- (3) *Webster v. Webster & Williamson*, [1926] P. 198; 95 L.J.P. 97; 135 L.T. 670; 27 Digest (Repl.) 642, 6047.
- (4) *Scollick v. Scollick*, [1927] P. 205; 96 L.J.P. 96; 137 L.T. 485; 27 Digest (Repl.) 642, 6048.
- (5) *Newson v. Newson*; *Tagart v. Tagart & White*, (1934), 151 L.T. 159; 27 Digest (Repl.) 642, 6049.
- (6) *Garforth-Bles v. Garforth-Bles*, [1951] 1 All E.R. 308; [1951] P. 218; 27 Digest (Repl.) 651, 6131.

Application to vary registrar's report.

The wife applied by notice to vary the report of Mr. Registrar KINSEY dated Mar. 22, 1955, whereby he submitted that her application to vary an ante-nuptial settlement be dismissed. The facts appear in the judgment.

P. Malcolm Wright, Q.C., for the wife.

D. Lloyd for the husband.

R. F. Ormrod for the child Anthony.

J. P. Comyn for the child Timothy.

Cur. adv. vult.

July 1. **KARMINSKI, J.**, read the following judgment: By an ante-nuptial settlement made on Jan. 18, 1935, the husband brought into settlement investments now worth approximately £4,000 and a policy of assurance on his life for the sum of £5,000 payable on Dec. 5, 1970, or on his previous death. The husband covenanted to pay the annual premium, now £143, on this policy, and this he has done. By the settlement the income from the whole of the settlement is payable to the wife during her life and after her death to the husband for his life, and

"After the death of the husband and wife the trustees shall stand possessed of the trust fund in trust for all or such one or more exclusively of the others or other of the issue of the said marriage whether children or remoter issue at such time and if more than one in such shares for such interests and with such trusts for their respective benefit and such provisions for their respective advancement (but during the lives or life of the husband and wife and the survivor of them only with their his or her consent) and maintenance and education and otherwise at the discretion of any person or persons and upon such conditions with such restrictions and in such manner as the husband and wife shall by any deed or deeds revocable or irrevocable jointly appoint and in default of and subject to any such appointment then as the survivor of them shall in like manner or by will or codicil appoint and in default of and subject to any such appointment in trust for all the children or child of the said marriage who being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares."

The parties were married on Jan. 19, 1935. On June 1, 1945, by an order made in the Trowbridge County Court they adopted a male child Timothy Gerald Best born on Dec. 7, 1944. On Oct. 7, 1947, there was born Anthony Arthur Best, a child of the parties and lawful issue of the marriage between them. On Dec. 3, 1954, the decree dissolving the marriage between the wife and the husband on the ground of the husband's adultery was made absolute. On Feb. 3, 1955, the wife by notice applied to this court to vary the above settlement by extinguishing all the rights powers and interests of the husband therein as

A from the date of the decree absolute. On Mar. 22, 1955, Mr. Registrar KINSEY reported on the wife's application and submitted, inter alia, that the wife's application be dismissed. On Apr. 1, 1955, the wife gave notice asking to vary the registrar's report by

B " (i) extinguishing the interests of the [husband] under the said settlement as though he were now dead; alternatively (ii) accelerating the interests of the child Anthony Arthur Best under the said settlement and postponing the interests of the [husband] thereunder; and/or alternatively (iii) providing that the adopted child Timothy Gerald Best shall benefit under the said settlement as though he were issue of the body of the [wife] and of the [husband]."

C When the application to vary first came before me it was clear that the interests of both the infants Anthony and Timothy were or might be seriously affected, and I adjourned the matter to enable them to be represented. On June 20, 1955, the matter came again before me, with counsel representing Anthony and Timothy. Prior to the hearing of the application to vary, the parties agreed to an order for the maintenance of the wife and of the two children at the rate of £2,000 per annum less tax for the wife during joint lives, for Anthony at the rate of £250 per annum less tax and for Timothy at the rate of £500 per annum less tax. The difference in the payments to the children was due solely to the fact that Timothy is now at a boarding school while Anthony is still at home. Though agreed, the order for maintenance has not yet been made, pending the decision of the application to vary. At the request of all the parties, including the infants, I now direct that the agreed order for maintenance be drawn up, E In the result, therefore, the wife will have for herself £2,000 per annum by way of maintenance and will also receive about £175 per annum, being the income from the settlement.

I wholly agree with the registrar's submission to dismiss the wife's application to extinguish the husband's rights powers and interests in the settlement. The husband earns a substantial gross income and has also an income from certain F family trust funds. Such capital as he has outside the settlement is effectively charged to his bankers in connection with certain business undertakings. Counsel for the wife did not press this part of his application, but pointed out that if the husband's rights were extinguished the interests of one (or of both) the infants would be accelerated. The position of the wife would not be improved, as she will in any event receive the income from the settlement during her life. Further G the funds of the settlement were wholly provided by the husband. It is a well-established principle that settlements ought not to be interfered with further than is necessary for the purpose of making proper provision for the injured spouse and the children of the marriage: *Prinsep v. Prinsep* (1) ([1930] P. at p. 47). In my view proper provision for both the wife and the children has already been made and no further provision is needed. Nor do I see any good reason for H accelerating the interests of Anthony and postponing those of the husband. Both the wife and the husband are now forty-three years of age, and there is no reason why one should be more likely to live longer than the other. If the wife survives the husband, any acceleration of Anthony's interests over those of the husband would be valueless. Having regard to all the circumstances of the parties as set out above, I do not think that the interests of Anthony need any I acceleration. On the other hand to postpone the interests of the husband would be to penalise him for his wrong-doing. To punish the wrongdoer is not the object of a variation of settlements: *Prinsep v. Prinsep* (1) ([1929] P. at p. 236).

There remains the third and most difficult part of this application, namely, that for providing that Timothy shall benefit under the settlement as though he was issue of the body of the wife and the husband. Anthony and Timothy have been brought up to regard each other as brothers in every sense, and I have no doubt that in all respects they have been treated with complete equality by

the wife and the husband and with equal affection. This part of the application proposed by counsel for the wife was of course warmly supported by counsel for Timothy. It was equally warmly opposed by counsel for Anthony. Counsel for the husband while desiring equality between the children appreciated the difficulties which might exist in law, and was unenthusiastically neutral.

The position of adopted children is now regulated by the Adoption Act, 1950. Section 13 (2) of that Act is as follows:

"In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person; (b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and (c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person."

The registrar submitted that Timothy is expressly excluded by the operation of that sub-section from taking a benefit under the settlement, since the adoption order in respect of Timothy was made after (and not before) the execution of the settlement. I would myself prefer to say that Timothy is not included in the settlement by the provisions of s. 13 (2) (a), a proposition at once accepted by counsel for the wife and counsel for Timothy. The latter rightly called my attention to s. 10 (2) of the Adoption Act, 1950, which states:

"In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them respectively in the same relation as to a lawful father and mother respectively",

and argued that this should form the background to s. 13 (2). The "matters aforesaid" in s. 10 (2) refer to custody, maintenance and education of the adopted child and include the rights of consent or dissent to marriage. I accept that the general tenor of the Adoption Act, 1950, is to put adopted children as nearly as possible in the position of children of the marriage, especially where the adopters are husband and wife. It remains clear, however, that the Adoption Act, 1950, does not bring into a will or settlement a child adopted after the execution of such will or settlement.

Both counsel for the wife and counsel for Timothy urged that the powers of the court created by s. 25 of the Matrimonial Causes Act, 1950, should be used to vary the settlement so as to bring a benefit to Timothy. By that section the court is empowered to make such order as it thinks fit: but it was conceded that the use of so wide a power must be made in the exercise of judicial discretion. It was not suggested that there was any financial quid pro quo for Anthony, unless his interest was accelerated. For the reasons given above I do not think it right in the present case to postpone the husband's interest or to extinguish it. Counsel for Anthony argued that Anthony was being asked to give up the half of £9,000 without compensation. Counsel for the wife and counsel for Timothy contended that the benefit of Anthony would be personal but not financial, and would preserve the true relationship with one whom he regards at present as an elder brother. Emphasis was laid on the need to preserve at least

A a feeling of equality between these two boys. Counsel for Timothy conceded that there would be great difficulties in his way but for a line of authorities decided under earlier enactments* relating to variation, enactments which have now been re-enacted by s. 25 of the Matrimonial Causes Act, 1950. These authorities have made it clear that the court can vary a settlement by creating a power enabling children of a future second marriage to share in the benefits of the
B settled fund if the existing child or children of a first marriage gain concurrent advantages.

Some examination of these authorities is necessary. In *Atkins v. Atkins & Urquhart* (2) ([1913] P. 211), SIR SAMUEL EVANS, P., confirmed a registrar's report extinguishing all the interests of the respondent (wife) in the settled funds and inserted a power enabling the petitioner on any future marriage to settle interests
C in three-fourths of the fund on any future wife and the children of any future marriage, but providing that the child of the existing marriage should never take a less share than he would have taken under a settlement declaring a trust in favour of all the children, not exceeding four, of the petitioner by any marriage in equal shares. In that case the President is not reported as having given any reasons for his judgment, but counsel for the infant child of the marriage expressed
D the view that the child of the marriage was put in a better position by the proposed variation than he was before. It will be noted that in that case the child of the marriage benefited by the extinction of the respondent's interests. In 1926 HILL, J., expressed doubts whether or not the court ought to create a new power not contemplated by the settlement but stated that even if he had power he did not think that he ought on the facts of that case to exercise it;
E *Webster v. Webster & Williamson* (3) ([1926] P. 198). In 1927 Hill, J., in *Scollick v. Scollick* (4) ([1927] P. 205) reconsidered the general principles and varied a settlement by creating a fresh power of appointment enabling the children of a future second marriage to share in the settled funds. HILL, J., dealt with the general principles in the following terms (*ibid.*, at p. 209):

F "It must always be in the interest of a child, if she has half-brothers and half-sisters, that she should not be in some superior position in her expectations to them. I do not think that that is an important consideration. But unless there is some pecuniary interest I do not think I ought to interfere on that ground taken by itself. Here it must be very much to the benefit of the child that while she is growing up she should be secured with proper main-
G tenance and good education, even at the sacrifice of some portion of a fund, which may in fact not come actually into her possession for many years. That being so, I think it would be pedantic to pay too close a consideration to the question whether the original settlement contemplated a power of appointment such as is now proposed to be introduced. The case is unlike
H *Webster v. Webster* (3) because in that case, apart from what has been spoken of as the sentimental side of the question, the proposed alternative would have been all money lost to the child. It was difficult to see any real quid pro quo of any sort in that case."

The earlier authorities were fully reviewed by SIR BOYD MERRIMAN, P., in *Newson v. Newson*; *Tagart v. Tagart & White* (5) (1934) (151 L.T. 159). In
I *Newson v. Newson* (5) the President introduced a new power of appointment for the benefit of an after-taken spouse and the issue of a future marriage, after being satisfied that the existing child would be compensated for any future loss by the guarantee of substantial advantages. In that case the interests of the child of the marriage were accelerated by the extinction of his father's interests in his mother's fund and of the mother's interests in his father's fund. In addition the father proposed to make an arrangement by which the child would

* Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, 11 HALSBURY'S STATUTES (2nd Edn.) 832, which re-enacted the Matrimonial Causes Act, 1859, s. 5.

take a substantial share of the income in his fund on falling into possession and the mother agreed to a like provision. Further his grandmother was prepared to covenant to provide for maintenance and education. In *Tagart v. Tagart & White* (5), the President refused to insert in the settlement a clause giving power to the petitioner to appoint an interest to an after-taken wife or the children of such a future marriage, on the ground that such a variation was not for the benefit or advantage of the children of the dissolved marriage.

Both counsel for the wife and counsel for Timothy relied on certain observations of PEARCE, J., in *Garforth-Bles v. Garforth-Bles* (6) ([1951] 1 All E.R. 308). In that case the husband respondent had brought into settlement substantially all he possessed. There was one child of the marriage and on the variation proceedings the husband applied to extinguish the interests of the wife in his fund and the wife applied to extinguish the husband's interests in her fund. Both agreed on this variation but the husband also asked to revoke the trusts of the settlement in respect of half his fund and to appoint that half or any part of it to an after-taken wife or to the issue of an after-taken marriage. PEARCE, J., held that the removal of both prior life interests in the fund was itself a substantial benefit to the child; he further held that if the husband's application to revoke was refused the relationship between himself and the child might be strained and that such a strain might be more disadvantageous to the child than the retention of the whole of her interests. In the result PEARCE, J., made an order allowing the husband to remove two-fifths of the fund. PEARCE, J., was careful to point out (*ibid.*, at p. 310) that although the child of the marriage would probably have been appointed by the husband in any case to the whole of his fund she (the child) was assured by the variation that no part of the fund would be appointed to her children. It is true that PEARCE, J., laid more emphasis on the importance of the personal relationship between father and child than any of the earlier judgments to which I have been referred; but it is important to note that he emphasised also the material benefits which the child would receive under the variation.

Counsel for Anthony emphasised that in none of the reported authorities had the power to appoint to a future spouse or to the children of a subsequent marriage been given on sentimental or personal grounds alone. In all the authorities to which I was referred the variation was accompanied by a substantial monetary benefit to the child or children of the marriage. I can well understand the desire of the wife in the present case to put these two boys on an equality in respect of financial matters, since to do so would at least remove any feeling of future inequality between them. In my view, although I fully appreciate the importance of this argument, I feel myself unable to obtain equality of this kind at the price of so large a financial sacrifice on the part of Anthony. It may be that it will be possible for the husband to make some provision for Timothy by way of a policy of assurance, but that is a matter outside the questions before the court. I have come to the conclusion that that part of the report of the learned registrar submitting that the application of the wife to vary should be dismissed, is correct.

Order accordingly.

Solicitors: *Baileys, Shaw & Gillett* (for the wife); *Pontifex, Pitt & Co.* (for the husband); *Official Solicitor* (for the child Anthony and the child Timothy).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A O'SULLIVAN (VALUATION OFFICER) v. ENGLISH FOLK DANCE AND SONG SOCIETY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.J.J.), June 21, 23, 24, 27, 1955.]

Rates—Exemption—Fine arts—Purposes of the "fine arts" exclusively—Society for preservation and promotion of folk dances, songs, and music—Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.

B The English Folk Dance and Song Society was incorporated under the Companies Act, 1929, and its objects, as set out in para. 3 of its memorandum of association, were, among other things, "(a) To preserve English folk dances and songs and other folk music (including singing games), to make them known and to encourage the practice of them in their traditional forms. (b) To promote the knowledge and practice of English folk dances, songs and music by means of schools, classes, examinations, lectures, demonstrations, festivals and other like methods. (c) To promote and encourage research into and study of the origins, development and traditional practice of English folk dances, songs and music and their relationship with those of other countries." The activities of the society included examinations for proficiency in folk song and dance and the award of certificates; publications about folk song and dance; the employment of teachers to hold classes at which folk dances and songs were taught; and the holding of dances, "at homes", holiday courses in folk dancing and song, demonstrations of folk dancing, and recitals of folk song and folk music. In the course of its activities the society did not attempt to create anything and then to present it for appreciation, nor did it claim to appeal to the mind or to the faculty of taste, or to attract the aesthetic sense of an audience. In the case of folk dances, the society endeavoured to teach the dancer to execute spontaneous movements said to be expressive of natural or ritualistic physical impulses. The folk dances which the society encouraged people to dance in their traditional form included country dances such as "Sir Roger de Coverley" and square dances such as "The Lancers", and the folk music included singing games such as "Gathering nuts in May" and "Here we go round the mulberry bush". The society claimed to be exempt from the payment of rates by virtue of s. 1 of the Scientific Societies Act, 1843,* on the ground that it was instituted for purposes of science and the fine arts exclusively. The society contended that the objects set out in para. 3 (c) were purposes of science, and that those in para. 3 (a) and (b) were purposes of the fine arts but not that the latter were purposes of science.

H **Held:** the society was not a "society instituted for purposes of science . . . or the fine arts exclusively" within the meaning of those words in s. 1 of the Scientific Societies Act, 1843, because the folk dance and song which the society was instituted to preserve and encourage was not a form of expression that constituted a fine art; accordingly the claim to exemption from rates failed.

I Per JENKINS, L.J.: I am prepared to treat the fine arts as including, e.g., poetry, eloquence and music as well as such arts of design as painting, sculpture or architecture . . . It is possible that dramatic art also should be included . . . I see no justification for holding that dancing can never rank as a fine art. Ballet perhaps affords an example of a dancing fit to be recognised as a fine art (see pp. 857, 858, post) . . . whether the society was instituted for the purposes of the fine arts exclusively is a question of law (see p. 859, letter E, post).

Appeal allowed.

[**Editorial Note.** Apart from the decision expressed above the court had before them a contention of the valuation officer that the society was not entitled

* The section is set out at p. 846, letter I, post.

to exemption because it was not supported wholly or in part by annual voluntary contributions, since the members, who contributed, got material advantages in the form of rights of attendance at dances, festivals, etc., at prices lower than those charged to the public. The court did not decide this point but SIR RAYMOND EVERSHERD, M.R., said (p. 853, letter I, post) that as at present advised he was not prepared to accept the view that a subscription ceased to be a voluntary subscription merely because, as a part of the rights of membership, the subscriber might obtain some privilege which could be said to have a monetary value, or the deprivation of which entitled him to claim compensation expressed as a monetary loss or as damages.

As to the exemption of fine arts societies from rates, see 21 HALSBURY'S LAWS (2nd Edn.) 12, para. 26; and for cases on the subject, see 38 DIGEST 493-499, 485-540.

For the Scientific Societies Act, 1843, s. 1, see 14 HALSBURY'S STATUTES (2nd Edn.) 7.]

Cases referred to:

- (1) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q.B. 809; 67 L.J. Q.B. 540; 78 L.T. 441; 62 J.P. 357; 38 Digest 499, 540.
- (2) *Nonentities Society v. Linley (Valuation Officer)*, (1954), 47 R. & I.T. 426; 3rd Digest Supp.
- (3) *Battersea Metropolitan Borough v. British Iron & Steel Research Assoc.*, [1949] 1 K.B. 434; [1949] L.J.R. 646; 2nd Digest Supp.
- (4) *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, 525.

Case Stated.

This was a Case Stated by the Lands Tribunal (SIR WILLIAM FITZGERALD, President, and C. H. BAILEY, Esq.) pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, for the decision of the Court of Appeal.

The respondent, the English Folk Dance and Song Society, which was incorporated under the Companies Act, 1929, as a company limited by guarantee, was the owner and occupier of premises known as Cecil Sharp House, 2 Regent's Park Road, London, in the metropolitan borough of St. Pancras rating area. On Sept. 29, 1952, the appellant valuation officer made a proposal that the hereditament should not be exempt from rates under the Scientific Societies Act, 1843, s. 1, and that it should be assessed at a gross value of £1,300 and a rateable value of £1,080. The society objected, and the valuation officer appealed to a local valuation court for North-East London. On Jan. 27, 1953, the valuation court dismissed the appeal, and the valuation officer thereupon appealed to the Lands Tribunal. On Oct. 21, 1953, the Lands Tribunal dismissed the appeal. The facts are fully stated in the judgment of SIR RAYMOND EVERSHERD, M.R.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the appellant, the valuation officer.

C. P. Harvey, Q.C., and *A. C. Goodall* for the respondent, the English Folk Dance and Song Society.

SIR RAYMOND EVERSHERD, M.R.: The question in this appeal is whether the English Folk Dance and Song Society is, as it was held to be by the Lands Tribunal and the local valuation court, entitled to exemption from rates in respect of the premises known as Cecil Sharp House in Regent's Park Road, London, which the society owns and occupies. The claim to exemption is based on s. 1 of the Scientific Societies Act, 1843. The terms of the section, so far as relevant (for in certain respects there is no question that the society complies with its terms) are:

"No person or persons shall be assessed or rated . . . in respect of any land, houses, or buildings . . . belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner . . . provided that such society shall be supported wholly or in part by annual voluntary contributions . . ."

A The case comes before us on a Case Stated in which all the facts found, or given in evidence, are set forth. Out of respect for the arguments, and so as to make this judgment intelligible, I will, however, refer to certain of the paragraphs in the Case. Paragraph 9 sets out the objects of the society, which are taken from para. 3 of its memorandum of association. The first five sub-paragraphs of para. 3 of the memorandum are:

- B “(a) To preserve English folk dances and songs and other folk music (including singing games), to make them known and to encourage the practice of them in their traditional forms. (b) To promote the knowledge and practice of English folk dances, songs and music by means of schools, classes, examinations, lectures, demonstrations, festivals and other like methods. (c) To promote and encourage research into and study of the
- C origins, development and traditional practice of English folk dances, songs and music and their relationship with those of other countries. (d) In furtherance of the above objects to promote, and co-operate in, demonstrations, festivals and other like performance of folk dances, songs and music of other countries, whether held in England or elsewhere. (e) Also in furtherance of the above objects to prepare and publish, issue and make use of, for sale, performance or otherwise, such books, journals, records, reports,
- D and other literature, and means and apparatus for the visual and mechanical reproduction of folk dances, songs and music as may seem desirable.”

The Case also sets out para. 3 (f) of the memorandum which relates to the making of instruments, and an argument was based on the proposition that, assuming that a particular instrument in general use is requisite for use also in folk dancing, the memorandum authorised (and it was, therefore, one of the purposes of the society) the making and selling of those musical instruments. In the event, however, I think that nothing turns on that particular matter and I shall pass it over. Another sub-paragraph in the memorandum (para. 3 (g)) related to subscriptions, but I will, for the moment, confine my citations to those parts of the Case which relate to the first part of s. 1 of the Act of 1843, the

- F purposes for which the society is formed.
- I can, therefore, pass to para. 11 of the Case which sets out the society's activities and shows that they include such matters as examinations, publications, records and films, the employment of teachers and the holding, at Cecil Sharp House and elsewhere, of dances, “at homes”, courses, exhibitions, demonstrations, recitals and festivals. There is also a reference made to the very
- G extensive, and I think valuable, library kept at Cecil Sharp House; and, finally, there is a reference to the competing by members of the society in such events as the annual eisteddfod. Paragraph 12 amplifies by way of example the previous paragraph, for it sets out a summary of the events of the year 1952-53, which shows that there were a number of “at homes” and dances at which
- H members, their guests, and other persons were present, and that courses were held. Also, since the year was Coronation year, there were particular festivities arranged for Coronation week. Paragraph 14 is of considerable importance and is as follows:

- I “Folk dancing has its origin either in the spontaneous expression of emotion on the part of the folk—that is, the whole population in a primitive community—or in some sort of ritual or religious act, or in both. In Europe it is mainly of religious pre-Christian origin and ritualistic in character, but most of it has changed gradually through the ages from a religious meaning into an art form. Its performance in its traditional form ought to be unselfconscious. Its technique is best acquired by repetition over a long period until in the words of Mr. Douglas Kennedy [the director of the society] ‘the mind as it were, is knocked silly and the body assumes its own status and responsibility for actual behaviour’. The reason for this is that, again in Mr. Kennedy's words, folk dancing ‘depends for its

finest expression on a bodily capacity to express, and one of the factors which operates most directly against this freedom of bodily expression is a conscious knowledge, or a conscious attempt at knowledge, of what the body is doing'. Folk dancing differs from ballet dancing in that the latter is almost impossible without a conscious technical appreciation of what is to be done, so that the ballet dancer does not depend on spontaneity but on disciplined capacity."

In para. 15 reference is made to the character of the dances comprehended by the term "folk dances". Particularly the phrase includes square dances, which appear to have been discovered as existing in the mountains of Kentucky. Reference is also made to a notable event, namely, the attendance of Her present Majesty (then Princess Elizabeth) at a square dance party in Canada in 1951, an event which gave enormous stimulus to the activities of the society. The paragraph goes on:

"The square dances practised by the society can, however, be quite recognisably distinguished from the rather more flashy square dances which have appeared on television, and which have been mainly of the variety danced (for example) at holiday camps. The society could not persuade the B.B.C. to show its variety on television, as the latter considered the society 'stuffy'. For some years the society co-operated with the B.B.C. on sound programmes connected with folk dancing, but recently the society has refused to continue this co-operation since in its view the broadcast programmes have concentrated too much on the purely entertainment element of folk dancing. Among the general public there has been a certain amount of confusion as to what is meant by the square dance, and the society's square dances are not what the ordinary person in the street would expect as a square dance. Since the recent popular fashion referred to above, the society's dances have been attended by a large mass of the public that is ephemeral. Such visitors are a little disappointed when they find that the dances performed differ from the commercialised versions of square dances and how staid the society's dances are. A few go off in haste, but most of them stay and have their money's worth, and have an evening when they can enjoy and learn something."

In para. 16 there is a reference to singing games:

"Singing games originated from the pre-Christian carol and usually contained a mixture of the drama, the mime, the playing of a game and a certain amount of dancing. They are part of folk tradition and were originally performed by grown-up people; but only fragments have survived, mainly preserved by children, of which fragments 'Roman soldiers', 'Gathering nuts in May' and 'Here we go round the mulberry bush' are examples. The society regards singing games as being of great interest as representing survivals of old rituals; in its early days it did a great deal of work in collecting them, and included them in its courses of instruction, particularly for school teachers at primary schools. It does not now itself teach singing games, but it has records of them and its teachers advise and help school teachers in connection with their teaching."

Paragraph 17* sets out the fact that the only method of preserving folk dances is by demonstration and teaching, as they are not susceptible to the ordinary notation of a musical score.

The conclusion of the Lands Tribunal on this point is expressed in para. 23:

"On the evidence before us we came to the conclusion that there was no reason why dancing, which is a form of expression similar to music, drama and painting, could not qualify for inclusion within the term 'fine

*Paragraph 17 is set out at p. 855, letter E, post.

A art ' and we were of opinion that the activities of the society as enjoined by the memorandum of association and as carried out by them were devoted to the purposes of the ' fine arts ' exclusively."

From the evidence given and recorded in the Case, it is possible to state, at least in negative form, certain characteristics of the society and its activities. Thus:

B (i) The activity or " art " (if it is properly so called) of folk dancing and singing is not in any sense creative. The painter creates a picture which remains to be seen, appreciated and judged. In the case of music there is the presentation by an orchestra or individual players of the composer's composition. In the case of folk dancing and singing the purposes of the society are, not to create anything and then present it for appreciation, but rather to encourage the performance by as many persons as possible of the old and traditional dances and songs in the old and traditional manner. (ii) The society does not claim to appeal to the mind, or even, as I understand, to the faculty of taste. The passages which I have read from the Case show the society's ideas to be that the dancer is so taught that he executes with his body, as far as is possible, spontaneous movements said to be expressive of natural or ritualistic physical impulses.

D The result may be pleasing or picturesque to the beholder but no claim is made to exhibit the beauties or graces of the human form. Artistic performances cannot be said to be the aim, still less the *raison d'être*, of folk dancing. The controversy with the British Broadcasting Corporation seems to show a repudiation on the part of the society of any claim to please or attract the aesthetic sense of an audience.

E In the circumstances I have been conscious, for my part, of an essential difficulty of formulation, namely, what is it in regard to folk dancing or singing which is said to be " a fine art " ? To that question the only possible answer seems to me to be the actual performance by the dancers or singers of the old traditional songs and dances, the characteristics and requisites of the execution of which being those which I have already recited. I have referred to the fine arts as one of the trilogy, in s. 1 of the Act*, science, literature and the fine arts. Literature

F has no relevance in the present case, but the society contended that it was, in part, instituted for the purpose of science, as that word should be understood in the Act. In support of this contention, counsel pointed to the considerable research undertaken into the origins of folk songs and dances and to the learning devoted thereto, and to the propagation of public interest therein. I must say that I feel grave doubt whether any activities of the society could be classified

G as scientific within the meaning of the section. It is not, of course, suggested that all such activities are scientific; and, in any event, it must be shown that the residue falls within the category of " a fine art "; for it is not to be forgotten that to obtain the exemption provided by the Act the society must be shown to be instituted for the purposes of science or the fine arts exclusively. Therefore, the remainder—the non-scientific part—of the society's activities must, in any

H event, be comprehended by the term " the fine arts "; or, to adopt the expansion of the language of the section used by A. L. SMITH, L.J., in *Royal College of Music v. Westminster Vestry* (1) ([1898] 1 Q.B. at p. 818), all such activities must be shown to constitute the advancement, dissemination or propagation of the fine arts, including the actual performance of the dances and songs themselves.

I The real question in the case, therefore, in my judgment, is whether the society's purposes, in so far as they are not—if, indeed, they are at all—scientific, can be said to be for the purposes of the fine arts. The expression " the fine arts " is one well known to, and recognised by, all users of our language. Treating the question as one of the impression made by such words on my own mind, and without the assistance of any dictionary definitions or of decided cases in the courts, I would say, unhesitatingly, that the society is not, according to my

* I.e., s. 1 of the Scientific Societies Act, 1843, the relevant terms of which are stated at p. 846, letter I, ante.

understanding of the language, instituted for the purposes of the fine arts. To take but one example (and if it be thought extreme it is to be remembered that the society must show itself "exclusively" so instituted), I cannot persuade myself that the performance, however faithful to tradition, by members of the society of the singing game, "Here we go round the mulberry bush", can sensibly be regarded as an exhibition of the fine arts. Having taken that example, I wish to make it quite plain that I am not to be taken to be casting any doubt whatever on the seriousness of the society's activities or the genuineness of its members' devotion to the society's pursuits, or, indeed, on the social value and utility of what the society does. No such denigration of its work can fairly be made of a society having so well-established a reputation as this society has, and having as its president so distinguished a musician as Dr. Vaughan Williams. The court, however, is concerned, not with social uses or values, but only with the narrow question whether the society is instituted for the purposes exclusively of the fine arts, or of science and the fine arts, within the meaning of the Act of 1843.

I am not restricted to my own understanding of the term because we were referred to the definitions found in well-known dictionaries. Thus, according to the SHORTER OXFORD ENGLISH DICTIONARY, the term "fine arts", which appears originally to have been a translation from the French "beaux arts", is:

"The arts which are concerned with 'the beautiful', or which appeal to taste. Often restricted to the arts of design, as painting, sculpture, and architecture."

Under the word "Art" in the same dictionary is found: "*Fine Arts*: those in which the mind and imagination are chiefly concerned". We were also referred to the following passage in the ENCYCLOPAEDIA BRITANNICA (7th Edn.):

"Fine Arts. The term Fine Arts may be viewed as embracing all those arts in which the powers of imitation or invention are exerted, chiefly with a view to the production of pleasure by the immediate impression which they make on the mind. But the phrase has of late, we think, been restricted to a narrower and more technical signification; namely, to painting, sculpture, engraving and architecture, which appeal to the eye as the medium of pleasure; and, by way of eminence, to the two first of these arts."

It appears that the entry which I have just quoted was from the edition published in the years 1830 to 1842 and was contributed by no less a master of our tongue than Mr. William Hazlitt. Having regard to the characteristics of the activities cultivated by the society as I have taken them from the evidence, they fall, in my judgment, outside even the broad definitions which I have cited. I do not forget the submission of counsel for the society that, whatever may have been intended by Parliament by its language in 1843, the terms used may fairly be shown to have been since expanded. I do not dissent from that view or say that the doors of the pavilion of fine arts were finally closed in 1843. Thus, there are many subjects of technique and research which can now be regarded as applied science, though they were not dreamed of in the philosophy of 1843. Similarly, it may be (though I do not so decide) that the art of photography, which in 1843 would have been, at most, a scientific curiosity, would in 1955, at least in some of its aspects, lay claim to be regarded as a fine art. There is, however, no finding here that at any time since 1843 folk dancing and singing have been accepted as among the company of the fine arts by the community generally or by the more educated and cultivated section of the community.

I turn now to decided cases, and it is clear that there is no authority directly bearing on the present question in the books. The cases may, I think, fairly be said to show that the fine arts are not now interpreted according to the more restricted definition of the plastic arts alone. Thus, music must now be

A taken as among the fine arts since the *Royal College of Music* case (1), which I have already quoted. In *Nonentities Society v. Linley (Valuation Officer)* (2) in 1954, this court had before it the claim to exemption of a society instituted for purposes of the drama and dramatic performance. In the event it was not necessary for this court to decide whether a society so constituted was instituted for the purposes of fine arts, for the court held that, in any case, the Nonentities Society failed to satisfy the later requirement in s. 1 of the Act of 1843 as to voluntary contribution. The majority of the court, however, were undoubtedly inclined to favour the view that the presentation, at any rate, of acknowledged masterpieces in drama would be within the term "fine arts". Thus SOMERVELL, L.J., said (47 R. & I.T. at p. 428):

C "Having come to that conclusion [that is, in regard to voluntary contributions] it is unnecessary to decide the other points, some of them very interesting points, which were raised. It was submitted on behalf of the valuation officer, in the first instance, that drama and dramatic art and the art of acting ought not to be regarded as a matter of law as within the words. It is quite true that the expression 'fine arts' is sometimes used to mean painting, sculpture, and, perhaps, architecture, but it is plain from the decisions that it cannot be regarded as so limited in this section. In a case* which is referred to in JENKINS, J.'s judgment [in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (3) ([1949] 1 K.B. 434)], music has been held to be within the words. I was not satisfied that it could possibly be said that drama and acting as a matter of law must be excluded from the ambit of the words in the section."

E BIRKETT, L.J., in like manner, said (47 R. & I.T. at p. 429):

F "I am not ready to accept the contention of counsel for the valuation officer that dramatic art cannot be included in the fine arts, or that the presentation of plays at a theatre may not qualify under the heading of literature. If, for example, a theatre produced plays like *Twelfth Night*, I think there might be a considerable argument on the matter."

ROMER, L.J., on the other hand, indicated a contrary opinion.

G The effect of the case to my mind is, however, to show that any addition to the class of fine arts which might otherwise be restricted to the plastic arts would have to be of activities showing a true analogy to the primary instances. At least, it is clear that there has been no case before the courts concerned with dancing. In the case of ballet dancing there would, as it seems to me (though I do not so decide), be substantial claims for it to be included in the class of fine arts which would not be available to folk dancing. On the other hand, to my mind it would, prima facie, offend the sense of propriety of language that a society formed for the purpose of cultivating the practice of modern ballroom dancing could bring itself within the section. Yet, the society's argument seems inevitably to involve that result when regard is had to the evidence which I have cited—or certainly to involve that result, if, instead of modern ballroom dancing, there were substituted, say, the more graceful ballroom dances of the eighteenth or nineteenth century. Counsel for the society, indeed, contended that a society for cultivating, amongst other things, what should be appreciated as good or bad in ballroom dancing would be within the section as a society constituted for the purposes of fine arts. I am not clear by what standard goodness or badness, in the example given, would be judged. I assume, however, that counsel intended an appeal to cultivated taste. Any such appeal seems to me to be expressly excluded and repudiated by much of the evidence given in the present case unless it be assumed that the standards of taste are necessarily satisfied by the mere antiquity of folk songs and folk dances. In any case, even if such a claim could possibly be justified in the case of the more austere aspects

* *Royal College of Music v. Westminster Vestry* (1).

of the society's activities, it must, as I have already more than once stated, be established that the society's purposes are exclusively those of the fine arts.

Finally, the view of the Lands Tribunal, which was expressed by them in para. 23 of the Case already read, seems to me to involve the acceptance of the claim, *prima facie*, that dancing is to be considered as one of the fine arts. If I may repeat the reference, it is:

"On the evidence before us we came to the conclusion that there was no reason why dancing, which is a form of expression similar to music, drama and painting, could not qualify for inclusion within the term 'fine art' and we were of opinion that the activities of the society as enjoined by the memorandum of association and as carried out by them were devoted to the purposes of the 'fine arts' exclusively."

If the premise is accepted, there is, no doubt, much to be said for the conclusion; but, with all respect to the Lands Tribunal, I am not prepared for my part to accept the premise. I do not think it possible to say that all dancing is, *prima facie*, within the term "fine art": nor can I agree with the correctness of the analogy in the words "... dancing, which is a form of expression similar to music, drama and painting...". In my judgment the references which I have made to the dictionaries and authorities confirm the impression of my own unaided mind, and I conclude accordingly that the society fails to satisfy the requirements of the statute to the effect that it is instituted exclusively for the purposes of the fine arts or of science and the fine arts.

In the result it is unnecessary to express any view on the second point raised by counsel for the valuation officer in the appeal, namely, whether, even if the society be treated as one instituted exclusively for the purposes of the fine arts, or of science and the fine arts, it is still not shown to be wholly or partly—that is, to any appreciable, relevant extent—supported by annual voluntary contributions. I must return to the Case to make some further references to the facts. Thus, it is shown by para. 10 of the Case that in March, 1953, the society had 3,600 full members, 7,350 associates, and 95 donor members or contributors, of whom (referring to the donor members) rather over one-third are also full members. Each year a full member or a donor member subscribes 25s. and an associate 7s. 6d. Then there are set out the privileges to which members are entitled; for example, free copies of the annual journal and participation, at favourable rates, in certain of the functions organised by the society—dances, "at homes", etc. In para. 12, to which I earlier referred, and which contains a summary of the events in the year 1952-53, there is shown in the case of the various activities, "at homes", dances, and so forth, what a member paid to participate as compared with the charges made for non-members and, as indicated, the members' charges were smaller than those made to strangers. It is said that in fixing the charges the society goes on the view that the dances, "at homes", etc., assuming that they are well attended, should pay their way on the footing that only members are present, and the result of making the additional charges to non-members is merely to increase the profits that are made for the general purposes of the society. The conclusion of the tribunal on those facts was this:

"24. We were further of the opinion that although the members of the society had certain privileges vis-à-vis non-members, this can be said of most learned societies. We considered that these privileges were only incidental to the main purposes of the society and did not debar it from claiming exemption under the section. 25. Finally we came to the conclusion that the amount of £7,000 odd out of a total income of £32,000 odd in 1952 was represented by subscriptions and donations of members [that, of course, meant annual subscriptions and donations] and that this was sufficient to enable us to come to the conclusion that the society conformed to the requirements of the provisions of s. 1 of the [Act of 1843] in that it was in part supported by annual voluntary contributions."

A The submission of counsel for the valuation officer, in opening the case, was that the ordinary subscribers could not be said to be voluntary contributors, since they got some material advantages from their membership, particularly the right to attendance at the dances and other festivals of the society at prices appreciably below the prices charged to outside members and the public. Counsel, accordingly, referred to and relied on *Savoy Overseers v. Art Union of London* (4). The headnote of that case reads ([1896] A.C. 296):

"A society is not 'supported by voluntary contributions' within the meaning of 6 & 7 Vict. c. 36 s. 1, when it returns to every contributor the equivalent of his contributions in money's worth. 'Voluntary' as there used does not mean not compulsory; it means gratuitous, without any money or other merely material consideration."

C It will be seen that the second sentence of the headnote appears to go considerably further than the first sentence. The two questions, namely, whether the society is one instituted exclusively for the purposes of the fine arts, and, second, whether it is supported in part by annual voluntary contributions, are necessarily somewhat inter-dependent, in that, on the one hand, the facts as regards the prices charged for the various functions tend in themselves somewhat to support the view that the cultivation of folk dances and singing is not, as such, a fine art. On the other hand, if the society is properly regarded as one instituted for the purposes of the fine arts, I am not, as at present advised (although, again, I do not so decide), prepared to say that it would be disqualified from exemption on the ground that the subscribers could not be said, on the grounds already stated, to be annual voluntary contributors. The basis, as I understand it, of the decision of the House of Lords in the *Art Union* case (4) was that the subscribers were there, in effect, making an investment. That is most clearly shown from the final paragraph in the speech of LORD HALSBURY, L.C. ([1896] A.C. at p. 306):

F "It hardly admits of debate that the Art Union gives to every subscriber full value for his money. The document published by the Art Union itself appears to establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to if not beyond the amount he has subscribed. I cannot therefore regard this as a voluntary contribution; it is a prudent and well-rewarded investment."

G Every member of a learned and scientific society gets, in the ordinary course, as counsel for the valuation officer conceded, some privileges—as an example, the receipt of the publications of the society. In truth, to my mind, the question is one of substance and degree, and for this purpose I am content to adopt the language of JENKINS, J., in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (3), where he said ([1949] 1 K.B. at p. 457):

H "This does not, however, mean that a subscription is prevented from being a voluntary contribution merely because it carries with it membership of the society and certain incidental advantages are conferred by membership. The substance of each case must be looked at to see whether the payments claimed to be voluntary contributions are, in substance, made as a matter of business, or as a matter of bounty."

I Being a matter of degree, the question, then, is *prima facie* one of fact. The difficulty in the present case is that, in the paragraphs which I have read, I do not find any such finding. In the circumstances, however, for reasons already indicated, I do not propose to express any opinion of my own. I say only that, as at present advised, I am not prepared to accept the view that a subscription ceases to be a voluntary contribution merely because, as part of the rights of membership, the subscriber may obtain some privilege which could be said to have a monetary value, or the deprivation of which entitles him to claim compensation expressed as a monetary loss or as damages. For the reasons which I have expressed on the first question, I think that this appeal must be allowed.

JENKINS, L.J.: The issue in this appeal is whether, as the Lands Tribunal has held, the society is entitled, in respect of its premises Cecil Sharp House, 2 Regent's Park Road, London, to the exemption from rates afforded by s. 1 of the Scientific Societies Act, 1843, to the premises of "any society instituted for purposes of science, literature, or the fine arts exclusively . . . provided that such society shall", amongst other conditions as to which no question arises, "be supported wholly or in part by annual voluntary contributions". It is contended on the part of the valuation officer (i) that the society is not instituted for purposes of science, literature, or the fine arts exclusively within the meaning of the section; and (ii) that, even if, contrary to his contention, the society is so instituted, it is not supported wholly or in part by annual voluntary contributions within the meaning of the section. If either of these contentions is well founded, the appeal must succeed, for in order to qualify for the exemption the society must satisfy both conditions.

The society was incorporated under the Companies Act, 1929, as a company limited by guarantee with the licence of the Board of Trade to dispense with the addition of the word "limited" to its name under s. 18 of that Act. The objects of the society as set out in its memorandum of association include those to which my Lord has already referred* and which I need not repeat. The facts as to membership of the society are summarised in para. 10 of the Case Stated by the Lands Tribunal. My Lord has also referred to the essential provisions of that paragraph† and I will not read it again. The society's activities are described in para. 11 of the Case, and, although my Lord has already referred to that paragraph, I may perhaps mention some of those activities. Paragraph 11 says: "The society's activities include the following", and then reference is made to examinations for proficiency in folk song and dancing and the award of certificates (sub-para. (a)). Then there are publications, records and films which are sold at a profit, although that profit is but an insignificant proportion of the total income of the society, a matter of £1,743 out of a total income of £32,000 odd (sub-para. (b)). Then it appears that the society employs teachers who hold classes at which folk dances and songs are taught, and they also adjudicate at competitions (sub-para. (c)). Then reference is made at considerable length (in sub-para. (d)) to the events promoted and organised by the society at Cecil Sharp House and elsewhere. I think it is noteworthy that the list includes events such as dances of various sorts, some of which are open to members and non-members while others are open only to members and their guests, namely, country dances, men's morris and sword dances, community dances and square dances. Then there are "at homes", which are open only to full members, or in some cases also to associate members, and their guests, and there are occasions on which members can meet the director and each other and practise rather more advanced and complicated dances. Then there are holiday courses in folk dancing and song; exhibitions of films of folk dancing; lectures and classes; demonstrations of folk dancing; recitals of folk songs and folk music. Then there are folk dancing festivals which the society promotes alone or in conjunction with others. It is mentioned that Cecil Sharp House only accommodates two hundred and fifty dancers, and that members attending the dances there almost invariably bring guests. Then para. 11 (e) says that the society keeps a library at Cecil Sharp House, details of which are set out in one of the attached documents. There is, apparently, no other comparable library in England and Mr. Howes‡ did not know of any other in Europe. Sub-para. (f) says:

"The society has rescued from oblivion many ancient folk songs and dances and through its journal and magazine encourages research into their

* See ante, p. 847, letter B.

† See ante, p. 852, letter E.

‡ The president of the Royal Musical Association and a former editor of the society's journal.

A origins. It has published the Index of English Songs. The Royal Anthropological Society has had papers read to it on comparative music, while on one or two occasions anthropologists have contributed articles to the society's journal."

Then finally, in sub-para. (g), it is said:

B "Members of the society have competed in folk dancing events at the eisteddfod. The society has promoted and encouraged international conferences of folk songs and dances, and was largely responsible for the formation of the International Folk Music Council."

C This information is amplified in great detail in para. 12 of the Case, which gives particulars of events held by the society in the autumn and summer seasons in the year 1952-53. Reference is made in para. 13 of the Case to provincial events which are described as the same in principle as those listed in para. 12. Then in para. 14 of the Case there is a description of folk dancing to which my Lord has already adverted. Paragraph 15 explains that folk dances include morris-dances, sword dances, country dances and square dances, the latter being described as the American equivalent of the English country dance. In para. 16 of the Case D singing games are dealt with. My Lord has read that paragraph, which is the one which says that examples of singing games are such things as "Roman soldiers", "Gathering nuts in May", and "Here we go round the mulberry bush". The paragraph says that the society regards singing games as being of great interest as representing survivals of old rituals. Apparently, the society does not now itself teach singing games, although it formerly did so, but it has E records of them and its teachers advise and help school teachers in connection with the teaching of such games.

I should also refer to para. 17 and para. 18 of the Case, which are in these terms:

F "17. The only method of preserving folk dances is by demonstration and teaching; for there is no simple method of notation of dances comparable to a musical score. No doubt those who attend the society's dances enjoy them, but the instructional element is always present, although the society naturally endeavours to make it as unobtrusive as possible and its events are most successful when this is done. Although the words 'social events' are used in the accounts the evidence showed that this description was used as a generic term to cover all the dances and similar functions held at Cecil Sharp House and that the only one of the society's activities which can G properly be described as a purely social event was the members' children's Christmas party. 18. Folk song and folk dancing are very closely inter-related. Evidence was given by Mr. Frank Howes that folk song and folk dance airs form one of the principal sources of all music and have served as an inspiration to many composers past and present. The witness referred in particular to the music of Dr. Vaughan Williams, the president of the H society. This would not apply to folk dancing, but one or two choreographers have used folk dance forms in ballet. Massine was cited as an example."

I Paragraph 19 of the Case refers to certain grants made to the society by the Arts Council of Great Britain and its predecessor, the Council for the Encouragement of Music and the Arts, apparently as implying recognition by those two bodies of the society as having for its exclusive object the furtherance of fine arts, or some or one of them. That, however, is a question for the court to decide on the facts found, and not by reference to any opinion on the matter which may have been expressed or implied by the Arts Council of Great Britain or the predecessor of that body.

In paras. 23 to 26 of the Case, the Lands Tribunal expresses its conclusions and the question of law for the opinion of the court in the following terms:

"23. On the evidence before us we came to the conclusion that there was

no reason why dancing, which is a form of expression similar to music, drama and painting, could not qualify for inclusion within the term 'fine art' and we were of opinion that the activities of the society as enjoined by the memorandum of association and as carried out by them were devoted to the purposes of the 'fine arts' exclusively. 24. We were further of the opinion that although the members of the society had certain privileges vis-à-vis non-members, this can be said of most learned societies. We considered that these privileges were only incidental to the main purposes of the society and did not debar it from claiming exemption under the section. 25. Finally we came to the conclusion that the amount of £7,000 odd out of a total income of £32,000 odd in 1952 was represented by subscriptions and donations of members and that this was sufficient to enable us to come to the conclusion that the society conformed to the requirements of the provisions of s. 1 of the [Act of 1843] in that it was in part supported by annual voluntary contributions. 26. For these reasons we dismissed the appeal. The question for the opinion of the Court of Appeal is whether on the above evidence and findings of fact we came to a correct decision in law."

The society claims that on the facts as found in the Case it was rightly held by the Lands Tribunal to be instituted for purposes of the fine arts exclusively within the meaning of the exempting section; and, further or alternatively, that, if and so far as any of its purposes are not purposes of the fine arts, they are, within the meaning of the section, purposes of science exclusively, so that the society is entitled to the exemption as being, within the meaning of the section, either a society instituted for purposes of the fine arts exclusively or a society instituted for purposes of science and the fine arts exclusively. It is clear from the Case that, before the Lands Tribunal (although the decision did not deal with this alternative basis of exemption), the society based its claim on purposes of science as well as purposes of the fine arts; but the argument based on purposes of science took, at all events before us, a secondary and subordinate place. The scientific element in the society's purposes is said to consist in the historical and anthropological or ethnological study and research, the promotion and encouragement of which form part of its objects. These activities might, I suppose, be described as being in a broad sense scientific, but, even if they are purposes of science within the meaning of the section, there remain other and leading objects which, to my mind, are clearly not purposes of science and can only qualify for the exemption (if they are to qualify at all) on the ground that they are exclusively purposes of the fine arts.

I, therefore, pass from the claim based on the purposes of science and address myself to the crucial question whether those objects of the society which cannot be classed as scientific are purposes of the fine arts exclusively within the meaning of the section. Excluding from consideration as possibly scientific in content para. 3 (c) of the memorandum, which is:

"To promote and encourage research into and study of the origins, development and traditional practice of English folk dances, songs and music and their relationship with those of other countries"

one is left, so far as leading objects are concerned, with para. 3 (a) and (b) of the memorandum. If I may read those paragraphs again, they are in these terms:

"(a) To preserve English folk dances and songs and other folk music (including singing games), to make them known and to encourage the practice of them in their traditional forms. (b) To promote the knowledge and practice of English folk dances, songs and music by means of schools, classes, examinations, lectures, demonstrations, festivals and other like methods."

- A These objects must be read in the light of the facts found in the Case, which show (see para. 15) that folk dances include morris-dances, sword dances and country dances, of which "Sir Roger de Coverley" is an example, and that country dances include square dances, of which "The Lancers" is an example. They show further (see para. 16) that singing games include such old favourites as "Gathering nuts in May" and "Here we go round the mulberry bush".
- B Object (a) must thus be read as directed, inter alia, to the preservation and making known and encouraging the practice in their traditional forms of folk dances, including country dances such as "Sir Roger de Coverley" and "The Lancers", and of folk music including singing games such as "Gathering nuts in May" and "Here we go round the mulberry bush". Similarly, object (b) must be read as directed to the promotion of the knowledge and practice of folk
- C dances (including as above) and folk music (including as above) by means of schools, classes, examinations, lectures, demonstrations, and other like methods.

Are these objects, which are clearly not purposes of science, and none of which has been claimed to be purposes of literature, purposes of the fine arts exclusively within the meaning of s. 1 of the Act of 1843? By way of approach to that question, we were referred to various definitions of the terms "art", "fine art" and "the fine arts" in the OXFORD ENGLISH DICTIONARY and in the seventh and eighth editions of the ENCYCLOPAEDIA BRITANNICA, covering the period from 1830 to 1860 and thus spanning the date of the Scientific Societies Act, 1843. The OXFORD ENGLISH DICTIONARY has under "Art":

- "10. A pursuit or occupation in which skill is directed towards the gratification of taste or production of what is beautiful. Hence *The Arts*: (specifically)='The Fine Arts' . . . 11 . . . (a) . . . *Industrial, mechanical, useful arts*: those in which the hands and body are more concerned than the mind. *Fine Arts*: those in which the mind and imagination are chiefly concerned."
- E

The OXFORD ENGLISH DICTIONARY has, under "Fine":

- "Fine art . . . In plural, the arts which are concerned with 'the beautiful', or which appeal to the faculty of taste; in the widest use including poetry, eloquence, music, etc., but often applied in a more restricted sense to the arts of design, as painting, sculpture, and architecture."
- F

The seventh and eighth editions of the ENCYCLOPAEDIA BRITANNICA have under "The Fine Arts" the following introductory passage:

- "Fine Arts. The term Fine Arts may be viewed as embracing all those arts in which the powers of imitation or invention are exerted, chiefly with a view to the production of pleasure by the immediate impression which they make on the mind. But the phrase has of late, we think, been restricted to a narrower and more technical signification; namely, to painting, sculpture, engraving and architecture, which appeal to the eye as the medium of pleasure; and, by way of eminence, to the two first of these arts."
- G
- H

I am prepared to accept the wider meaning assigned to "the fine arts" in the above definitions and to treat them as including, for example, poetry, eloquence, and music as well as such "arts of design" as painting, sculpture, and architecture. We are, indeed, bound for the present purpose to include music amongst them: see *Royal College of Music v. Westminster Vestry* (1), a decision of this court. It is possible that dramatic art should also be included: see the *Non-entities Society's* case (2), where the question was discussed but not decided, as the society's claim to exemption under the Act of 1843 failed on the ground that it was not supported wholly or in part by annual voluntary contributions. If music and drama rank as fine arts, I see no justification for holding, as a general proposition, that dancing, which in some of its forms is closely allied to music and the drama, can never do so. I observe that the OXFORD ENGLISH DICTIONARY under the word "Ballet" says that it is "now for the most part

I

regarded as an artistic exhibition of skill in dancing", and this perhaps affords an example of a form of dancing fit to be recognised as one of the fine arts. It by no means follows, however, that all dancing is in itself fine art, or that everybody who dances any form of dance on any occasion is practising the fine art of dancing. An artistic exhibition of skill in dancing may be fine art, but I cannot bring myself to hold that dancing of the sort in which the assembled company take part for their own amusement at a ball or similar function can properly or reasonably be so described. Dancing of that sort is, to my mind, no more than a recreation or pastime—dancing as a social amusement as distinct from dancing as a fine art.

Applying these considerations to the present case and re-stating the two leading objects of the society in summary form, I find that so far as dancing is concerned the purposes of the society include making known English folk dances, encouraging people to dance them in their traditional forms, and teaching people how to do so. Bearing in mind the inclusion in English folk dances of country dances such as "Sir Roger de Coverley", and square dances such as "The Lancers", I find more specifically that the society's leading objects include making known country dances such as "Sir Roger de Coverley" and "The Lancers", encouraging people to dance them in their traditional forms, and teaching people how to do so. Quite clearly these objects extend to the re-introduction or perpetuation in recreational dancing of old-fashioned country or square dances such as "Sir Roger de Coverley" and "The Lancers", done as they used to be done in olden times, and giving people who enjoy dancing of this kind facilities for taking part in it. I cannot hold these to be purposes of the fine arts within the meaning of the section.

So far as folk songs and other folk music are concerned, apart from the inclusion of singing games, no point is made for the valuation officer against the society's claim to exemption in view of *Royal College of Music v. Westminster Vestry* (1). Re-stating the two leading objects in summary form in relation to singing games, I find that the purposes of the society include making known singing games, encouraging people to play them in their traditional forms, and teaching people how to do so. As appears from the Case and as I have already mentioned, singing games include such things as "Gathering nuts in May" and "Here we go round the mulberry bush". The question, therefore, arises whether teaching people (in this instance, no doubt, children) how to play, and encouraging them to play, such games as "Gathering nuts in May" and "Here we go round the mulberry bush", are purposes of the fine arts. I cannot bring myself so to hold. To my mind, a person teaching children to play these games cannot reasonably be held to be instructing them in a fine art any more than children playing these games can reasonably be held to be practising a fine art. The children are simply being shown how to play a traditional game, or, having been shown how, are amusing themselves by playing it, and no question of fine art enters into the matter.

For these reasons I am of opinion that the society's claim to exemption fails on the first of the two grounds above stated, namely, that it is not instituted for the purposes of science or the fine arts exclusively within the meaning of the exempting section. I should add that in reaching this view I have, as the authorities enjoin (see the *British Iron & Steel Research Assn.* case (3)), guided myself by reference to the purposes of the society as defined by its constitution, rather than by the purposes which it has actually pursued in practice, but that the facts as to its actual activities as found in the Case seem to me on the whole to confirm my conclusion.

I trust that nothing which I have said will be taken as belittling the work of the society, which I have no doubt is valuable work, not only for the pleasure which it gives to many people, but also for the additions which it has made, and is making, to our knowledge of the traditional dances and songs of our ancestors,

- A and for its success in preserving and reviving for our instruction and enjoyment these old dances and songs. Nor am I suggesting that the society is incapable of presenting, or may not from time to time present, exhibitions of skill in dancing for which the status of fine art might well be claimed. I am concerned only with the question whether the society is, within the narrow terms of the section, instituted for purposes of science or the fine arts exclusively, and for the
- B reasons which I have stated I have come to the conclusion that it is not.

This makes it unnecessary to decide whether the society complies with the second condition of exemption, namely, that it should be supported wholly or in part by annual voluntary contributions. The valuation officer's argument on this point turns largely on the facts found in para. 11 and para. 12 of the Case, from which it appears that full members, and to a lesser degree associates, are

C accorded certain privileges and, in particular, admission to some of the society's functions at rates lower than those charged to non-members. The question is whether these privileges are such as to make the annual subscriptions of full members and associates other than "voluntary", according to the meaning of that expression in s. 1 of the Act of 1843, as interpreted by the House of Lords in *Savoy Overseers v. Art Union of London* (4), where it was held to mean, in effect,

D "made without equivalent consideration" as distinct from "made without obligation". That seems to me to be a question of some nicety, and, as it is immaterial to the result in the present case, whereas a comparable case in which the corresponding question is decisive of the claim to exemption may well arise at some future date, I prefer for the present to leave it unanswered.

- E I should add in conclusion that in the course of the argument for the society it was suggested that the question whether the society was instituted for purposes of the fine arts exclusively was a question of fact, which, having been decided by the Lands Tribunal as the proper tribunal of fact, was not open to this court. I cannot agree. The question is whether the society was instituted for purposes of the fine arts exclusively within the meaning of the section. That is a question
- F concerning the true construction of the section, and, as such, plainly a question of law open to this court. For the reasons which I have stated I think that this appeal should be allowed.

PARKER, L.J.: I have come to the same conclusion. From a perusal of the leading objects of the society it is clear that, to use the words of A. L. SMITH, L.J., in the *Royal College of Music* case (1) ([1898] 1 Q.B. at p. 818), the

G society is "instituted for the purpose of advancing, or disseminating, or propagating", inter alia, the practice of English folk dancing. Assuming, as I do, that folk dancing is an art in the wide sense of the word, the question is whether it is also a fine art. The finding by the Lands Tribunal on this point is to be found in para. 23 of the Case, to which my Lord has already referred. Its conclusion, it will be seen, is arrived at on the basis that there is no reason

H why dancing in general cannot qualify as a fine art. I cannot bring myself to accept such a wide premise. While it may be that some dancing—for example, ballet dancing—might qualify, the question for this court is whether, on the facts found, the tribunal was entitled in law to hold that the form of dancing here in question, English folk dancing, comes within the expression "fine arts" where used in the Scientific Societies Act, 1843.

- I What, then, is included in the expression "the fine arts"? It was urged by counsel for the society that any medium of what he called "pure art" as opposed to "applied art" comes within the expression. Whether an art is also a fine art, he said, depended merely on the use to which it was put. I am unable to accept this view. It seems to me that fine art involves something more than this. What exactly it is I will not attempt to define, but this, at least, is necessary, I think, before an activity can be so classified. It must be an activity which makes an immediate impression on the mind or imagination, its perception, by whatever sense, arousing aesthetic satisfaction. Moreover, the person on whom

that impression is to be made is the person perceiving the performance, not merely the performer. The fact that the performers get pleasure from their activity does not, of course, prevent an activity from being a fine art if otherwise it is one. Here, however, the main emphasis is on the pleasure derived by the performers. There is little, if any, evidence that people go to watch folk dancing like they undoubtedly go to see ballet dancing, or, if they do, that it is to see more than others partaking in a revival of traditional and recreational dances. Dancing does not become a "fine art" merely because what is danced is a revival of that which was performed many hundreds of years ago and because the onlookers enjoy seeing others enjoying themselves. No doubt, there is also a considerable historical interest aroused, but that is, in my judgment, not enough. A pageant, or indeed a tattoo, of the times of Henry V has great historical interest and may be performed in such a way as to please the eye; but there is all the difference between that and a performance of Shakespeare's *Henry V*. The latter performance may well be an exposition of fine art, but certainly not the former.

It was further contended that research into the origins of English folk songs and dances, an undoubted object of the society, was in the nature of a science. Even, however, if that were the case, that is not exclusively the purpose of the society. Accordingly, I am of opinion that the Lands Tribunal was wrong in law in holding that the society was instituted for purposes of the fine arts exclusively: and, accordingly, it is unnecessary to consider the further question whether the society is supported wholly or in part by annual voluntary contributions. I would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *E. F. Turner & Sons* (for the respondent society).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law*.]

GREGSON v. HICK HARGREAVES & CO., LTD.

[MANCHESTER ASSIZES (Donovan, J.), April 21, 22, 23, May 3, 1955.]

Factory—Dust—"All practicable measures" to be taken—Dust likely to be injurious—Substantial quantity of dust of any kind—Iron foundry—Risk of silicosis known only after disease contracted by workman—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 47 (1).

From 1934 to 1951 the plaintiff was employed as a moulder in the defendants' iron foundry. The moulds used for the castings were built up of bricks and loam, and during some of the moulding processes dust was given off, but until 1951 it was not known that this dust might be dangerous. Whenever there was likely to be a substantial quantity of dust, the defendants took all the measures which, at that time, were considered necessary to prevent their workmen from inhaling the dust, and, until 1951, the measures adopted by the defendants appeared to be adequate. In January, 1951, the plaintiff was certified to be suffering from silicosis, and it was then realised for the first time that dust from loam might contain silica. The plaintiff claimed damages against the defendants for breach of their statutory duty under s. 47 (1) of the Factories Act, 1937.

Held: the defendants were not in breach of their duty under s. 47 (1) to take "all practicable measures" to protect their workmen against inhalation of dust which was "likely to be injurious", because until after the plaintiff had contracted silicosis the defendants neither knew nor ought to have known that the dust given off by the moulding process which they used was likely to be injurious (*Ebbs v. James Whitson & Co., Ltd.* ([1952] 2 All E.R. 192) applied); and the fact that further methods of protection

A might now be required in view of the new knowledge obtained did not retrospectively affect their liability to the plaintiff.

[**Editorial Note.** If problems similar to those decided in this case arise subsequently the decisions as regards periods after the knowledge of the risk illustrated in this case has become widespread may well be different, for the defendants were held not liable because they could not reasonably be expected to take "all practicable measures" against risks of which the world was unaware. The position if a disease contracted previously to knowledge of a new risk being acquired gets worse, after that knowledge is generally known, as result of a failure to take precautions against the newly known risk is illustrated in *Crookall v. Vickers-Armstrong, Ltd.* (ante, p. 12), by head (iii) of the holdings there stated. The view that the question what measures are "practicable" within the Factories Act, 1937, s. 47 (1) must be considered in the light of current knowledge was also adopted in *Adsett v. K. & L. Steelfounders, Ltd.* ([1953] 1 All E.R. at p. 98, letter H).

For the Factories Act, 1937, s. 47 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1038.]

Case referred to:

D (1) *Ebbs v. James Whitson & Co., Ltd.*, [1952] 2 All E.R. 192; [1952] 2 Q.B. 877; 3rd Digest Supp.

Action.

The plaintiff, who had contracted silicosis during his employment as a moulder in the defendants' iron foundry, claimed damages against the defendants for breach of their statutory duty under s. 4 (1) and s. 47 (1) of the Factories Act, 1937.

F. Atkinson, Q.C., and *G. Heilpern* for the plaintiff.

H. I. Nelson, Q.C., and *C. M. W. Elliott* for the defendants.

Cur. adv. vult.

F May 3. **DONOVAN, J.:** The plaintiff, who is now fifty-eight years of age, was employed by the defendants as a moulder in their iron foundry from 1934 to 1951. In January, 1951, he was medically certified as suffering from pneumoconiosis, and it is now agreed that he was then, and is now, suffering from that species of pneumoconiosis which is called silicosis. It is further agreed that this disability has arisen out of and in the course of his employment by the defendants. The plaintiff was away from his work from January to July, 1951, when he went back to work with the defendants. He was unable, however, to secure his old job as a moulder and is now employed as a storeman. Due to silicosis he is certified as being disabled to the extent of twenty per cent., and is compensated under the National Insurance (Industrial Injuries) Act, 1946, accordingly. He now claims that this state of affairs has been brought about by the defendants' breach of s. 4 (1) and s. 47 (1) of the Factories Act, 1937, which deal respectively with ventilation and with measures against dust. No allegation of negligence at common law is now made.

H The defendants carry on their iron foundry at Bolton, where large castings are made. The moulds used for the purpose are built up of bricks and loam. Loam is moulding sand mixed with manure and is used wet. It becomes dry and hard when the mould is baked preparatory to casting. During certain of the moulding processes dust is given off. The present case has revealed, it seems for the first time, that dust from loam may contain silica; that is, minute fractured particles of sand floating in the air which, breathed in over a long period, severely damage the lungs. This is what has happened to the plaintiff, and he says the cause of it is that the moulding shop was not adequately ventilated, as s. 4 (1) of the Act of 1937 requires, and that all practicable measures to prevent injurious dust being inhaled were not taken, as required by s. 47 (1) of the same Act.

I Section 4 (1) requires that effective and suitable provision shall be made (a) for securing and maintaining adequate ventilation by the circulation of fresh

air in each workroom, and (b) for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health, generated in the course of any process or work in the factory. This latter requirement means that such fumes, dust and other impurities are to be rendered harmless, so far as practicable, by adequate ventilation: see *Ebbs v. James Whitson & Co., Ltd.* (1) ([1952] 2 All E.R. 192). [His LORDSHIP reviewed the evidence on the question of ventilation, said that he himself had visited the factory while work was in progress and felt no discomfort whatever from lack of air, and continued:] I have no acceptable evidence which would justify me in finding that the defendants were at any time in breach of s. 4 (1). They appear to be enlightened employers who have introduced many amenities in their foundry in advance of requests, and who are alive to the importance and advantages of good working conditions. Had there been any ground for supposing that the ventilation of the moulding shop was inadequate, I feel no doubt that they would have taken immediate steps to make it adequate.

Section 47 (1) of the Act provides:

"In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom . . ."

The sub-section then goes on to deal with the provision of exhaust appliances, but no criticism is made of the absence of such appliances from this moulding shop. They have not been installed in any moulding shop in this country and it is considered by some that it would be quite impracticable to do so. So far as dust is concerned, the sub-section divides it into two categories: (i) dust which is likely to be injurious or offensive; (ii) dust of any kind. The obligation to protect workmen against inhalation of dust likely to be injurious or offensive arises if such dust is given off to such an extent as to cause the likelihood of injury or offence to arise. In the case of some such dust, that extent may be small. The obligation to protect workmen against dust of any kind (that is, all dust, whether likely to be injurious or offensive or not) arises when a substantial quantity of dust is given off.

Dealing first with dust likely to be injurious or offensive, it is clear now that during the years the plaintiff was employed such dust was given off in the moulding shop. No one, however, knew it. The danger of silicosis in a moulding shop using ordinary moulding sand is a very recent discovery. The danger of silicosis in a loam-moulding shop is revealed for the first time by this case. Up to the time when the plaintiff's complaint was diagnosed the defendants did not know of the danger, and it is not, and could not be, suggested that they ought to have known. Neither they nor anyone else had reason to suspect that loam might give off injurious dust. What, then, is their position under s. 47 (1)? One construction of the sub-section is that knowledge on the part of the employer is immaterial; *in fact*, the dust was likely to be injurious, whether he knew it or not, and consequently if he took no protective measures he failed in his duty. This was not the construction which commended itself to McNAIR, J., and SINGLETON, L.J., in *Ebbs v. James Whitson & Co., Ltd.* (1). They took the view that an employer could not be expected to take "all practicable measures" against something of which he was blamelessly ignorant. It would be my duty to follow this construction even if I did not agree with it, but I respectfully do agree with it. In the present case, therefore, so far as dust, likely to be injurious or offensive is concerned, the defendants cannot be held to be in breach of s. 47 (1), because until after the plaintiff had contracted silicosis they neither knew

A nor ought to have known that such dust was given off by the moulding process which they used.

With regard to the second category of dust dealt with by s. 47 (1), namely, "any substantial quantity of dust of any kind," the position is this. Such a quantity of dust is given off in the moulding shop when the following operations are carried on. (i) The removal of certain steel grids embedded in the mould.

B This takes place after casting and while the mould is still warm. The removal of these grids breaks part of the mould and dust ensues. The heat of the mould causes this dust to rise vertically and most of it escapes through the roof windows. (ii) The breaking down of the mould by manual labour after casting has taken place and the mould is no longer required for similar castings. (iii) The tipping up by a crane of the heavy steel plate on which the mould was originally built up. C This is the final stage of the breaking-up operation and it gets rid of the residue of the debris of the mould in one operation, on to what is called a dust ruck. All these operations take place in the moulding shop.

The measures which the defendants took to protect work-people against inhaling the aforesaid dust were these. When the steel grids were being removed from the mould, masks were provided for and were worn by the men doing this

D job. To these masks a tube some thirty feet long was fitted, and the other end of the tube usually tied to a stanchion some five or six feet from the ground, the idea being that the worker should breathe uncontaminated air. So far as anyone could tell, this was the result. This mask and tube were primarily a protection against fumes which were released when the grid was taken away from the casting, although they served to protect against the inhalation of dust as well. E Due to the heat, any one man could work only two minutes or so at this job and would then be relieved by another moulder who would wear the same mask, as a rule, as the man he relieved. While waiting to take their turns, the other moulders would stand around the job, and one of the plaintiff's contentions is that they were not protected at all while so waiting. I am satisfied that no such moulder was ever inconvenienced by dust while so waiting. There were no complaints. The dust, as I say, rose vertically with the heat and the waiting moulders were free to stand where they liked while awaiting their turn at the work of dislodging the grids. As regards the breaking down of a mould when no longer required, this was done by labourers and not by moulders. The labourers were not made to wear masks, although they were available, nor were the labourers pressed to wear them. If the plaintiff had been a labourer who had had to do

G this work, different considerations might arise, but as a moulder the plaintiff was sixty to seventy yards from where this process, known as "knocking off", was done and there was nothing to suggest that any dust was reaching him and being inhaled by him. With regard to the final tipping of the plate, this is the operation which gives off most dust. It takes place about twice a month, and

H when it was being done the doors were opened and the moulders were sent out of the shop until the resulting cloud of dust, which at times might fill the whole shop for a few moments, had dispersed. It was, whenever possible, done on a Saturday morning, when few moulders were in the shop. One other measure taken to keep the atmosphere as clear as possible was to damp the foundry floor at frequent intervals.

I The aforesaid measures appeared to have achieved their object. The plaintiff never complained to the defendants that he was inconvenienced by the dust in any way; nor did any other moulders. No moulder ever went sick because of dust. No one ever contracted a complaint such as silicosis, giving rise to a suspicion that protection against dust in the foundry was inadequate. All the available evidence indicated the contrary. The plaintiff now says, *inter alia*, that more masks should have been provided and more persuasion used to induce him and others to wear them, and that the "knocking off" should have been

done outside the shop, though, due to its present lay-out, this would have meant reconstructing a substantial part of the works. A

The truth in this unfortunate case is that for almost seventy years everyone thought that the dust had been adequately and effectively got rid of, and the moulders protected against inhalation, until this case arose. Then, unhappily, the truth became known that some invisible dust must have remained in the atmosphere and was of such a kind that breathing it over a long period of years, albeit in small quantities, had produced silicosis in the plaintiff. B

How, in these circumstances, do the defendants stand under s. 47 (1) ? Their duty was to "protect the persons employed against inhalation of the dust". The means which they were to employ to discharge that duty were "all practicable measures". It is important in this case not to confuse the end with the means, and also to remember that this definition of the means makes the duty less than absolute. All the evidence available at the time and all the knowledge at the disposal of the defendants indicated that the end had been achieved. No question arose, therefore, as to the adequacy of the means. The duty imposed by the sub-section had, by all the indicia available, been discharged. In 1951, however, with the diagnosis of silicosis in the plaintiff, it became apparent for the first time that protection was incomplete. This new knowledge means that further and additional measures of protection must be sought, and all such as are practicable taken. Does it, however, also mean that retrospectively the defendants must be treated as having failed in their duty ? I think not. Otherwise the defendants would be penalised for not acting on knowledge which nobody possessed, or for not being suspicious when there was nothing to arouse suspicion. There is really no criterion which can, in justice, be applied to test this matter except the knowledge which the defendants had at the time, or ought reasonably to have had. If, as I have held, an employer is not blameworthy under the sub-section because he does not know that dust injurious in character is given off by some process, and shares this ignorance with the world, should I hold that he is nevertheless blameworthy if, judged by all the knowledge available at the time, he had protected his workers against inhalation of dust of any kind ? I do not think so; and, if that view be right, the question whether some other measures were available and practicable does not arise. The end had, to all appearances, been achieved. C D E F

For the future, of course, now that the defendants know the facts, the position will be different, and they are in fact actively considering what further measures to take. In relation to the plaintiff, however, I do not think they have transgressed the provisions of s. 47 (1). I have said nothing so far about their duty to prevent dust from accumulating. There must always be some dust somewhere in a foundry, but the evidence does not establish that preventable accumulations of dust were permitted. Had the defendants been in breach of their statutory duty and had to pay compensation as being entirely responsible for the plaintiff's silicosis, I would have awarded him the sum of £1,750 as general damages. As it is, my judgment must be for the defendants. G H

Judgment for the defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *G. Keogh & Co.*, Bolton (for the defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

A

Re WYNN (*deceased*).
PUBLIC TRUSTEE *v.* NEWBOROUGH AND OTHERS.

[CHANCERY DIVISION (Harman, J.), June 30, July 1, 1955.]

B

Trust and Trustee—Trust for sale of land—Repairs and improvements to agricultural land—Capital and income—Incidence of cost—Cost paid out of income—Whether recouped to life tenants out of capital—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 28—Settled Land Act, 1925 (15 & 16 Geo. 5 c. 18), s. 73, s. 84—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 81 (1).

C

By cl. 11 of his will a testator devised all his landed property (which was therein defined and was agricultural land) on trust for sale and to hold the income of the proceeds of sale on trust to divide it into two equal parts and pay one part to each of the first and second defendants during their joint lives and to pay the whole of the income to the survivor of them during his life with remainders over to the third and fourth defendants. By cl. 16 he directed that his trustee should out of the income of his general estate (defined therein to include his landed property and the proceeds of sale thereof) pay all the legal and other costs of estate management "and pay all costs of repairs insurance rates taxes tithe . . . and other outgoings in [the trustee's] opinion properly attributable to income and shall also out of the said income pay all such parts as [the trustee] shall not in [the trustee's] discretion charge to capital of . . . improvements . . ."

D

E

The testator died on Jan. 20, 1932. The court found that cl. 16 on its true construction obliged the trustee to pay for repairs out of income but gave a discretion to pay for improvements out of capital or income. Since March, 1946, the trustee had done repairs to the agricultural property and until Apr. 1, 1952, the cost had been paid out of income. Some or many of these repairs were improvements within Sch. 3 to the Agricultural Holdings Act, 1948, and by virtue of s. 81 (1) of that Act were deemed to be improvements within Sch. 3 to the Settled Land Act, 1925, the cost of which there was power to defray out of capital under that Act as applied to trustees for sale by s. 28 of the Law of Property Act, 1925. Since Apr. 1, 1952, the cost of the repairs had not been allocated as between capital and income. On the question whether the cost of the repairs prior to April, 1952, should be recouped to the life tenants and whether the cost after March, 1952, should be borne by capital or income, it was contended on behalf of the life tenants that by virtue of s. 81 (1) of the Act of 1948 the whole cost of the improvements within that Act must be borne by capital.

F

G

Held: the trustee's powers under the Law of Property Act, 1925, s. 28, and the Settled Land Act, 1925, s. 73 and s. 84, were additional to powers under the will and by these statutory powers as applied by s. 81 (1) of the Agricultural Holdings Act, 1948, the trustee had a discretion to apply capital in paying for improvements within Sch. 3 to that Act but was not bound to do so; it would not be proper, the question having been decided by the trustee, for the court to order any part of the cost of repairs or improvements prior to April, 1952, to be recouped to the life tenants; the court would leave the trustee to decide in the exercise of his discretion how the subsequent costs should be borne as between capital and income.

I

Re Duke of Northumberland ([1950] 2 All E.R. 1181) distinguished.

[For the Law of Property Act, 1925, s. 28, see 20 HALSBURY'S STATUTES (2nd Edn.) 475; for the Settled Land Act, 1925, ss. 73, 84, Sch. 3, see 23 HALSBURY'S STATUTES (2nd Edn.) 161, 188, 272; and for the Agricultural Holdings Act, 1948, s. 81 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 86.]

Cases referred to:

- (1) *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27; [1953] Ch. 792; 3rd Digest Supp.
- (2) *Re Conquest*, [1929] 2 Ch. 353; 98 L.J.Ch. 441; 141 L.T. 685; Digest Supp.
- (3) *Re Duke of Northumberland*, [1950] 2 All E.R. 1181; [1951] Ch. 202; 2nd Digest Supp.

Adjourned summons.

The Public Trustee, the plaintiff, sought by originating summons the determination of the following questions, namely: (1) whether (on the true construction of the will of Frederick George Wynn and having regard to the provisions of the Settled Land Act, 1925, the Law of Property Act, 1925, and the Agricultural Holdings Act, 1948, s. 96, and the decision in *Re Duke of Northumberland* (3) ([1950] 2 All E.R. 1181)), the plaintiff as the trustee of the will of the above-named testator had power or was obliged to apply capital of that part of the testator's estate which is held on the trusts of cl. 11 of the will (hereinafter called "the landed property") in recouping to the tenants for life, in equal shares, sums paid by the plaintiff out of income of the landed property for repairs of the nature of those specified in the Agricultural Holdings Act, 1948, Sch. 3, Part 2, to agricultural land forming part of the landed property, notwithstanding that such agricultural land was held by the plaintiff on trust for sale; and (2) whether and to what extent the plaintiff ought to recoup to the tenants for life in respect of the expenditure particulars whereof were set out in a schedule of agricultural repairs exhibited to the affidavit in support of the summons.

By his will dated July 31, 1931, the above-named testator appointed the plaintiff, the Public Trustee, to be his executor and trustee and by cl. 11 gave all his landed property to his trustee on trust for sale and on trust to invest the proceeds as therein mentioned and to hold the income of such proceeds and of a certain mortgage and of his residuary estate, to divide the same into two parts and to pay one part to Lord Newborough, the first defendant, during his life and after his death to the second defendant Colonel Wynn during his life and to pay the other part to the second defendant during his life and after his death to the first defendant during his life. After the death of the survivor of the first and second defendants he directed his trustee to stand possessed of such part of his landed property as should then be unsold and of capital moneys representing the proceeds of sale of such parts thereof that had been sold on trust for the first and other sons of the first defendant in tail male with remainder to the third defendant for life with remainder to his first and other sons in tail male with remainders over. By cl. 14 the testator declared

"that the expression 'my general estate' where hereinafter used means my landed property and the proceeds of the sale thereof and the principal sum secured by [a certain mortgage] and any such balance of my residuary estate"

there being in fact no such balance. By cl. 15 he authorised his trustee

"to continue the system of estate management carried on by me . . . and in considering the question of repairs . . . to act as good landlords"

and he directed that the trustee might charge to income matters that might strictly be charged to capital. By cl. 16 he directed that his trustee should out of the income of his general estate pay all the legal and other costs of estate management and pay all costs of repairs, insurance, rates, taxes, tithe and the expenses of running the power house and electric plant and other machinery and other outgoings in his opinion properly attributable to income and should also out of the said income pay all such parts as he should not in his discretion charge to capital of, *inter alia*, improvements.

The testator died on Jan. 20, 1932, and probate of his will was granted to the plaintiff on Mar. 9, 1932.

- A The first defendant had no son. The second defendant had two sons, the third defendant and one other, and the third defendant had one son only, the infant defendant. By an order of the Chancery Division dated Jan. 17, 1952, it was declared that on the true construction of the testator's will such part of the testator's landed property as was still unsold was subject to an immediate binding trust for sale, but without prejudice to the question whether such
- B trust for sale would continue after the death of the survivor of the first and second defendants.

- The plaintiff had from time to time carried out certain improvements to the property subject to the trusts declared in cl. 11 of the will and, prior to April, 1952, had charged the cost of such improvements to capital. In addition, the plaintiff had carried out repairs to agricultural buildings forming part of the
- C landed property and the fixed equipment thereon required for the proper farming of agricultural land forming part of the landed property. None of those repairs were repairs which the tenant of the property concerned was under an obligation to carry out (the repairs were set out in a schedule of agricultural repairs showing all sums so spent by the plaintiff since Apr. 1, 1946, which was exhibited to the affidavit in support of the summons). The cost of all such repairs was debited,
- D prior to April, 1952, to the income of the landed property, but since that date the cost had not been allocated as between capital and income.

J. A. Wolfe for the plaintiff, the Public Trustee.

Lionel Edwards, Q.C., and *Arthur Bagnall* for the first defendant.

Raymond Jennings, Q.C., and *B. S. Tatham* for the second and third defendants.

Michael Albery, Q.C., and *Paul V. Baker* for the fourth infant defendant.

- E **HARMAN, J.:** This is an originating summons issued by the Public Trustee as plaintiff concerning the will of one Frederick George Wynn. It invokes certain statutory relief with which I am not here concerned and in addition asks two questions concerning the trusts of the will, the Public Trustee being a trustee for sale under it as interpreted by this court in 1952.

- F There are large numbers of agricultural holdings on which repairs have been done by the Public Trustee, and a great deal of money has been spent. An elaborate schedule was put before me showing the repairs carried out year by year since Apr. 1, 1946; I suppose that was the year in which post-war repairs were begun. The total cost of repairs in 1951-52 was as high as £5,000. Those were all done to properties let to agricultural tenants, and, I understand, are not
- G repairs which the tenants themselves were bound under their tenancies or leases to do. It is submitted on behalf of one of the persons entitled to the income, that having regard to certain statutes which I shall mention in a moment, all those repairs ought to have been done at the expense of the corpus of the estate and in so far as they have been done and paid for out of income there should now be an adjustment between capital and income and that in future all such repairs
- H must be paid for out of capital. The alternative view is that the Public Trustee as a trustee has a discretion and counsel for the remainderman concedes that since 1952 a discretion is vested in the trustee whether to do these repairs out of income or out of capital under the statutory powers which have been conferred on him. The point at issue is that the tenants for life deny and the remainderman asserts that for the period up to 1952 the book is closed, that the income has
- I been spent and the trustee has exercised the trust or the power and that there should be no readjustment because the matter is at an end.

In order to understand the argument I must shortly state the facts. The testator made his will in 1931 and died in 1932. He left a large estate, principally real estate, in Wales. In the upshot there has turned out to be no residue. At the present time, as I understand it, the real estate still unsold amounts to about half a million pounds in value and there are capital moneys representing proceeds of sale of real property in the trustee's hands to the tune of something under £100,000.

The testator by his will, so far as material for this purpose, devised by cl. 11 all his landed property as therein defined on trust for sale with certain consents and with a power to postpone. That is the trust for sale now subsisting as interpreted by the order of 1952. The income from that landed property and from a certain mortgage which is now subsisting was to be held on the following trusts:

"(1) Out of the gross income to pay such costs charges annuities and expenses as are by this will directed or authorised to be paid thereout.

(2) To divide the net income into two equal parts . . ."

and pay half to each of the first and second defendants during their joint lives with cross remainders between them: that is to say, the survivor will take the whole income. Then

"Upon the death of the survivor of my said two nephews my trustees shall stand possessed of all such parts of my landed property as shall be then in fact unsold . . ."

and of the capital moneys representing the proceeds of sale, on certain limitations under which it is enough to say that the last two defendants are interested, one of them for his life and the other in tail. There was then in cl. 14 a bequest of residue. The first trust of that is to pay the estate duty and it was all used for that purpose. The testator then declared by cl. 14 that

"the expression 'my general estate' where hereinafter used means my landed property and the proceeds of the sale thereof and the principal sum secured [by a certain mortgage] and any such balance of my residuary estate as aforesaid"

—there being no such last item. He then authorises his trustees to carry on his system of estate management and in considering the question of repairs to act as good landlords and to charge the income if they please with matters which might strictly be charged to capital.

By cl. 16 he explains what the charges are which are to come out of the income of the general estate. They are

"all the legal and other costs of estate management and . . . all costs of repairs insurance rates taxes tithe and the expenses of running the power house and electric plant and other machinery and other outgoings in their opinion properly attributable to income and shall also out of the said income pay all such parts as they shall not in their discretion charge to capital [of among other things] improvements . . ."

In my judgment, the words "in their opinion properly attributable to income" apply only to outgoings and not to repairs. Therefore, under the will there is a direction to pay for repairs out of income and a power to pay for improvements out of income unless they in their discretion think they should be paid for out of capital. There is again a similar expression at the end of cl. 16 where he says:

". . . it is my wish that my trustees shall out of the income of my general estate provide for and pay . . . all rates taxes tithe land drainage charges repairs insurance and similar outgoings . . ."

in connection with certain pieces of real property specifically bequeathed.

By the will the trustees are not only entitled but enjoined to pay for all repairs out of income and apparently that is what they did for a number of years, they having the powers of trustees for sale. It has long been recognised that these powers, by virtue of the Law of Property Act, 1925, s. 28, import the powers of the tenant for life and of trustees under the Settled Land Act, 1925, and, therefore, the improvement sections of the Settled Land Acts are imported where there are trusts for sale: the difference, of course, being that in the case of trusts for sale the trustees are in the saddle and not the tenant for life. In the case of settled land of which there is a tenant for life he decides whether to

A make improvements and, if they are Part 1 improvements he may call on the trustees to raise capital to pay for them.

I pointed out in *Re Sutherland Settlement Trusts* (1) ([1953] 2 All E.R. 27), that a tenant for life making an improvement and calling on the trustees to pay for it out of capital must use his powers in such a manner as trustees would use them having due regard to all those who come after him. Subject to that, the
B tenant for life decides. It is quite different in the case of a trust for sale, for there the trustees decide. CLAUSON, J., pointed out in *Re Conquest* (2) ([1929] 2 Ch. 353), that trustees for sale have, by reason of the Law of Property Act, 1925, s. 28, two sets of powers: first, the power of management of the trust conferred on the trustees by the Settled Land Act, 1925, s. 102, and, secondly, the improvement powers under s. 84 of that Act. I add that they also have, where the
C will confers powers on them, the powers given by the will. No doubt the statutory powers are superimposed on those latter, so if the will directs that repairs may only be done out of income the statute has the effect of giving the power to do it also out of capital if it be an improvement which under the Settled Land Act may be so done. That was a concession which was in fact offered by counsel for the remainderman and which I think all parties accepted.

D But counsel for one of the life tenants wishes to go much further than that. He says there has been imported into the code, so to speak, a new situation altogether by the Agricultural Holdings Act, 1948. Section 96 of that Act had the effect of altering the Settled Land Act, 1925. It will be remembered that the Settled Land Act, 1925, s. 73, which deals with the investment of capital moneys by trustees, authorises them to pay, as for an improvement authorised by this
E Act, any money expended under the Agricultural Holdings Act, 1923. The effect of s. 96 is to substitute 1948 for 1923 there. Therefore, one of the ways in which one may invest or apply capital moneys if one is a trustee for sale is in payment for improvements or what are treated as improvements under the Act of 1948. When one looks for the relevant provisions one finds them in s. 81 of the Act of 1948 which is a very extraordinary piece of legislation. It refers to "any
F improvement specified in Sch. 3 to this Act . . ." When one looks at Sch. 3 one finds included among the improvements under No. 23 "Repairs to fixed equipment". Therefore, these repairs, on the true construction of the Act, must be treated as being improvements for the purposes of this Act on which one may spend capital under s. 73 of the Settled Land Act. Counsel says s. 81 (1) of the Act of 1948 obliges one to spend capital on them whether one likes it or not.
G I will read s. 81 (1):

"Where under powers conferred by the Settled Land Act, 1925, or the Law of Property Act, 1925, capital money is applied in or about the execution of any improvement specified in Sch. 3 to this Act no provision shall be made for requiring the money or any part thereof to be replaced out of income, and accordingly any such improvement shall be deemed to be an improvement
H authorised by Part 1 of Sch. 3 to the Settled Land Act, 1925."

In my judgment, the effect of that is to show that these matters which are specified in Sch. 3 to the Act of 1948 are to be treated as what I may call Part 1 improvements under the Settled Land Act, 1925; in other words, improvements on which if capital is spent it is not to be recouped out of income. Counsel says it means that having regard to the words "such improvements" all improve-
I ments under the Agricultural Holdings Act, 1948, are Part 1 improvements and nothing else and must be defrayed out of capital. I do not follow that argument at all. All the section seems to me to say is that if capital is spent on such improvements it cannot be recouped out of income. Indeed, it starts by saying "Where capital money is applied in the improvements then it shall not be recouped". That is all it says and that is all, in my opinion, that it means.

No capital money has been applied in any of the improvements in the present case and, therefore, it does not seem to me that the section has come into operation

at all. Apart from that, I can see nothing in that section, or anywhere else, to show that the powers thrust on the trustees for sale, being Settled Land Act powers, override their powers as trustees for sale. They are given additional powers and, therefore, they may override the trust instruction to this extent that, whereas under that the trustees had only the right to pay out of income, they may now in addition pay out of capital. It does nothing to destroy the discretionary power which they had to pay out of income if they chose: so, therefore, I reject counsel's proposition. A B

There remains the question about the back payments. The evidence on that is not very complete. All I have is the statement in para. 6 of the affidavit in support of the summons that the Public Trustee has from time to time carried out improvements to the property and has charged the cost of such improvements to capital. No doubt that is an exercise of his rights under the Settled Land Act, 1925. In para. 7 it is stated: C

"In addition, the Public Trustee has carried out repairs to agricultural buildings forming part of the landed property and the fixed equipment thereon required for the proper farming of agricultural land forming part of the landed property. None of these repairs were repairs which the tenant of the property concerned was under an obligation to carry out. [The repairs are then specified] The cost of all such repairs and also the general costs of management of the landed property have been debited to income of the landed property to which Lord Newborough and Colonel Wynn are entitled in equal shares." D

That is the position up to Apr. 1, 1952. That is what he has done. He has done those repairs and paid for them out of income as the will directed him to do, treating those persons entitled to the income as only so entitled when the trusts imposed by the will have been performed. No one can complain, as I see it, of that transaction. It has been suggested that although he has done that there ought to be some readjustments having regard to the decision of VAISEY, J., in *Re Duke of Northumberland* (3) ([1950] 2 All E.R. 1181). That case drew the attention of those concerned in the management of land to this rather revolutionary section [s. 81] in the Act of 1948 so that repairs could be done out of capital and landowners were not slow to take advantage of it. VAISEY, J., held that, as the tenant for life had spent money on repairs which came within Sch. 3 to the Act of 1948, he was entitled to call on the trustees to recoup those expenses for a number of years. So it is suggested here that the trustees who have spent the money may recoup it from themselves, as I understand it, by raising it out of capital and paying it over to the tenant for life as income. E F G

In my judgment, there is an essential difference between a settlement on trust for sale and a strict settlement in this respect. Here it is not the tenant for life who has spent the money or who has to raise the capital which he wishes to spend. It is the trustee who has spent the money in the exercise of his powers and, indeed, as the trusts imposed on him by the will direct. Having done that, it seems to me that no question of undoing that which he has done arises. It is said that he had no idea that he had a discretion to pay these sums out of capital under the Act of 1948. There is no evidence whether he had any such idea or not. Even if he had no such idea, I do not see that there was anything wrong in the Public Trustee carrying out the trusts of the will. Whether he would have come to a different conclusion if the Act of 1948 had been pointed out to him I do not know and I think it is quite irrelevant to ask. In 1952, and since that time, payments have not been allocated to capital or to income and in fact that has been done advisedly in order to await the guidance of the court on the matter. As to those payments, in my judgment, the matter is still open and the Public Trustee may exercise his discretion about it, or, he may surrender his discretion and ask the court what he should do, but that part of the summons is not before me and I H I

A say nothing more about it. The pre-1952 expenditure, in my judgment, for the reasons which I have given, ought to lie where it has fallen.

Declaration accordingly.

Solicitors: *Whitfield, Byrne & Deane*, agents for *Carter, Vincent & Co.*, Caernarvon (for the Public Trustee, the plaintiff); *Lewis & Lewis and Gisborne & Co.* (for the first defendant); *Patersons, Snow & Co.*, agents for *Longueville & Co.*, Oswestry (for the second, third and fourth defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

C

GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* GREEN. SAME *v.* COPE.

[COURT OF APPEAL (Denning, Birkett and Romer, L.JJ.), June 23, 1955.]

D *Rent Restriction—Possession—Dwelling-house owned by “housing trust”—Trust for charitable purposes—Funds in fact devoted to provision of housing for the working classes—Meaning of “working classes”—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 188 (1)—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 33 (1), (9).*

E The Guinness Trust administered a fund for “the amelioration of the condition of the poorer classes of the working population of London . . . by the provision of improved dwellings; by giving them facilities . . . for obtaining means of subsistence . . . and by . . . other means”. It was required to devote the whole or substantially the whole of its funds to charitable purposes. The great majority of its buildings were houses for poor people, including dockers, railway workers, office cleaners, dustmen and furniture hands, falling within the lower income group. In proceedings brought by the trust for the recovery of possession of two of its houses the tenants claimed the protection of the Rent Restrictions Acts, and the trust contended that the trust was a housing trust within s. 33 (9) of the Housing Repairs and Rents Act, 1954*, with the consequence that by virtue of s. 33 (1) of the Act the Rent Restrictions Acts did not apply to the two houses.

G **Held:** the trust was a housing trust within the meaning of s. 33 (9) of the Act of 1954, since it devoted the whole or substantially the whole of its funds to housing members of the “working classes”, which expression meant people in the lower income group (dictum of DENNING, J., in *Green & Sons v. Minister of Health (No. 2)* [1947] 2 All E.R. at p. 471, approved and applied); and accordingly the trust was entitled to possession of the two houses.

H Appeal dismissed.

* The Housing Repairs and Rents Act, 1954, s. 33 (9), provides:

I “In this section the expression ‘housing trust’ means a housing trust as defined by the Housing Act, 1936, or a corporation or body of persons which, being required by the terms of its constituent instrument to devote the whole or substantially the whole of its funds to charitable purposes, would be a housing trust as so defined if the purposes to which it is so required to devote its funds were restricted to those to which it in fact devotes the whole or substantially the whole thereof.”

The Housing Act, 1936, s. 188 (1), defines “housing trust” as follows:

“‘Housing trust’ means a corporation or body of persons which by the terms of its constituent instrument, is required to devote the whole of its funds, including any surplus which may arise from its operations, to the provision of houses for persons the majority of whom are in fact members of the working classes, and to other purposes incidental thereto.”

[For the Housing Act, 1936, s. 188 (1), see 11 HALSBURY'S STATUTES (2nd Edn.) 586-588; and for the Housing Repairs and Rents Act, 1954, s. 33 (1) and (9), see 34 HALSBURY'S STATUTES (2nd Edn.) 357, 359.]

Case referred to:

(1) *Green & Sons v. Minister of Health* (No. 2), [1947] 2 All E.R. 469; [1948] 1 K.B. 34; [1948] L.J.R. 1; 111 J.P. 530; 2nd Digest Supp.

Appeal.

The tenants appealed against orders of His Honour JUDGE HARGREAVES in West London County Court, made on Apr. 18, 1955, ordering them to give up possession of their houses to their landlords, the Guinness Trust. The tenants claimed the protection of the Rent Restrictions Acts. The Guinness Trust claimed that they were a housing trust within the meaning of s. 188 (1) of the Housing Act, 1936, and of s. 33 (9) of the Housing Repairs and Rents Act, 1954, and that the houses were therefore outside the operation of the Rent Restrictions Acts by virtue of s. 33 (1) of the Act of 1954.

R. H. Tuck for the tenant, Miss Green.

The tenant, Mrs. Cope, appeared in person.

R. O. Wilberforce, Q.C., and *M. Littman* for the Guinness Trust.

DENNING, L.J.: The Guinness Trust claims possession of premises from a Miss Green and Mrs. Cope, who are tenants of property at 32, Cadogan Street. The only defence raised is that the tenants are protected by the Rent Restrictions Acts. So indeed they were until 1954, but in that year the Housing Repairs and Rents Act, 1954, was passed which decontrolled houses where the landlords' interest belonged to a housing trust subject to the jurisdiction of the Charity Commissioners. The question in this appeal is whether the Guinness Trust is a housing trust within the meaning of the Act. That depends on whether it is a corporation which, being bound to devote its money to charitable purposes, nevertheless in fact restricts its purposes wholly or substantially to housing members of the working classes. That summarises, I think, s. 33 (1) and (9) of the Act of 1954, which refers back to s. 188 (1) of the Housing Act, 1936.

It is therefore necessary to consider the nature of the Guinness Trust, whether it is a charitable trust or not, and the nature of its operations. Under the trust deed, under which the trusts were set up sixty-five years ago, a fund was set aside by Sir Edward Guinness, Bt., for

" the amelioration of the condition of the poorer classes of the working population of London and of their modes and manner of living, by the provision of improved dwellings; by giving them facilities, should the trustees think it desirable in any or all cases to do so, for obtaining means of subsistence and the necessaries and decencies of life; and by such other means as the trustees may in their uncontrolled discretion think fit."

The trust is required by the terms of its constitution to devote the whole or substantially the whole of its funds to charitable purposes. So the first part of the definition is satisfied. It is certainly subject to the jurisdiction of the Charity Commissioners. Both those points are common ground. The point taken before us is this: Is the trust *in fact* devoting its funds wholly or substantially to the provision of houses for members of the working classes? From the annual reports which we have seen, and from the evidence, it is clear that the great majority of the buildings owned by the trust are houses for poor people. It is true that there is also a residential home for old people and a holiday home at Newhaven for tenants, but those homes do not seem to me to derogate from the nature of the work as a whole, which is providing houses for people who are not well-to-do.

Counsel for the tenant, Miss Green, says that the people who are housed are not members of the " working classes ", or at any rate that a great many of them

A are not. Some years ago in *Green & Sons v. Minister of Health* (No. 2) (1) ([1947] 2 All E.R. at p. 471) I said that the phrase "working classes" was quite inappropriate in modern conditions. Fifty years ago the phrase was well understood to mean people who worked with their hands, whether on the land or on the railways or in the mines. Such people in those days earned wages which on the whole were much less than the rest of the community. Nowadays the phrase
B is quite inapplicable. People who work on the land or in factories often earn more than people who work in offices or shops. Craftsmen earn as much as or more than clergymen or teachers. Yet we still have to apply the test whether a house is provided for the working classes. The only way to do it, I think, is to ask whether the house is provided for people in the lower income range, or in other words for people whose circumstances are such that they are deserving of support
C from a charitable institution in their housing needs. Applying this test, I am quite satisfied that the Guinness Trust does provide houses for such people. The majority of them do fall within the lower income group, and they are deserving of support by this charitable institution. The people in the buildings provided by the trust include dockers from Bermondsey, railway workers at Vauxhall, office cleaners and dustmen in Chelsea, and furniture hands in Shoreditch. There
D can be no doubt to my mind that this trust in fact provides houses for people who in the old days would have been called members of the working class and who today are properly described as falling within the lower income group. That being so, in my judgment the Guinness Trust is a housing trust within the meaning of the Act of 1954 and the judge was right in his conclusion.

Counsel for the tenant, Miss Green, in the course of his argument pointed out
E that some of the statements made by the learned judge did not precisely cover the matters required by the definition, but I am quite clear, having read the argument, evidence and judgment, that these are mere verbal criticisms. The judge had all the matters before him, and intended to find that the facts were such as to render the Guinness Trust a housing trust within the meaning of the Act. It follows that the two tenants are no longer protected by the Act and the
F Guinness Trust is entitled to possession. I think that the appeal must be dismissed.

BIRKETT, L.J.: I am of the same opinion. The real difficulty arises from the fact that we have to deal with a trust created some sixty-five years ago. Naturally the social revolution which has taken place in our lifetime makes
G language which was appropriate sixty-five years ago a little inappropriate now. For example, the trust deed made on Feb. 4, 1890, recited:

H "Whereas the said Sir Edward Guinness, having long felt the gravity of the evils which result from the insanitary and insufficient accommodation supplied to large numbers of the poorer of the working classes, in the dwellings now inhabited by them, on Nov. 18 last addressed a communication to the trustees requesting them to undertake the administration of a fund amounting to £200,000 which he proposed to establish with the object of endeavouring in those and other respects to ameliorate the condition of the labouring poor of London . . ."

I Since 1890 there has been a long succession of Housing Acts under which local authorities and public authorities in general have done something at any rate to deal with that situation described in the language of the deed of 1890.

Section 33 (9) of the Act of 1954 provides:

"In this section the expression 'housing trust' means a housing trust as defined by the Housing Act, 1936, or a corporation or body of persons which, being required by the terms of its constituent instrument to devote the whole or substantially the whole of its funds to charitable purposes, would be a housing trust as so defined if the purposes to which it is so required to devote

its funds were restricted to those to which it in fact devotes the whole or substantially the whole thereof." A

Counsel for the tenant, Miss Green, reminds us that that section deals with this phrase "working class", which is introduced by this reference to the Housing Act, 1936. I agree exactly with what my Lord said in the case he cited and what he has said here today. In 1890 the term "working class" had a fairly well-known significance, but as the years have passed that early significance has changed. I think the true way to look at this matter now is to take this section of the Act and apply it to the work done by this trust to see whether in substance it complies with the trust deed. The learned county court judge who heard the evidence on this matter was satisfied on the facts that it did, that the trust was really employed in erecting houses and repairing houses which were for people of comparatively small income. The other day in a case in this court an unskilled labourer, who in 1890 would certainly have qualified as one of the working classes, was working on one of the underground tubes in London and earning over £20 a week—a thing unheard of in 1890. That is an illustration of the complete revolution which has taken place since this deed first came into being. The language of this deed must be looked at quite generally to see whether in substance work has been carried out and houses erected and maintained for people of lower income. Looking at the report of 1953 and the kind of figures there given of the average weekly rent of the rooms, and the balance sheet and income and expenditure account showing how the income was expended, it seems to me clear that there was abundant evidence on which the learned judge could have found as he did and I would dismiss the appeal. B C D E

ROMER, L.J.: I agree. In the old days, the expression "working class" was probably well understood in the sense which my Lord has indicated. I agree that that test no longer affords any real assistance in ascertaining what the expression means. The working classes in this country are now generally known as the lower income group of people who earn their living which is a description that is regardless of the social level, whatever it may be, to which they belong. I agree that this appeal should be dismissed. F

Appeal dismissed.

Solicitors: *Emanuel, Round & Nathan* (for the tenant, Miss Green); *Travers Smith, Braithwaite & Co.* (for the Guinness Trust).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A X.L. FISHERIES, LTD. v. LEEDS CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.J.J.), July 4, 5, 1955.]

Landlord and Tenant—New tenancy—Business premises—Request by tenant for grant of new tenancy—Reversion acquired by local authority after the date of request—Opposition to grant of new tenancy—Application to government department for certificate—Notice served on tenant within two months of request—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 57 (4) (b).

B The tenant held shop premises under a lease for a term of seven years which expired on Mar. 1, 1955. On Nov. 22, 1954, the tenant made a request in proper form under the Landlord and Tenant Act, 1954, s. 26 (1), to the then landlord for the grant of a new tenancy. On Dec. 30, 1954, the landlord, having taken no action on the tenant's request, contracted to sell her reversionary interest in the premises to Leeds Corporation, and on Jan. 19, 1955, the sale was completed. Thereupon and within two months from the date of the tenant's request the corporation made an application to the Home Office for a certificate under s. 57 (1) of the Act of 1954 that it was requisite for their purposes that the use or occupation of the premises should be changed to occupation by the city's police from Mar. 1, 1955. At the same time, the corporation gave the tenant notice of the application in compliance with s. 57 (4) (b)* of the Act. The tenant applied to the court for the grant of a new tenancy pursuant to Part 2 of the Act of 1954.

C **D** **E** **F** **Held:** the Landlord and Tenant Act, 1954, did not require that the landlord should be the same person at the time when the tenant requested a new tenancy and at the times when the landlord applied for a certificate and notified the tenant that the landlord's application under s. 57 of that Act was under consideration; and, therefore, the tenant's application failed because, after the corporation had given its notice to the tenant, the tenant's request for a new tenancy had no effect, without prejudice however to the tenant's making a new request when the Minister should have determined whether to give a certificate.

Appeal allowed.

G [**Editorial Note.** In relation to the particular facts of this case the opening words of s. 57 (4) of the Landlord and Tenant Act, 1954, had effect as if they read "in a case in which a tenant has made a request [for a new tenancy] and the interest of the landlord at any relevant time belongs or is held" to or by a local authority (see p. 881, letter G, post). The insertion of the words in italics, which are not found in the sub-section, shows clearly that it is unnecessary that the landlord's title to the reversion should exist at the time of the tenant's making his request for a new lease. The Court of Appeal expressly leave open

H * Section 57 (4): "Where a tenant makes a request for a new tenancy under s. 26 of this Act, and the interest of the landlord or any superior landlord in the property comprised in the current tenancy belongs or is held as mentioned in sub-s. (1) of this section, the following provisions shall have effect: . . . (b) if no [certificate under sub-s. (1)] has been given but notice under sub-s. (2) of this section has been given before the making of the request or within two months thereafter, the request shall not have effect, without prejudice however to the making of a new request when the Minister or Board has determined whether to give a certificate."

I Section 57 (2): "A certificate under [sub-s. (1)] shall not be given unless the owner of the interest belonging or held as mentioned in the last foregoing subsection has given to the tenant a notice stating—(a) that the question of the giving of such a certificate is under consideration by the Minister or Board specified in the notice, and (b) that if within twenty-one days of the giving of the notice the tenant makes to that Minister or Board representations in writing with respect to that question, they will be considered before the question is determined, and if the tenant makes any such representations within the said twenty-one days the Minister or Board shall consider them before determining whether to give the certificate."

the question whether if, a reversion changes hands after the landlord has given notice of opposition, the successor to the reversion is bound by the grounds of opposition put forward by his predecessor (see pp. 878, 879, post). It is shown, however, by the present case that if the predecessor gave no notice of opposition the succeeding landlord may, within the permitted time limit, give his own notice of opposition. A

For the Landlord and Tenant Act, 1954, s. 57, see 34 HALSBURY'S STATUTES (2nd Edn.) 434.] B

Appeal.

Appeal by the respondents, Leeds Corporation, from a decision of His Honour JUDGE McKEE given on Apr. 27, 1955, at Leeds County Court, granting the applicant a new tenancy of a shop and basement known as No. 12, Town Street, Chapel Allerton, Leeds 7, for a term of seven years from June 1, 1955, at the same rent and otherwise on the same terms as were contained in the lease dated Apr. 2, 1948, and made between Beatrice Mary Hewitt of the one part and the applicant of the other part. C

N. C. Bridge for the respondents, Leeds Corporation.

G. H. Rountree for the applicant, the tenant. D

SIR RAYMOND EVERSHED, M.R.: This appeal has raised a difficult, though short, question of the construction of certain sections of the Landlord and Tenant Act, 1954, and I should like at once to acknowledge the debt that we all feel to the learned counsel on each side who have assisted us with their argument. The difficulty emerges from the somewhat troublesome subject-matter and the complex nature of the language used in dealing with that subject-matter; but, put very briefly, the question is this: The Act gives to a tenant of a certain character (that is, one who holds a lease or tenancy having certain defined characteristics, and here the interest of X.L. Fisheries, Ltd., is of that kind) a right to apply for the grant, in certain circumstances, of a new lease. E
The tenant's landlord in such an event is given by the Act certain rights of opposition or of seeking to limit the tenant's right to continued security of tenure. The present question arises because the identity of the landlord in this case changed after the date when the machinery of the Act was first invoked by the tenant; and that question is whether all (or, if not all, some, and particularly one, which I will later specify) of the possible weapons put into the hands of the landlord are available here to the Leeds Corporation which became the landlord after the date of X.L. Fisheries, Ltd.'s request for a new tenancy. I may deal now more precisely with the facts. The X.L. Fisheries, Ltd. (I will henceforth call them "the tenant") held a lease of the premises in question which, in the ordinary course, would have expired by effluxion of time on Mar. 1, 1955. F
In accordance with the terms of the Act, the tenant applied on Nov. 22, 1954, by way of request in writing to the then landlord for the grant of a new tenancy which would begin to run, under the scheme of the Act, from the date of determination of the existing tenancy, that tenancy running on in the meantime. G
The tenant asked that the new tenancy in fact should begin on June 1, 1955. H
The landlord at the time of that application was a Mrs. Hewitt, and she, on Dec. 30, 1954, without having herself taken any action on the tenant's request, contracted to sell her reversionary interest in the premises to the Corporation of Leeds, the appellants in this court, whom I will hereafter call "the corporation." I
The reason why the corporation bought the property was that they desired to make use of it as an addition to, or extension of, the city police premises. They completed the sale on Jan. 19, 1955, and it will be observed that that date was (by a small, but nevertheless a valid, margin) within the period of two calendar months from the date of the tenant's original application on Nov. 22, 1954. Acting with admirable dispatch, the corporation made an application to the Home Office, as the department of state concerned with

A police matters, for a certificate of a nature which I shall mention when I read the sections of the Act; and at the same time, within the two months they gave notice to the tenant that they had made such application.

The question which has to be determined is whether, that application having been made within the two months, the corporation can now invoke certain provisions of the Act, in particular s. 57 (4). If the corporation can do so,

B whether the result will be that, pending the determination by the Secretary of State whether to grant the necessary certificate, the request which the tenant originally made is in suspense and has ceased to be effective. If the Secretary of State decides not to grant the certificate, then the tenant will be able to set the machine again in motion. If, on the other hand, the Secretary of State grants the certificate, then it will be plain, if the corporation is right, that

C the tenant will lose any right to obtain a new lease under the Act and will receive instead, as the corporation acknowledges, compensation under s. 59.

Having regard to the periods of time which are mentioned in the Act, it is plain that occasions will occur when the landlord, at the time when the first move is made by the tenant, ceases to be the landlord before the final trick is turned. It is a serious question whether that happening was really in the

D contemplation of Parliament or of the draftsman in these sections. I am inclined for myself to think that the possibility may not have been thought of when the Act took its shape. Certainly, if it was thought of, the draftsman forbore to make any express reference to it. In arriving at a conclusion I think for myself that it is of great importance to bear in mind what the effect would be in the ordinary case of an individual landlord who became such a landlord after

E the date of the original request by the tenant, but before the question had finally been determined.

I will pass, therefore, to a reading of certain of the sections of the Act which deal with the matter I have last mentioned, viz., the ordinary case where the landlord has no special privileges by virtue of being a local authority or government department. The Part of the Act which deals with those ordinary cases

F is Part 2, which bears the general heading "Security of tenure for business, professional and other tenants". Counsel for the corporation, in his opening of the case, read the substance of the sections, beginning with s. 24 and continuing to the end of s. 31. I hope that I shall not be shirking my proper duty if I do not read all those sections, but refer to the effect of them, with such references to the language as seems essential. After s. 23 (which specifies what type of

G tenancy is within this Part of the Act and which is, for reasons I have already mentioned, irrelevant) the subject-matter opens with s. 24, of which sub-s. (1) is as follows:

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under

H such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act."

The first of the two alternatives (that of the landlord giving notice) is covered

I by s. 25. That section provides, among other things, that if the landlord does give notice, it is essential, if that notice is to be effective, that the tenant should be required within two months of the giving of the notice to tell the landlord whether or not he is willing to give up possession. The notice must also indicate, if the tenant is not willing to give up possession, what are the grounds on which the landlord would oppose an application by the tenant for an extension of his tenancy.

So much for the first of the two alternatives in s. 24 (1). The second alternative, that of the tenant's initial request, is provided for by s. 26. That section provides

that the tenant should forward to the landlord a request for a new tenancy within a certain period, in such a case as the present, before the end of the existing tenancy (a condition which has again been here complied with), and s. 26 (6) indicates what the landlord's position will be on receipt of such a request. Sub-section (6) is important and I shall read it: A

"Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application." B

I can leave out, for present purposes, s. 27 and s. 28. Section 29 provides for the appropriate application which has to be made to the court, where, to take this kind of case, a request has been made and the landlord has given notice of opposition. It is just to be noted that the tenant cannot apply to the court by virtue of sub-s. (3) until, at any rate, the two months, which is the period specified in s. 26, have expired. I mention that, because it is important in the scheme of the Act to note that, however quickly a landlord might respond to the request, the stage of application could never be reached before two months had expired from the date of the request. C D

Section 30 sets out, as anticipated, the grounds on which the landlord may base his opposition. There are altogether seven of them. They are not all quite of the same kind, and as to one of them (the case in which the landlord intends to occupy the premises for his own purposes) a special qualification is required of a landlord seeking to rely on that ground based on the date when he himself acquired his interest. In the view I take, I do not find it necessary to pursue that particular matter, though it was relied on and referred to in the course of the argument, because of the language used in reference to dates. Certain of the grounds, as one might expect, are based on alleged infringements by the tenant of his duties as tenant; but one which I shall take because it will illustrate sufficiently my argument is that lettered (f), that on the termination of the current tenancy the landlord intends to reconstruct the premises comprised in the holding and cannot reasonably do so without obtaining possession. E F

Having referred to those sections, I will pose and attempt to answer the question: Do those sections contemplate or require that the landlord, throughout the whole period after the machinery of the Act has been set in motion, should be the same person, whether an individual person or a *persona ficta*? I think for my part that the answer to that question is inevitably in the negative. I can find nothing in the sections or the language used therein which would require the continuity throughout of the same person as landlord; and, indeed, it would be a strange thing if the Act did so require, because, though Parliament may do many things, it cannot insist that a particular person shall live a particular length of time. It is, in other words, I think quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having acquired the premises or the reversion since the date of the request, is able to say when he puts in his notice of opposition before the two months' period expires that he is the landlord and (to take the example that I chose from s. 30) that on the termination of the current tenancy he intends to reconstruct. G H

During the course of the argument, a further question was somewhat debated, and I will say at once that, finding it unnecessary to give an answer to it, I prefer to leave it until it actually arises for determination. The question is this: Suppose that landlord A had within the two months given notice of opposition based on intention to reconstruct, under s. 30 (1) (f), and then, still within the two months, sold the premises to landlord B. What is B's position until the two months have expired? Is he (so to speak) limited and bound by the objections that landlord A has intimated? Is he free to abandon them and I

- A substitute new ones ? Or is he left without any effective opposition at all ? As I have said, I do not find it necessary to answer that somewhat difficult question, and I therefore pass it by, saying only this, that the presence of that possible difficulty does not seem to me to qualify the conclusion I have already expressed, that so far, in the ordinary case contemplated by Part 2, I find nothing which could sensibly produce the result that the landlord must be the same person
- B throughout the whole period of the operation of the scheme of this Part of the Act.

- Now that circumstance, I think, is of overriding importance when I come to deal with the question which arises in this particular case under (as I have already indicated) the somewhat special provisions of s. 57. That section is not within the embrace of Part 2 of the Act. It is part of Part 4, headed "Miscellaneous and supplementary". Part 4 deals with a number of somewhat special and rather divergent subject-matters. Section 57, however, is concerned with the case where the interest of the landlord is held by what I will call compendiously a public authority. The public authority may be, in s. 57, a government department, a local authority, a statutory undertaker or a development corporation; and, as will be apprehended in this case, we are concerned with the second
- C member of that category, namely, a local authority. A number of sub-sections have this in common, not only in this section itself, but elsewhere in the Act and, indeed, in other enactments to which counsel for the corporation drew our attention: they open with the formula "Where" such and such a thing is done and something else exists or happens. I take, for example, s. 57 (1):

- E "Where the interest of the landlord . . . in the property comprised in any tenancy belongs to or is held for the purposes of a government department . . . the Minister . . . in charge of any government department may certify that it is requisite for the purposes of the . . . department, or . . . the [local] authority . . . that the use or occupation . . . shall be changed by a specified date."

- F Then again, in sub-s. (4) to which our attention is specially directed in this appeal, it is provided:

"Where a tenant makes a request for a new tenancy [under Part 2] and the interest of the landlord . . . in the property comprised in the current tenancy belongs or is held as mentioned in sub-s. (1) [in this case, by a local authority] the following provisions shall have effect . . ."

- G Again, sub-s. (5):

"Where application is made to the court under Part 2 [s. 24, s. 29] for the grant of a new tenancy and the landlord's interest in the property . . . belongs or is held as mentioned in sub-s. (1) . . ."

- H Again, in sub-s. (7) there is the same formula, though a transposition of the order (so to speak) in which the matters mentioned are introduced: "Where the interest of the landlord . . . in the property . . . belongs to" (in that case) the National Trust, then the Minister may certify; and again similarly in s. 58 (1):

- I "Where the landlord's interest in the property . . . belongs to or is held for the purposes of a government department, and the Minister . . . certifies that for reasons of national security it is necessary . . ."

The question (and it at once emerges, I think, from the reading of the sub-sections) is this, to take the particular problem under s. 57 (4): Is the use of the present tense twice in the formula which I have mentioned such as to signify an intention by Parliament that the two events, the two things mentioned, should be contemporaneous, "Where a tenant makes a request . . . and the interest of the landlord . . . belongs"? Is it the proper intention (i.e., the proper result of the terminology used) that the interest of the landlord

must "belong" at the same time as the tenant makes a request? It will be noticed, of course, that the events or happenings are not entirely of the same kind. The making of a request is a specific event, a thing done on a particular date; the conception of the interest "belonging" is not a reference to a particular moment of time, but to a period of time. That, though obvious, does not much help. The question is: Is the period of ownership intended and specified one that must extend so as to cover the time of the making of the request? A
B

Before I seek to give my answer to that problem, I must state (though I shall do so quite briefly and without long references) what are the particular privileges, for such they are, which this section confers on the public authorities mentioned. From my reading of s. 57 (1), it will be apprehended that these privileges arise because the public authority seeks a certificate that it is requisite for the purposes of the authority that the use or occupation of the property should be changed. As I have said, in this case the corporation wish to have it certified that it is requisite that the use of these premises shall be changed from that of being a fried fish and chip shop to being part of the city's police premises. When that matter is in contemplation, the procedure contemplated is that the authority applies to the appropriate Minister—in this case the Secretary of State for the Home Department. Under the Act, on making such an application for a certificate, the owner of the interest, the landlord (in this case the corporation), must inform the tenant that he is making that representation to the Minister, and the tenant is given thereby an opportunity to put his point of view also to the Minister. If that is the stage reached then, by s. 57 (4) (b) the request—I use the language of the Act— C
D
E

"shall not have effect, without prejudice however to the making of a new request when the Minister . . . has determined . . ."

but it is essential that the request for the certificate and the notice of the making of it should have been given within the important period, two months from the date of the request. That is specifically set out in s. 57 (4) (b): F

"if . . . notice under sub-s. (2) of this section has been given . . . within two months [after the making of the request]."

I am only concerned with a case such as has arisen here. It may be that in other cases a notice will have been given before any request was made, but I am only, as I say, concerned with this particular case and, by the terms of the section, within the two months such notice has to be given. It was given; and I can now re-state the problem: Having regard to the opening language of sub-s. (4), is the landlord entitled to rely on sub-s. (4) (b), to say that within two months of the making of the request the notice has been given, and, therefore, that the request is not to have effect pending the Minister's determination, although at the time of the making of the request the corporation was not the landlord at all? That is the problem. G
H

Without taking time to expand this matter unduly, there are other privileges given in this and the succeeding section to public authorities generally, all of a particular kind. Thus, in s. 57 (5), though the public authority there mentioned may not be in a position to call on a Minister or invite a Minister to certify that it is requisite for the purposes of that department that the use or occupation shall be changed, nevertheless it may call on the government department to certify that it is necessary in the public interest that any new lease should be terminable by six months' notice on the landlord's side. Again, s. 58 deals with the case where a government department calls on the Minister to certify that, for reasons of national security, the use or occupation shall be changed. It has been conceded in argument that these special privileges which public authorities may have, circumstances giving them special rights for limiting what otherwise would be a tenant's statutory claim for a new tenancy, are I

A in addition to the ordinary rights which a landlord of any kind may have or has under Part 2; i.e., the fact that the landlord is a local authority (say, the Leeds Corporation) in no way disables the corporation from setting up by way of opposition one or other of the grounds referred to in s. 30; and I have already said, leaving aside the case where landlord A has already put in a notice of opposition and is then succeeded by landlord B, that to my mind it is tolerably clear that a local authority who became landlord after the date of the request would not be disabled from putting in, within the two months' period, a notice of opposition based on any one or more of the grounds referred to in s. 30.

If that is right, it will be seen that, on the general scheme of the Act, a local authority which has special grounds of objection should not *prima facie* be any more disabled from relying on the special ground, because the local authority had become landlord since the request, than it would be in relying on one of the general grounds in s. 30. If it were so, it would seem to me illogical that a local authority should be deprived of the chance of setting up the special privilege cases under s. 57 merely because it happened to become landlord after the date of the request. That is, of course, another way of putting the second head of the argument of counsel for the corporation, that the view for which he contended is the one more consonant with the general scheme of the Act. But I think for myself, on the whole, and in addition to that argument, that the language of s. 57 (4) itself, on its natural meaning, should not be read as limiting the order of events there stated, so as to make it necessary that the interest of the landlord should belong or be held throughout the whole period from the date of the making of the request. The formula "Where a tenant makes a request and the property is held"—is, I think, simply a draftsman's well-established way of expressing what might otherwise be put in the form "In the case where a tenant makes a request, then, if certain events are shown to exist, certain consequences follow".

Counsel for the corporation referred us to the use of that kind of formula, in, for example, the Landlord and Tenant Act, 1927, s. 21, and in the Leasehold Property (Repairs) Act, 1938, s. 1, and elsewhere in the Act of 1954; and he at any rate showed instances (of which that from the Leasehold Property (Repairs) Act, 1938, s. 1, is one) that if real contemporaneity is intended, then it is expressed. I will also refer to s. 24 (3) (b) of the Act of 1954, which is an instance where such contemporaneity is intended and expressed; for there Parliament says "*where, at a time when a tenancy is not one . . . the landlord gives notice to quit.*" There is no reference here which would put the matter beyond doubt, such as "*and at the time of making the request the interest is*"; and particularly if I bear in mind the scheme to which I earlier referred, I think the natural meaning here is more naturally expanded to this effect: "*Where (that is) in a case in which a tenant makes (that is) has made a request and the interest of the landlord at any relevant time belongs or is held*". If that is a right reading, then it is sufficient if the interest is held at the time when, by the section, the landlord is called on to do anything. The landlord, it will be remembered, is so called on, if a certificate has not been given but application has been made therefor. The giving of notice of that application is the thing which has to be done; and it seems to me that if the landlord is a landlord of the nature specified in sub-s. (1) when he gives that notice, then (in the same way as it suffices if he is the landlord when he gives a notice under Part 2) it suffices if he shows he is at that time the landlord.

I was myself somewhat troubled by comparing sub-s. (4) and sub-s. (5) of s. 57. Sub-section (5) begins "*Where application is made to the court . . . and the landlord's interest . . . belongs or is held*". I was inclined to think that in such a case the essential point of time was the making of the application and that the landlord's interest must be shown to be of the nature specified when the application is made. I think now that that may not be right. I think that it may well

be sufficient if the interest of the landlord is of the requisite nature when the application is dealt with. Whether that is so or not, here there is no such necessary or natural crystallising of rights by the mere making of the request or that which follows when the court's jurisdiction is invoked. On this particular point and in regard to the contrast between these two sub-sections I have felt, perhaps, a greater difficulty than either of my brethren. They at any rate both take the view that, the general scheme of the Act being as it is, there is no good ground for giving to the language in sub-s. (4) a meaning which would produce an illogical result. It is here conceded that the language is equivocal; and, if that is so, then plainly the duty of the court is to give to the language a meaning which does conform with the general scheme of the Act, rather than one which does not. It is not difficult, I think, to imagine other cases which can arise under one or other of these sub-sections and which will be exceedingly difficult to solve. Instances were given during the course of the argument. I do not propose to indulge in such academic exercises. I only mention them for the reason that no case has been given by way of illustration in the argument which would tend to show, to my mind, that one view rather than another of sub-s. (4) would not fit with some other imagined case. I have not been satisfied that the view to which I have myself come will create some other anomaly in the Act. Knowing the hazards of the construction of statutes, I will not assert that my conclusion is incapable of producing further difficulties in the future, and in the argument (and I have already acknowledged the skill with which the case has been presented) I can see no obstacle, derived from the consideration of other sub-sections, to what I think, on the whole, is the more natural meaning of sub-s. (4) (treating it as a somewhat technical formula in any case) and is a meaning consonant with the earlier part of the Act. That view is contrary to that which commended itself to the county court judge. He thought that, looking at the sub-section itself, contemporaneity was intended. I have said that I have felt personally some sympathy with that view, but, with all respect to the learned judge, considered in all its context, I cannot accept it. I have come to a different conclusion and think, therefore, without saying more, that the appeal should be allowed and that the corporation are entitled to the order which they seek.

JENKINS, L.J.: I agree and find nothing I can usefully add.

PARKER, L.J.: I also agree.

Appeal allowed. Application dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town Clerk*, Leeds; *Gibson & Weldon*, agents for *Bretherton, Ditchburn & Nelson*, Sunderland (for the applicant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A WESTMINSTER BANK, LTD. v. LEE AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), April 28, May 3, 4, 5, 6, July 6, 1955.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Mortgage of matrimonial home by husband after desertion—Equitable mortgage—Claim for possession by equitable mortgagee—No notice of desertion—Wife's right to remain in matrimonial home—Nature of right.

B For some time before September, 1948, the first defendant, the husband, had been a customer of the Belper branch of the plaintiff bank. From time to time he had mentioned to the manager of the branch that he wanted to pay off a mortgage on his house and to deposit the deeds as security for an overdraft. On or about Sept. 2, 1948, this was agreed and about a week later the husband was allowed to overdraw on an undertaking that the deeds would be deposited. The deeds were deposited and in November, 1948, an equitable mortgage to the bank was executed. At all material times until Sept. 2, 1948, the husband and his wife, the second defendant, had lived at the mortgaged premises. On or about Sept. 2, 1948, the husband deserted his wife. Of this the bank had no knowledge. In December, 1948, the bank received an unsigned request on the husband's business notepaper to address all letters to him at a new address as he had left the mortgaged premises for a period. The wife continued to reside at the mortgaged premises. In July, 1954, the bank took proceedings to enforce the equitable mortgage by sale or foreclosure and asked that there should be an order for the usual accounts and for sale with vacant possession three months after the date of the master's certificate certifying the amount due.

E **Held:** the right of a deserted wife to remain in the matrimonial home was a mere equity and no equitable estate or interest in the land was created in her favour on her being deserted, and the title of a purchaser of an equitable interest in the land for value and without notice of the wife's equity would prevail over her equity; in the circumstances existing when the mortgage was negotiated and executed the bank had been entitled to assume that a normal relationship existed between the husband and the wife and had not constructive notice of the desertion, and accordingly the order for accounts and inquiries would be made and, if the bank obtained thereafter an order for sale, the bank would be entitled to an order for possession within three months after the master's certificate.

G *Street v. Denham* ([1954] 1 All E.R. 532) followed; dicta of DENNING, L.J., in *Bendall v. McWhirter* ([1952] 1 All E.R. 1307) and *Jess B. Woodcock & Son, Ltd. v. Hobbs* ([1955] 1 All E.R. 445) and of JENKINS, L.J., in *Hole v. Cruzen* ([1953] 1 All E.R. 87), ROXBURGH, J., in *Thompson v. Earthy* ([1951] 2 All E.R. 235) and HARMAN, J., in *Barclays Bank, Ltd. v. Bird* ([1954] 1 All E.R. 449) considered; *Ferris v. Weaven* ([1952] 2 All E.R. 233) considered and distinguished.

I [**Editorial Note.** There has been a conflict of dicta on the question whether a deserted wife's right to continue to reside in the matrimonial home is a right which is a personal one that avails only against her husband or is an equity which is good against subsequent purchasers with notice of her right. In the present case UPJOHN, J., considered that he was bound by a decision of a court of first instance to decide, against his own opinion (see p. 887, letter C, post) in favour of the latter view. Thus the wife's right may prevail, as the law now stands, against a purchaser with notice. If it does, however, it is not a permanent right but entitles her to remain in possession only until the court in its discretion orders her to leave (*Jess B. Woodcock & Son, Ltd. v. Hobbs*, [1955] 1 All E.R. 445); and in addition it is now held that a purchaser is not fixed with constructive notice of the wife's equity unless he has notice of a fact which should put him

on further inquiry whether there has been desertion or unless he abstains from inquiry to avoid notice (see p. 889, letter H, post).

As to a deserted wife's right to remain in the matrimonial home, see Supplement to 16 HALSBURY'S LAWS (2nd Edn.), para. 1211; and for cases on the subject, see 27 DIGEST 3rd Supp., 621a-621e.

As to constructive notice, see 13 HALSBURY'S LAWS (2nd Edn.) 104, para. 95; and for cases on the subject, see 20 DIGEST 300, 301, 551-553, and 329, 330, 730-748.]

Cases referred to:

- (1) *Lee v. Lee*, [1952] 1 All E.R. 1299; [1952] 2 Ch. 489, n.; 3rd Digest Supp.
- (2) *Lloyds Bank, Ltd. v. Oliver's Trustee*, [1953] 2 All E.R. 1443; 3rd Digest Supp.
- (3) *Barclays Bank, Ltd. v. Bird*, [1954] 1 All E.R. 449; [1954] Ch. 274; 3rd Digest Supp.
- (4) *Whitely v. Delaney*, [1914] A.C. 132; 83 L.J.Ch. 349; 110 L.T. 434; 35 Digest 619, 3561.
- (5) *Smithett v. Hesketh*, (1890), 44 Ch.D. 161; 59 L.J.Ch. 567; 62 L.T. 802; 35 Digest 351, 931.
- (6) *Jess B. Woodcock & Son, Ltd. v. Hobbs*, [1955] 1 All E.R. 445.
- (7) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.
- (8) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407; 2nd Digest Supp.
- (9) *Hole v. Cuzen*, [1953] 1 All E.R. 87; sub nom. *Bradley-Hole v. Cuzen*, [1953] 1 Q.B. 300; 3rd Digest Supp.
- (10) *Ferris v. Weaven*, [1952] 2 All E.R. 233; 3rd Digest Supp.
- (11) *Street v. Denham*, [1954] 1 All E.R. 532; 3rd Digest Supp.
- (12) *Phillips v. Phillips*, (1862), 4 De G.F. & J. 208; 31 L.J.Ch. 321; 5 L.T. 655; 45 E.R. 1164; 35 Digest 432, 1728.
- (13) *Cave v. Cave*, (1880), 15 Ch.D. 639; sub nom. *Chaplin v. Cave, Cave v. Cave*, 49 L.J.Ch. 505; 42 L.T. 730; 35 Digest 452, 1927.
- (14) *Cloutte v. Storey*, [1911] 1 Ch. 18; 80 L.J.Ch. 193; 103 L.T. 617; 37 Digest 384, 3.
- (15) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1946] 1 All E.R. 678; 115 L.J.Ch. 297; 175 L.T. 434; *revsd.* H.L., [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (16) *Hunt v. Luck*, [1901] 1 Ch. 45; 70 L.J.Ch. 30; 83 L.T. 479; *affd.* C.A., [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.

Adjourned Summons.

The plaintiffs, Westminster Bank, Ltd., the equitable mortgagees of a dwelling-house and premises known as Timberscombe, Shaws Hill, Whatstandwell, in the county of Derby, sought by originating summons (1) that an account might be taken of what was due to them under a memorandum or letter of deposit dated Nov. 10, 1948, and signed by the first defendant, Herbert Arthur Lee, in favour of the plaintiff bank and a deposit of documents therein referred to; (2) the sale or foreclosure of the mortgaged premises as against the first defendant, and (3) possession of the premises as against the second defendant, Kathleen Violet May Lee.

The facts appear in the judgment.

J. W. Mills for the bank.

Ian Campbell for the husband.

Peter Foster for the wife.

Cur. adv. vult.

July 6. UPJOHN, J., read the following judgment: This is an originating summons by Westminster Bank, Ltd. to enforce an equitable mortgage dated

- A Nov. 10, 1948, over certain premises known as Timberscombe, Shaws Hill, Whatstandwell, in the county of Derby. The first defendant is the mortgagor, and I will refer to him as "the husband". It is not disputed that as against him the bank is entitled to the usual order to enforce a mortgagee's charge; but the bank also ask for an order for possession against the second defendant, who is the wife of the husband but has been deserted by him.
- B The facts are not in dispute. The defendants were married in 1937, and at the time of the marriage the site on which the house Timberscombe now stands was purchased by the husband's father and by his direction conveyed into the husband's name. Subsequently the father built the house on it and it became the matrimonial home in 1939. In the same year the husband created a legal mortgage of the premises in favour of the Co-operative Insurance Society, Ltd., to secure repayment of £495 then advanced to the husband. For some time before September, 1948, the husband had been a customer of the Belper branch of the bank, and was in the habit of visiting that branch weekly to draw money for the wages of those employed by him in his business. On some of these occasions he mentioned to the bank manager that he wanted to pay off the Co-operative mortgage by means of a bank overdraft and to deposit the title deeds of his house with the bank to pay off that charge and as security for further overdraft facilities. This was ultimately agreed on or about Sept. 2, 1948. On Sept. 9 the husband was permitted to start overdrawing on the strength of an undertaking then given by the husband's solicitors that they would obtain and deposit the title deeds with the bank. On Sept. 10 the husband drew a cheque for £550 on his banking account, thereby becoming overdrawn for the first time, and on Sept. 16 he drew a cheque for £357 3s. in favour of the Co-operative Insurance Society for the purpose of paying off the mortgage. On Oct. 25 the society indorsed a vacating receipt on the mortgage, and on Nov. 9 the title deeds were deposited with the bank, the equitable charge being dated the next day. By this time the account was overdrawn to the extent of £1,346.
- E In the meantime the husband deserted the wife on or about Sept. 2. The latter took proceedings for maintenance in the Belper Magistrates' Court, and on Oct. 14, 1948, obtained an order stating (inter alia) that she had been deserted. Until evidence was filed in these proceedings, however, the bank was unaware that the husband had left home as early as September, 1948. The first intimation which the bank had of any change of address was the receipt on Dec. 7, 1948, of an unsigned memorandum on the husband's business notepaper asking the bank to address all letters to a new address at Matlock Bath "as I have left Shaws Hill for a period". The reference to Shaws Hill was, as I understand it, a reference to his home address and not his business address. To complete the story, in 1951, on the wife's application to the county court, His Honour JUDGE WILLES made an order permitting her to reside in the house Timberscombe unless and until the husband should have first provided suitable accommodation and restraining him by sale or assignment from evicting his wife from the matrimonial home. That case went to the Court of Appeal, who affirmed the decision. It is reported as *Lee v. Lee* (1) ([1952] 1 All E.R. 1299). At the date of the issue of the summons in 1954 some £1,673 was due from the husband. The amount due has since increased slightly.
- H Counsel for the bank advances two main points. He submits, first of all, that the bank is in effect subrogated to the rights of the Co-operative Insurance Society, and this would throw its rights as mortgagee back to a date anterior to the date of desertion and so bring it within the decisions of *Lloyds Bank, Ltd. v. Oliver's Trustee* (2) ([1953] 2 All E.R. 1443) and *Barclays Bank, Ltd. v. Bird* (3) ([1954] 1 All E.R. 449). He relied on *Whitely v. Delaney* (4) ([1914] A.C. 132). That was a very different case. It arose out of the failure of a solicitor to carry out a rather complicated sale and mortgage transaction in the manner intended, due entirely to the fact that the existence of a second mortgage
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was concealed by the mortgagor: it was a case that depended entirely on its own facts. In the present case there was nothing wrong whatever on the part of the husband in making the mortgage arrangements. The agreement which was made and carried out was that the earlier legal mortgage should be paid off and that a new equitable mortgage by way of deposit of title deeds should take its place; the husband paid off the earlier mortgage and his solicitors deposited the title deeds as they undertook to do. I can see no ground for treating the bank as having the rights of the Co-operative Insurance Society under their legal mortgage of 1939. In any event the bank could only be so treated to the extent of the £357 paid to the society; but that would be quite sufficient for the bank's purpose. Finally, I do not think this point is open to the bank on the originating summons as at present drawn.

I turn therefore to counsel's second main point. He does not seek an order for immediate possession against the wife, but asks for an order for accounts to be taken as against the husband and an order for sale with vacant possession three months after the date of the master's certificate certifying the amount due. Of course, the court can order a sale in lieu of foreclosure at any time (see ss. 90 and 91 of the Law of Property Act, 1925); but there must be some evidence that it would be proper, and there must be some evidence of value (see per NORTH, J., in *Smithett v. Hesketh* (5) (1890), 44 Ch.D. at p. 163). There is no such evidence before me, and I cannot today make any order for sale either immediately or on the taking of accounts; but, as was pointed out by NORTH, J., the refusal to do so will not fetter any of the parties, who can always apply for a sale until foreclosure absolute.

Counsel for the wife was constrained to concede that, since *Jess B. Woodcock & Son, Ltd. v. Hobbs* (6) ([1955] 1 All E.R. 455), a decision of the Court of Appeal, she has no right to stay on in the house indefinitely, but only until such time as the court in its discretion orders the wife to go out. He submitted, however, that, in exercising its discretion, the court will recognise that the wife has been deserted and as such has an interest in the property taking priority over the bank's mortgage, and will therefore allow a substantial period after decree of foreclosure absolute before ordering her to deliver up possession. As a practical matter, therefore, the case lies in a narrow compass and it ultimately becomes a question of how long the wife will be allowed to stay in possession; but, if the wife can establish that she has some equity having priority over the mortgage, that will enable her to plead with some force for a longer period, by some months, than if she has no rights as against the mortgagee. That may be an important matter for the wife, and I must determine it.

The first question is whether the right of the deserted wife to occupation of the matrimonial home is purely personal between husband and wife so that an assignee of the husband (other than a trustee in bankruptcy) taking even with notice would not be affected at all by any right of the wife against the husband himself to remain in possession or whether such right constitutes an equity binding all but purchasers for value without notice. That point was left open by the majority of the Court of Appeal in *Bendall v. McWhirter* (7) ([1952] 1 All E.R. 1307). In favour of the view that the right is purely personal is the decision of ROXBURGH, J., in *Thompson v. Earthy* (8) ([1951] 2 All E.R. 235) and the remarks of JENKINS, L.J., in *Hole v. Cuzen* (9) ([1953] 1 All E.R. at p. 91). In the later case of *Woodcock v. Hobbs* (6), PARKER, L.J. ([1955] 1 All E.R. at p. 451) expressed great difficulty in extending the wife's right to possession against a purchaser with or without notice and stated he would require further argument before determining the point. HARMAN, J., in *Barclays Bank, Ltd. v. Bird* (3) plainly preferred this view. In the last three cases I have mentioned the remarks were obiter. Against that view are the observations of DENNING, L.J., in *Bendall v. McWhirter* (7) and again in *Woodcock v. Hobbs* (6), and I think it is fair to say that, as I read the judgment of BIRKETT, L.J., in the last case, he

- A did not dissent from the views of DENNING, L.J. These observations were again obiter. In *Ferris v. Weaven* (10) ([1952] 2 All E.R. 233) a decision of JONES, J., the ratio decidendi was that a purchaser with notice is bound by the wife's right to possession; but it is not a satisfactory authority for the proposition under discussion because, as PARKER, L.J., pointed out in *Woodcock v. Hobbs* (6) ([1955] 1 All E.R. at p. 451) and HARMAN, J., in *Bird's* case (3) ([1954] 1 All E.R. at p. 450), the decision could be justified on its own special facts.
- B In *Street v. Denham* (11) ([1954] 1 All E.R. 532), LYNSEY, J., against his own view, considered that he was bound to hold that a purchaser for value taking with notice was bound. It is true that in that case the plaintiff was the husband's mistress, but unlike *Ferris v. Weaven* (10) the plaintiff appears to have paid the purchase money, nor was the sale obviously collusive, as it plainly was
- C in *Ferris v. Weaven* (10). Indeed, the husband appears to have behaved not unreasonably, being willing, at any rate at one stage, to provide alternative accommodation for the wife, which she refused.

My own view coincides closely with that of HARMAN, J., in *Bird's* case (3), namely that a deserted wife has no more than a status of irremovability by the husband; but, so far as this court is concerned, I think I ought to follow the

D decision of LYNSEY, J., on this point [*Street v. Denham* (11)] as he carefully considered the matter and the earlier authorities, and accordingly to hold that a wife has an equity which is enforceable against purchasers taking with notice.

Now the bank's charge is equitable, and therefore the bank takes subject to all equities affecting the land whether it has notice or not, subject only to the following qualification. The court of equity has been careful to distinguish

E between two kinds of equities, first an equity which creates an estate or interest in the land and secondly an equity which falls short of that. An equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation to a mere equity the defence of purchaser for value without notice may be available even as between the owners of equitable estates. The principle was laid down by LORD WESTBURY, L.C.,

F sitting at first instance in *Phillips v. Phillips* (12) (1862) (4 De G.F. & J. 208) but, as the relevant passages in his judgment are set out and followed in a subsequent judgment of a great master of equity, FRY, J., in *Cave v. Cave* (13) (1880) (15 Ch.D. 639), I propose to go straight to that case. He said this (*ibid.*, at p. 646):

"The case of *Phillips v. Phillips* (12) is the one which has been principally

G urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of LORD ST. LEONARDS in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this court should determine the priorities between them. The classes of cases to which

H that defence will apply are other than that. LORD WESTBURY in the course of his judgment in that case said this (4 De G.F. & J. at p. 215): 'I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable interest (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities, and the maxim applies, "Qui prior est tempore potior est jure". The first grantee is potior—that is, potentior. He has a better and superior—because a prior—equity'. His Lordship then proceeded to explain the

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different classes of cases in which that defence is available, and the one which has been relied upon as bringing the case of the defendants within the decision of LORD WESTBURY is the third class, which is this, that (*ibid.*, at p. 218) 'where there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere'.

"Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate?"

That is the question I have to determine. In the subsequent case of *Cloutte v. Storey* (14) ([1911] 1 Ch. 18), NEVILLE, J., treated an equitable estate and an equitable interest as equivalent terms.

The decision of the majority of the Court of Appeal in *Bendall v. McWhirter* (7) is clear. ROMER, L.J., with whom SOMERVELL, L.J., agreed, said ([1952] 1 All E.R. at p. 1316):

"She has no legal or equitable interest in the home which she continues to occupy and in that respect is in no better position than any other licensee."

In the same case DENNING, L.J., was careful not to describe a deserted wife as having an equitable estate or interest in the land. He described it in these terms (*ibid.*, at p. 1315): "He [the trustee in bankruptcy] takes, therefore, subject to her right, for it is an equity". It is true that the learned lord justice compared the wife's right to that of a contractual licensee, whose rights in turn were described (*ibid.*) as "a clog or fetter like a lien". A lien does not of necessity connote an interest in property, and I do not think DENNING, L.J., meant to suggest thereby that a deserted wife has an estate or interest in the land. If he did it was inconsistent with the view of the majority of the court. Moreover, the protection afforded to a contractual licensee, as *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (15) ([1947] 2 All E.R. 331) has made clear, does not depend on the licensee having an estate or interest in the land, for normally at all events he will not, but on the power of equity to restrain a breach of contract. See the judgment of LORD GREENE, M.R., in the Court of Appeal ([1946] 1 All E.R. at p. 680) and the speech of LORD UTHWATT in the House of Lords ([1947] 2 All E.R. at p. 340).

In my judgment, the right of a deserted wife to remain in the matrimonial home, put at its highest, is a mere equity, and no equitable estate or interest in that home is created in her favour on desertion. Accordingly the bank, although only an equitable mortgagee can, like the owner of a legal estate, if the facts warrant it, plead the defence of purchaser for value without notice; and to this question I now turn.

It is not in dispute that the bank had no actual notice of the desertion before execution of the charge, and the question is whether they had constructive notice by reason of the continued occupation of the matrimonial home by the wife as a deserted wife at the time of such execution. Actual occupation of premises by a tenant or a stranger gives constructive notice of the rights of such tenant or stranger to a purchaser (*Hunt v. Luck* (16) ([1901] 1 Ch. 45; [1902] 1 Ch. 428). Section 3 of the Conveyancing Act, 1882, only codified the law. In *Bendall v. McWhirter* (7), DENNING, L.J. ([1952] 1 All E.R. at p. 1314) applied this doctrine without qualification to the case of a deserted wife. With all respect, I think his observations, which were obiter, went too far. In the first place, rightly or wrongly, the view is generally held in the profession that s. 199 (1) (i) of the Law of Property Act, 1925, which replaces s. 3 with amendments, altered the law where the occupier enjoys possession of unregistered land

- A by some instrument or matter capable of registration, for s. 14 of the Law of Property Act, 1925, only applies to Part 1 of that Act and not to s. 199. So far as this case is concerned, however, this point is academic, for I ignore the order of the magistrates in October, 1948, as it has not been argued that such order was capable of being registered and that failure to do so entitled the bank to be treated as being a purchaser for value without notice, though I express no
- B opinion on that point. Secondly, in my judgment, this doctrine that notice of the rights of those in occupation will be imputed to a purchaser must be applied to the occupation of a deserted wife with great caution. The doctrine is only an illustration of the governing principle to be found now in s. 199 (1) (ii) (a) of the Law of Property Act, 1925, that the purchaser or mortgagee will be bound by constructive notice if knowledge of the particular matter (in this case desertion)
- C would have come to his knowledge

“if such inquiries and inspections had been made as ought reasonably to have been made by him”.

That is the question to be answered, and each case must depend on its own facts.

- D Now the facts in this case are simple. Husband and wife lived at the matrimonial home together for nine years. In 1948 the husband had been a customer of the bank at any rate for some time and was in the habit of going to the bank weekly to draw wages. The bank had his home address on their books. So far as the evidence goes, I assume all that continued throughout the time of the negotiations and execution of the mortgage. The bank had not the slightest
- E reason to suspect that the husband had even left home until December, 1948, a month after the mortgage was executed. In this state of affairs it would, in my judgment, be entirely unreasonable for the bank to send an officer to inquire, not whether a stranger was in occupation, but to inquire of the wife whether she had been deserted. If it be a necessary inquiry, nothing short of that will do, for mere discovery of the absence of the husband from home is no evidence of anything. In my judgment the law does not require an intending purchaser or
- F mortgagee who has no reason to believe that a wife is deserted to make any inquiry on the footing that it is conceivably possible that she may be; that is not a reasonable inquiry. If the law were otherwise it would mean that every intending purchaser or lender must inquire into the relationship of husband and wife and inquire into matters which are no concern of his and would bring thousands of business transactions into the area of domestic life and ties. That
- G could not be right. In my judgment the law is this, that, where a man is carrying out a perfectly normal transaction of raising money on mortgage and the proposing lender has reasonable grounds (as in this case) for believing that the intending mortgagor, the husband, is in occupation of the security offered, he is entitled to assume that a normal relationship exists as between husband and wife and is under no obligation to make any inquiry relating to their domestic relation-
- H ship. On the other hand, if the intending mortgagee has notice of any fact which may put him on further inquiry whether the vendor has deserted his wife, or if, having some suspicion, he wilfully abstains from inquiry to avoid notice, then the doctrine of constructive notice comes into play (see per FARWELL, J., in *Hunt v. Luck* (16), [1901] 1 Ch. at p. 52). Each case must be dealt with according to its own circumstances. For example, if before the mortgage was completed
- I the bank had received the unsigned letter of December from the husband asking them to send all letters to a new address as he had left the old, it may well be (though I express no concluded view on the point) that such a circumstance might have put the bank under the duty of making some further inquiry which would have disclosed the fact of desertion.

In the circumstances, however, in my judgment the bank had no reason to make any inquiry of the wife, and therefore is not affected by any constructive notice of the wife's rights. The bank's mortgage therefore takes priority over

the wife's equity. The bank is, in my judgment, therefore, entitled to an order for the usual accounts and inquiries in a foreclosure action. Against the wife the bank only seeks an order for possession three months after the master's certificate answering the accounts and inquiries if they obtain an order for sale, and they are plainly entitled to that. A

Order accordingly.

Solicitors: *Alfred Bright & Sons* (for the bank); *Cunliffe & Airy*, agents for *Walter Terry & Wilson*, Belper (for the husband); *Field, Roscoe & Co.* (for the wife). B

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

HILL v. MINISTER OF PENSIONS AND NATIONAL INSURANCE. C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 6, 1955.] D

Family Allowance—Child received into care of local authority and sent to residential school—Not provided for by parent—Whether child deemed to have ceased to live with parent by reason of absence at school—Family Allowances Act, 1945 (8 & 9 Geo. 6 c. 41), s. 3 (2), s. 11 (2), (3), s. 21 (7)—Children Act, 1948 (11 & 12 Geo. 6 c. 43), s. 1 (1). E

In November, 1952, after the mother of three children had been deserted by her husband, the local authority admitted her and the children into residential accommodation under Part 3 of the National Assistance Act, 1948. In April, 1953, the local authority took the two older children into their care, under s. 1 (1) of the Children Act, 1948*, and put them into residential schools. While the children were at school the mother contributed less than 8s. a week in cash or in kind towards the cost of providing for either of them. The mother claimed that she was entitled to include the two older children in her family for the purposes of family allowance, notwithstanding their absence at school. This claim was founded on s. 3 (2)† and s. 21 (7)‡ of the Family Allowances Act, 1945, by which latter sub-section absence of a child at school is deemed not to constitute absence from his parents. F

Held: after the local authority took the two older children into their care under s. 1 (1) of the Act of 1948 and sent them to residential schools, those two children could not be treated as included in the mother's family, within s. 3 (2) of the Act of 1945, because they then ceased to live with her, not "by reason of absence at [a] school", within the meaning of s. 21 (7) of the Act of 1945, but because the local authority, in exercising their power under s. 1 (1) of the Act of 1948, had undertaken the care and maintenance of the children; and, therefore, the mother was not entitled to claim family allowance in respect of a family of three children. G

[For the Family Allowances Act, 1945, see 16 HALSBURY'S STATUTES (2nd Edn.) 1008 et seq. H

For the Family Allowances and National Insurance Act, 1952, s. 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 583. I

* The terms of the sub-section are printed at p. 893, letter A, post.

† The terms of the sub-section are printed at p. 894, letter B, post.

‡ The terms of the sub-section are printed at p. 894, letter E, post.

- A For the Children Act, 1948, s. 1 and s. 2, see 12 HALSBURY'S STATUTES (2nd Edn.) 1105, 1107.

For the Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES (2nd Edn.) 974 et seq.]

Special Case.

- B This was a Special Case stated by a referee (A. C. LONGLAND, ESQ., Q.C.) under the Family Allowances Act, 1945, s. 5 (2), at the request of the respondent, the Minister of Pensions and National Insurance.

- C The appellant, Mabel Jean Hill, had been in receipt of a family allowance in respect of a family which included three children, Alan Charles Hill born on Apr. 1, 1947, Jean Margaret Hill born on Jan. 1, 1949, and Leslie Arthur Hill born on Feb. 9, 1952. On Dec. 18, 1953, the Minister decided that the appellant was not entitled to include the children Alan Charles Hill and Jean Margaret Hill in her family for family allowance purposes in respect of any period after May 4, 1953, on the ground that since Apr. 2, 1953, they had neither been living with her nor had she been contributing towards the cost of providing for them at the rate of at least 8s. weekly for each of them in cash or kind. The appellant was dissatisfied with the decision of the Minister and the question was referred to a referee appointed under the Family Allowances (References) Regulations, 1946 (S.R. & O. 1946 No. 139), for the purpose of references under the Family Allowances Act, 1945, s. 5 (2).

- D The referee found the following facts. On Dec. 10, 1952, the appellant and her three children were admitted by the London County Council into residential accommodation at Newington Lodge, London, S.E.17, under Part 3 of the National Assistance Act, 1948. The appellant and her three children lived together as a family in Newington Lodge from Dec. 10, 1952, until Apr. 2, 1953. On Apr. 2, 1953, the girl, Jean, was transferred to Oakdale Nursery, Holmwood, Surrey, which was a residential nursery and a school within the meaning of s. 114 of the Education Act, 1944. On the same date she was taken into care by the London County Council under s. 1 of the Children Act, 1948. From Apr. 3, 1953, until Apr. 20, 1953, the appellant and the remaining two children continued to live together in Newington Lodge as a family. On Apr. 20, 1953, the elder boy, Alan, was transferred to Ashford Residential School, Woodthorpe Road, Ashford, Surrey, which was a school within the meaning of s. 114 of the Education Act, 1944, and on the same date he was taken into care by the London County Council under s. 1 of the Children Act, 1948. On May 6, 1953, the appellant and the remaining child, Leslie, who had never been parted from her, were discharged by the London County Council from Newington Lodge to private accommodation. On June 6, 1954, Jean was discharged by the London County Council from Oakdale Nursery to the appellant, whom she joined in private accommodation. At the date of the hearing before the referee (July 7, 1954), Alan was still at the residential school. Such contributions as had been made by the appellant towards the cost of providing for either of the two children, Jean and Alan, while at Oakdale Nursery and Ashford Residential School respectively, had not at any time amounted to as much as 8s. weekly in cash or kind.

- H At the hearing before the referee it was contended on behalf of the Minister, among other things, (i) that, as the appellant had not contributed towards the cost of providing for the children at the rate of at least 8s. a week since Apr. 2, 1953, the children could be included in her family for family allowance purposes after that date only for such time as they could be said to be living with her (see s. 3 (2) of the Act of 1945); and (ii) that the absence of Jean and Alan should not be treated as absence at a school for the purposes of s. 21 (7) of the Act so as to entitle them not to be deemed for the purposes of the Act to have ceased to have lived with her during that absence, because (a) the London County Council, in taking the children into their care under s. 1 of the Children

Act, 1948, assumed the duty, which would otherwise have remained with the appellant, of providing for the children's proper accommodation, maintenance and upbringing, and their absence from school was an absence, not from the appellant, but from the county council, who sent them to school; and (b) the words "absence at any school", in s. 21 (7) of the Act of 1945, meant an absence from the parent for the purpose of education, and not predominantly for some other purpose, such as relieving the parent of the duty of maintenance or the provision of accommodation, and the absence must be temporary, which excluded the absence of a child who had gone away from his parent to live in an institution. On behalf of the appellant it was contended, among other things (i) that the word "temporary" in s. 21 (7) did not in any way qualify the expression "absence at any school"; (ii) that s. 21 (7) in no way qualified the type of school or the circumstances in which a child might be sent to school; and (iii) that there was nothing in the Act of 1945 which prevented a child who had been taken into care under s. 1 of the Children Act, 1948, from being included in the family of his parent for the purposes of family allowance.

The referee was of the opinion that the family unit was in being while the appellant and the children were living together at Newington Lodge in the accommodation provided for them by the county council under Part 3 of the National Assistance Act, 1948, and that the two older children, Jean and Alan, could not be deemed to be living with the appellant during their absences at the schools to which they were sent by the county council because the presence of those children at the schools was not the reason for their absence from the appellant. Accordingly, he held that Jean should be included in the family until Apr. 2, 1953, and after June 6, 1954, when she returned to the appellant, and Alan until Apr. 20, 1953.

The question for the opinion of the High Court was whether the effect of s. 3 and s. 21 (7) of the Act of 1945 precluded the Minister from deeming that the children had ceased to live with the appellant during their absences from her.

I. N. D. Wallace for the appellant.

Rodger Winn for the respondent, the Minister of Pensions and National Insurance.

LORD GODDARD, C.J.: This is a Special Case stated by a referee appointed by the Minister of Pensions and National Insurance under the Family Allowances Act, 1945, s. 5 (2), which provides:

"If any person is dissatisfied by the award or decision of the Minister in respect of an allowance . . . the question shall, on application being made in such manner and within such time as may be prescribed, be referred to one or more referees selected from a panel, and the decision of the referee or referees shall be final . . ."

Provision is made, however, in proviso (b) to the sub-section, for the referee to state an award in the form of a Special Case for the opinion of the court. In this case, the learned referee has made an award and put it in the form of a Special Case. The effect of his award is in favour of the Minister and against the appellant. The court has had the advantage of a very clear and careful argument from counsel for the appellant, but I have come to the conclusion, without any hesitation except on one point, that the award of the referee is clearly right.

The matter arises in this way. The appellant, Mrs. Hill, through no fault of her own, having been deserted by her husband, was for the time being taken, with her three small children, into one of the homes which the London County Council provide for what I may call destitute or homeless people who could not be properly sent to what used to be called the poor law institution. After a while, the two older children, a girl aged about four years and a boy aged about six years, were taken from the home by the county council, while the youngest

A child remained with the appellant. The county council put the girl in a nursery school and the boy into another school appropriate to his age. There is no question but that the county council in so doing were acting pursuant to their powers under the Children Act, 1948, s. 1 (1), which provides:

“Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen . . . (b) that his parents or guardian are, for the time being . . . prevented by reason of . . . infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section.”

The county council, having placed the appellant and her children in a home, and thinking it was right that two of the children should be sent to a school, exercised their power under that sub-section and put the children into appropriate schools. It is true, however, as counsel for the appellant pointed out, that under that section the mother does not lose parental rights, and she can require the local authority to return the children to her unless the local authority, for good reasons (which are set out in s. 2), pass a resolution under which they assume parental rights over the child. Generally speaking, apart from illness or mental or physical incapacity, such a resolution is passed where the parent has shown himself or herself to be incapable of looking after the child or an improper person to look after the child.

Two of the appellant's children having been sent to schools by the county council, the appellant was relieved of the obligation of maintaining and supporting those children so long as they were in the care of the county council. The maintenance had to be done by the county council. The council may be able to recover something from the mother, but the Case discloses that the council have not recovered anything like 8s. a week, which is what I may call the zero figure under the Family Allowances Act, 1945, for a person who is paying someone else for the maintenance of one of his or her children*. There is no question here that the appellant has paid, or been required by the county council to pay, as much as 8s. a week, so we may take it as though she has paid nothing. She submitted, however, that she was still entitled to claim family allowance in respect of a family of three children, although two of the children were being maintained in the schools by the county council. I do not think that any court would be astute to construe the Family Allowances Act, 1945, to produce a result which would certainly be extravagant so far as the taxpayers (who have to find the money for these family allowances) are concerned, and it would seem to be contrary to the reasoning of the Act.

The Family Allowances Act, 1945, is “An Act to provide for the payment of family allowances”. Section 1, as amended by the Family Allowances and National Insurance Act, 1952, s. 1, reads:

“Subject to the provisions of this Act, there shall be paid by the Minister, out of moneys provided by Parliament, for every family which includes two or more children and for the benefit of the family as a whole, an allowance in respect of each child in the family other than the elder or eldest at the rate of 8s. a week.”

It is, therefore, a payment to be made for the benefit of the family where there is more than one child. The Act contains provisions governing who is to be treated as a child for the purposes of the Act; for example, s. 2 (1) (a) reads:

* See the Family Allowances Act, 1945, s. 3 (2) (as amended), which is set out at p. 894, *post*.

"during any period whilst he or she is under the upper limit of the compulsory school age". Section 3 (1) provides: A

"Subject to the provisions of this Act, each of the following shall be treated for the purposes of this Act as constituting a family, that is to say . . . (c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her . . ."

Section 3 (2), as amended by the Family Allowances and National Insurance Act, 1952, s. 6 and Sch. 5, provides: B

"It shall be a condition of a child's being treated as included in a family as being issue of the man and his wife or one of them, of the man, or of the woman (according as the family falls within para. (a), (b) or (c) of sub-s. (1) of this section) that the child is living with them, with him or with her, as the case may be, or, if not, that the cost of providing for the child is contributed to by them taken together, by him, or by her, as the case may be, at the rate of 8s. a week or more."

Obviously those sections are considering what is, in common parlance, a family living together or being maintained as a family. C

In s. 21 (7), Parliament has dealt with certain absences, because children are not always living at home. This Act is one of which every person can take advantage. There is no means test. It is not what I may call a poor law provision. It gives anyone, whatever his means, whether he is a millionaire or a pauper, provided that he has more than one child, the right to receive 8s. a week in respect of each child other than the first. Parliament realising, however, that children may be away from home has made provision for absences. Section 21 (7) provides: D

"A child shall not be deemed for the purposes of this Act to have ceased to live with a person by reason of any temporary absence, and in particular by reason of absence at any school, and a person who has been contributing at any rate to the cost of providing for a child, or has been maintaining a child, shall not be treated as having ceased so to contribute, or to maintain the child, by reason of any temporary interruption or reduction of his contribution to the cost of providing for the child, and the question whether any such absence (other than at school), interruption or reduction is or is not to be treated as temporary for the said purposes shall be determined by reference to such rules as may be prescribed."

The rules* which have been prescribed under the Act simply provide that where E

*The rules for determining whether the absence of a child from a person or the interruption or reduction of a person's contribution is or is not to be treated as temporary are contained in Part 4 (reg. 12-reg. 15) of the Family Allowances (Qualifications) Regulations, 1946 (S.R. & O. 1946 No. 138), as amended by the Family Allowances (Conditions for Increase of Allowance) Regulations, 1952 (S.I. 1952 No. 1457). F

"(1) Subject to the provisions of reg. 15, in determining whether any absence (other than at a school) of a child from a parent or any interruption or reduction of a parent's contribution to the cost of providing for a child is or is not to be treated as temporary for the purposes of s. 21 (7) of the Act [of 1945] the following rules shall apply . . . (b) any such interruption or reduction due to the child being at a school shall be treated as temporary while the child is at that school; (c) any such absence, interruption or reduction which does not fall within sub-para. (a) [which applies to a period while a child is an in-patient in a hospital] or (b) of this paragraph shall be treated as temporary for a period of twelve weeks and no longer . . . (2) Notwithstanding the provisions of para. (1) (c) of this regulation, any absence from a parent and any interruption or reduction of a parent's contribution falling within that sub-paragraph shall cease to be treated as temporary if provision has been made for the child, other than by a person within the meaning of reg. 12 (2), for a period of four weeks during which no such person other than that parent has been providing in his own home for the child or contributing at the rate of 8s. a week or more to the cost of providing for the child elsewhere."

A there is a case of temporary absence of anything in the nature of four weeks, then four weeks is to be left out of account.* In other words, a child can be away from his parents for four weeks and the money will still be paid. That provision, however, does not apply where a child is at school. Absence at school is a different matter. Section 21 (7) says:

B "A child shall not be deemed for the purposes of this Act to have ceased to live with a person by reason . . . in particular . . . of absence at any school . . ."

The sub-section does not say, however, that when the child is at school he is still in any circumstances deemed to be living with the parents. It is the plain
C meaning of the sub-section that, if the child is at school but returns home during holidays and any periods of illness, then the child is still living with his parents although his physical residence for a period of the year is at the school. I think that the sub-section is merely dealing with the case of a child who is sent to a boarding school. In such a case the parent can still go on drawing the allowance for a child under the age of sixteen years.

D I hold, as a matter of interpretation that the appellant's two older children were not living with their mother in any sense whatever. The county council had taken over the care and maintenance of the children, and I cannot see how it can be said that the children were living in any sense with the appellant. That they were not living with the appellant is due, not to the fact that they
E were at a school, but to the fact that the county council deemed it their duty to exercise the powers which the Children Act, 1948, s. 1, placed on them in respect of these children, and had undertaken the care and maintenance of them.

The only doubt which I had in this case is that under s. 11 (1) of the Family Allowances Act, 1945, special provision is made for children who are detained
F at an approved school under the Children and Young Persons Act, 1933. Then there is a special provision, in s. 11 (2), that

"A child shall not, for the purposes of this Act, be treated as included in any family as respects any period during which there is in force an order under the Children and Young Persons Act, 1933, committing him
G or her to the care of a local authority."

There is also a provision in s. 11 (3) which has been amended by the Children Act, 1948, s. 52. Section 11 (3) now reads:

"A child in respect of whom there is in force a resolution of a local
H authority passed under s. 2 (1) of the Children Act, 1948,† shall not, for the purposes of this Act, be treated as included in any family: Provided that this sub-section shall not have effect as respects any period during which under the provisions of s. 3 or s. 4 of the said Act of 1948 the child

* See reg. 13 (2) of the Regulations of 1946.

† The Children Act, 1948, s. 2 (1), provides:

I "Subject to the provisions of this Part of this Act, a local authority may resolve with respect to any child in their care under the foregoing section in whose case it appears to them—(a) that his parents are dead and that he had no guardian; or (b) that a parent or guardian of his (hereinafter referred to as the person on whose account the resolution was passed) has abandoned him or suffers from some permanent disability rendering the said person incapable of caring for the child, or is of such habits or mode of life as to be unfit to have the care of the child, that all the rights and powers which the deceased parents would have if they were still living, or as the case may be, all the rights and powers of the person on whose account the resolution was passed, shall vest in the local authority."

is allowed by the local authority to be, either for a fixed period or otherwise, under the control of a parent, guardian, relative or friend of the child."

That is a reference to a child in respect of whom the local authority, having already taken the child under their care under s. 1 of the Act of 1948, have resolved, under s. 2 (1) of the Act of 1948, to stand in loco parentis to the child and to deprive the parents of parental rights over the child, at any rate for the time being, and themselves to exercise parental rights over the child. It may be said that, when one finds that special provision has been made with regard to those exclusions by s. 11 of the Act of 1945, it would be curious if some construction other than that which I have made were not placed on s. 21 (7) of the Act of 1945 with regard to a child coming under the care of the local authority under s. 1 of the Act of 1948. I cannot, however, bring myself to think that s. 11 of the Act of 1945 in any way destroys what seems to me to be the main provision, which is that, before the family allowances obtain, the child must be living with his parents, and that absence at school is not to count as living at the school rather than living with the parents. I think it may be that s. 11 was put in ex abundanti cautela. It may have been put in because in the cases which are expressly mentioned in the section a child can be taken out of the care of his parents against their wishes and a parent might be able to say "Why should I be deprived of my family allowance because the child has been taken away from me? I am perfectly prepared to go on looking after the child, but I am not allowed to do so by the court or by the local authority". Whatever the reason, I do not think that the presence of the provisions in s. 11 is enough to destroy what I think is the clear meaning of s. 21 (7). For that reason, I uphold the award of the referee.

Award upheld.

Solicitors: *Bell, Brodrick & Gray* (for the appellant); *Solicitor, Ministry of Pensions and National Insurance* (for the respondent).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

A EISINGER v. GENERAL ACCIDENT FIRE AND LIFE
 ASSURANCE CORPORATION, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 6, 1955.]

Insurance—Motor insurance—“Loss” of motor car—Motor car bought from owner on false pretence and for worthless cheque.

B The claimant sold his motor car to H. in return for a cheque which proved to be worthless. H. re-sold the car and disappeared. It appeared either that the subsequent purchaser was not tainted with knowledge of H.'s fraud or that it would be very difficult and costly to obtain evidence of such knowledge. The claimant claimed compensation for his loss of the motor car under a policy of insurance which provided, among other things:

C “Loss of or damage to insured motor car. The [respondents] will indemnify the [claimant] against loss of or damage . . . to [the motor car] . . . arising in Great Britain . . . or whilst in transit by sea between any points therein and/or during the processes of loading and unloading incidental to such transit.”

D **Held:** the claimant had not suffered a “loss” of the motor car within the meaning of that word in the policy for by the sale he had parted with the property in the motor car; he had suffered loss only of the proceeds of sale.

[**Editorial Note.** The present case is to be distinguished from *Webster v. General Accident Fire and Life Assurance Corpn., Ltd.* ([1953] 1 All E.R. 663), which was mentioned in argument. There the owner of a motor car allowed another person to retain possession of the car; he converted the car and as a result of that act of conversion there was a “loss” of the motor car within the meaning of the insurance policy relating to the car. In the present case the purchaser acquired a good, though voidable, title as by false pretences he induced the owner to part with the property in the car. The voluntary act of parting with the motor car was incompatible with the suggestion that it had been lost.

E As to what constitutes a loss under an insurance policy, see 18 HALSBURY'S
F LAWS (2nd Edn.) 516, para. 812; and for cases on the subject, see 29 DIGEST
420, 421, 3280-3282.]

Special Case.

This was a Special Case stated by an arbitrator under the Arbitration Act, 1950, s. 21 (1) (b).

G By a policy of insurance dated July 9, 1952, and by an indorsement dated Aug. 7, 1952, the respondents agreed to indemnify the claimant against, among other things, the loss of his Ford Zephyr motor car in the sum of £650. The policy provided that all differences between the parties should be referred to arbitration. Section 1 of the said policy read as follows:

H “Loss of or damage to insured motor car. The corporation [the respondents] will indemnify the policyholder [the claimant] against loss of or damage (including damage by frost) to any motor car described in the schedule hereto [the Ford Zephyr motor car] . . . arising in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands or whilst in transit by sea between any points therein and/or during the processes of loading and unloading incidental to such transit.”

I On Aug. 6, 1953, the claimant, having decided to sell the car, caused an advertisement to appear in a newspaper advertising the car for sale at £740. On Aug. 7, 1953, a man using the name Gordon Henson opened an account at the Old Street branch of Barclays Bank, Ltd., by depositing £20 in cash: he gave a false address and obtained a cheque book. He never deposited any further sum, but £16 was withdrawn on Aug. 8, 1953. On Aug. 8, 1953, Henson visited the claimant and had a trial run in the car. Henson impressed the claimant and his wife favourably and he persuaded them to accept a cheque

for £745 in payment and to allow him to take the car at once. The extra £5 was intended to reimburse the claimant for expenses he might incur through giving immediate delivery. The claimant's wife had doubts about accepting the cheque, but no reference to the bank could be made at that time on a Saturday. Henson gave the claimant a false address different from that he had given the bank. The claimant gave Henson the registration book of the car. He never expected to see or have anything to do with the car again and considered that from that moment he had ceased to be, and Henson had become, the owner of the car. Henson drove the car away and within an hour had bought another car in a similar manner. He never had any intention of paying for the claimant's car. On Monday, Aug. 10, 1953, the claimant, having learnt that the cheque was valueless, put the matter into the hands of his solicitors and the police. Police inquiries revealed that Henson had sold the car and that it had passed through the hands of three purchasers. The claimant was advised not to sue any of the purchasers, but to make a claim on the respondents. The learned arbitrator found that the value of the car was £740: that the claimant parted with possession of the car to Henson and at the same time transferred to him the property in the car in exchange for the cheque: that the transaction was induced by the fraud of Henson: that the loss occasioned to the claimant by Henson was the loss of the value of the cheque and not the loss of the car. The learned arbitrator considered that the parting with the property distinguished this case from *Webster v. General Accident Fire and Life Assurance Corp'n., Ltd.* ([1953] 1 All E.R. 663). He further found that recovery of the car from its subsequent holder was unlikely or at the least uncertain and that the decision of the claimant not to sue the purchaser from Henson or any subsequent purchaser was a reasonable one. The learned arbitrator held, subject to the decision of the court, that the claimant's claim failed.

F. C. Denny for the claimant.

Stephen Chapman, Q.C., and *B. Caulfield* for the respondents.

LORD GODDARD, C.J.: The question here is whether or not there has been a loss, within the meaning of that word in the policy of insurance under which the claimant insured his motor car. The policy provides:

"The corporation will indemnify the policyholder against loss of or damage (including damage by frost) to any motor car described in the schedule hereto . . ."

Has there been a loss of the motor car?

The claimant sold his motor car to a man who did not pay for it. The man obtained the car by false pretences. Having possessed himself of the car, he gave the claimant a cheque for £745. The claimant's wife did not want him to accept it. She thought that the cheque might be worthless, as it turned out to be. Nevertheless, the claimant went on with the transaction and sold the car. It is a clear case of obtaining a car by false pretences. That transaction passed the property in the car. The claimant did not lose the car; he lost the proceeds of sale. He has lost the price which the man promised to pay him, and purported to pay him by means of a worthless cheque. I cannot hold that that is a loss within the meaning of the policy.

I think that the learned arbitrator in this case was right in his judgment, and I must uphold the award.

Award affirmed.

Solicitors: *Philip Conway, Thomas & Co.* (for the claimant); *Dennes & Co.* (for the respondents).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A

R. v. ABBOTT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Finmore and Devlin, JJ.), July 12, 1955.]

B

Criminal Law—Trial—No case to answer—Submission by one of two accused joined in one indictment—Submission rejected—One accused giving evidence hostile to the other—Conviction of both—Whether conviction quashed.

C

The appellant and R.W. were indicted together on separate charges of the forgery of a receipt for money. At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence against the appellant to go to the jury. The trial judge overruled this submission. R.W. then gave evidence which was hostile to the appellant, the appellant himself also gave evidence, and the jury convicted both the appellant and R.W. In fact there had been no case for the appellant to answer. On the question whether the Court of Criminal Appeal were bound to quash the conviction of the appellant or were entitled in deciding whether to quash the conviction to have regard to the whole of the evidence including that of R.W. and of the appellant,

D

Held: where two persons are joined in one indictment and charged on separate counts with the same offence and there is no evidence against one accused that he committed the offence either alone or in concert with the other, then on the accused's submitting that there is no case against him to go to the jury, it is his right that his case should not be left to the jury; accordingly the conviction of the appellant would be quashed.

E

Judgment of CHANNELL, J., in *R. v. Cohen & Bateman* (1909) (73 J.P. at p. 352) applied.

R. v. Power ([1919] 1 K.B. 572) considered and distinguished.

F

Per CURIAM: if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, both ought to be acquitted (see p. 901, letter F, post).

Appeal allowed.

G

[**Editorial Note.** If, where one of several accused indicted together submits that there is no case against him to go to the jury, there is evidence against him to go to the jury and the submission is overruled, the Court of Criminal Appeal has refused to interfere with the conviction of the accused merely because the judge in summing-up used subsequent evidence of other accused against him; see *R. v. Hogan* (1922) (16 Cr. App. Rep. 182). In the present case there was no evidence against the appellant to go to the jury, and the distinction rests on that.

As to submission of no case, see 10 HALSBURY'S LAWS (3rd Edn.) 421, para. 772.

H

As to the effect on the determination of a criminal appeal of a wrong decision in law given at the trial, see 10 HALSBURY'S LAWS (3rd Edn.) 537, para. 987.

For the Criminal Appeal Act, 1907, s. 4, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Cases referred to:

(1) *R. v. Power*, [1919] 1 K.B. 572; 88 L.J.K.B. 593; 120 L.T. 577; 83 J.P. 124; 14 Digest 518, 5820.

(2) *R. v. Cohen & Bateman*, (1909), 73 J.P. 352; 2 Cr. App. Rep. 197.

Appeal against conviction.

The appellant in this case appealed against his conviction at Manchester Assizes. He had been indicted together with one Ruth Wales on an indictment containing six counts; the counts against the appellant alleged that he forged a receipt and that he obtained money by false pretences by means of the forged receipt and that he conspired together with Ruth Wales to defraud the Refuge Assurance Co., Ltd.

In 1948 the appellant's wife had taken out a policy of insurance on her own life. The negotiations for this policy had taken place between the appellant and his wife and a Mr. Smethurst who was a manager at the Leigh office of the Refuge Assurance Company. The appellant had been paying premiums of over £900 a year. In 1954 differences arose between the appellant and his wife and they agreed to separate. Mrs. Abbott went to live in Jersey while the appellant continued to live at Leigh in Lancashire. He had in his employment a secretary, Ruth Wales, who was indicted with him. On June 18, 1954, while Mrs. Abbott, the beneficiary under the policy, was living in Jersey, an inquiry was put through to the Leigh office of the Refuge Assurance Company as a result of which a Mr. Burns, who by that time had taken over from Mr. Smethurst as branch manager, attended at the appellant's house and there had a conversation with Ruth Wales. Her object was to inquire what would be the surrender value of the policy. Another conversation took place on June 29, 1954, but this time the conversation was between Mr. Burns and a Mrs. Warburton who was a daily help at the appellant's house. On that occasion Mrs. Warburton told Mr. Burns that Mrs. Abbott was away. About this the evidence of Mr. Burns, called for the prosecution, was as follows. He said that on the night of either July 5 or 6 (and he was certain it was one of those dates) he had a telephone conversation. He thought it might have been with Mrs. Warburton; whoever answered said that Mrs. Abbott was away but that Mr. Abbott (the appellant) was at hand and would like to speak to him. A male voice then spoke on the phone but Mr. Burns was not able to say it was the appellant. The conversation was such that if the prosecution could have shown that it was the appellant speaking then there would have been no doubt that the appellant was a party to the fraud which ultimately took place. The fraud which ultimately took place was that on July 15, in consequence of an appointment, Mr. Burns attended at the appellant's house when the appellant was not there and paid over to Ruth Wales £2,415 12s. in cash. Ruth Wales gave a receipt in the name of Mrs. Abbott. Mrs. Abbott never in fact received the money. Mr. Burns received £5 in cash for his trouble. The conversation on the telephone on July 5 or 6 previously referred to concerned the paying over of this money in this way. The whole case for the prosecution against the appellant centred on the fact that he was a party to this telephone conversation of July 5 or 6. Their case broke down because Mrs. Warburton's evidence was to the effect that she went away for her holiday to North Devon on June 29, so that she could not have been speaking on the telephone on July 5 or 6 from Leigh, and that the appellant had also gone away for his holiday to South Devon at the same time so that neither of them could have been there to have the telephone conversation.

The prosecution's evidence on this point having broken down there was no evidence which would have been fit to leave to the jury to show that the appellant was a party to the forging of the receipt and the fraud. At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence against the appellant to go to the jury.

A. P. Marshall, Q.C., and F. G. Paterson for the appellant.

Sir Godfrey Russell Vick, Q.C., C. T. B. Leigh and M. B. Scholfield for the respondent.

LORD GODDARD, C.J., having cited the relevant facts and reviewed the evidence continued giving the judgment of the court: All the members of the court are of the opinion that at the close of the case for the prosecution there was no evidence against the appellant at all, and that was the opinion of the learned judge, because when he came to sum up to the jury he stated that that was his opinion, and he then went on to say why, in all the circumstances, he thought it right to leave the case to the jury.

A Then happened what would be expected to happen. Not only did the appellant give evidence denying that he knew anything about it, he stuck to his story that he knew nothing about it, and I dare say in some respects he made an unsatisfactory witness. People on their trial often do make unsatisfactory witnesses, and the jury might have taken an unfavourable view of him as a witness, but he did not supply any direct evidence against himself that he had
B any part in this fraud. Ruth Wales went into the witness-box and put the whole thing on him. If she had not put the whole thing on him she might just as well have pleaded guilty because she had had the money and she had signed somebody else's name. Unless she could show circumstances which would lead the jury to suppose that she was doing it without intent to defraud because she thought Mrs. Abbott was going to get the money and she signed for the money
C at the instance of her employer, she might just as well have pleaded guilty. What then happened, as often happens, was that the jury convicted both.

Reliance is placed for the prosecution on *R. v. Power* (1) ([1919] 1 K.B. 572) heard in this court, for this purpose: It is said that if a judge wrongly overrules a submission of no case and allows the case to go to the jury and then prisoners give evidence and one gives evidence against the other, this court is not bound to
D say that it will quash the conviction because it may take into account the whole of the evidence given. *R. v. Power* (1) did not decide that, if there was no evidence against a man who was indicted along with another person, it was right to allow the case to go to the jury against that man, or that, if there was no evidence against him, to allow the case to go to the jury was other than a wrong decision in law.

E I think what possibly led the learned judge to act as he did when he was of opinion that there was no evidence against this appellant was that he had got into his mind that the jury could not say in this particular case: "We find a verdict of not guilty against both because we are not satisfied which of them is guilty, if one of them was". With great respect to the learned judge, that is not the law. If two people are jointly indicted for the commission of a crime,
F and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty.

FINEMORE, J., remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the
G murder of the boy was committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case. If
H the learned judge, as we think is clear from what he said to the jury in his summing-up, had in his mind that he could not allow the jury to be left of the opinion that they could not acquit one alone, with all respect to the learned judge we think he was wrong. No doubt he felt, having that view in his mind, that if he stopped the case against this appellant, that he then would have to say to the jury:

I "You must convict Ruth Wales because, as I have told you, one or the other must have done it and, as there is no evidence against this man, Ruth Wales has done it". That was not a line which it was open to the judge to take; if there was no evidence against the appellant he was entitled to be acquitted and to leave the dock. The jury would then still have to decide whether they were satisfied that Ruth Wales committed the offence. They would hear her defence and hear her say that it was the appellant who committed the offence. If the jury did believe that she signed for this money without the appellant telling her

to do it and in the honest belief that in what she was doing she was not acting fraudulently but for the benefit of Mrs. Abbott, then she would be entitled to be acquitted. If, on the other hand, the jury came to the conclusion that she signed something without authority and that the story that she thought the money was going to Mrs. Abbott was all untrue, then the prosecution had proved the case against her. It is only fair to this appellant to point out that the jury could not have accepted Ruth Wales' evidence because the jury convicted her although she endeavoured to put the whole burden on the appellant.

The question, therefore, is really whether *R. v. Power* (1) obliges us to take a different view and to say that as the learned judge, although in our opinion wrongly, allowed the case against the appellant to go to the jury, we must uphold the conviction because Ruth Wales did give evidence against the appellant. The first case to which I called attention during the course of the argument was the judgment of CHANNELL, J., in *R. v. Cohen & Bateman* (2) (1909) (73 J.P. 352) which is a case which has often been treated in this court as the most classic judgment on the subject of the construction of the Criminal Appeal Act, 1907, s. 4 (1). The learned judge said (*ibid.*, at p. 352):

"Taking s. 4 . . . with its proviso, the effect is that if there is a wrong decision of any question of law, the appellant has the right to have his appeal allowed unless the case can be brought within the proviso. In that case the Crown have to show that on a right direction the jury *must* have come to the same conclusion."

There is no question about the proviso arising in this case. Here we have a question whether or not there was a right decision in point of law by the judge. In our opinion, the learned judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant, and therefore the appellant is wrong in law in giving the decision which he did give. The rest of *R. v. Wales & Bateman* (2) deals with the position where the judge in some way wrongly deals with the facts, and I need not read it for the purposes of this case.

Then it is said that *R. v. Power* (1) has given a different interpretation to the section although it was not on the section. In *R. v. Power* (1) a submission had been made to the learned commissioner at the Central Criminal Court which he overruled, then both prisoners went into the box, one prisoner gave evidence against the other and supplied a great deal of evidence against the appellant. The court quashed the conviction on the ground that the summing-up was entirely defective and had never put the appellant's case to the jury at all. We desire to point out that in *R. v. Power* (1) the court was not pronouncing on whether the judge ought to have stopped the case at the end of the case for the prosecution. It is observable that Mr. Eustace Fulton, arguing for the Crown, submitted that there was some evidence given by witnesses for the prosecution ([1919] 1 K.B. at p. 573):

"There was evidence given by witnesses for the prosecution that some of the stolen property was found in the possession of the appellant."

Whether the court was dealing with the case on the footing that there was no evidence against Power, we do not know. What the court said in that case was that if the case did go to the jury, then the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and that this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that the court must, but they said that this court might, take the whole of the evidence into account. They certainly did not say that, if there was no evidence given against one of two or more prisoners, the learned judge could simply leave the case to the jury to see whether when the case for the defence was opened one or other of the prisoners would support the case set up by the prosecution.

- A Another point which it seems to me to be very necessary to take into consideration in deciding the present case is this, that with all respect it cannot be right for a judge to leave a case to the jury where the whole of the structure on which the prosecution has been built up to that moment collapses and falls, for that is what happened in this case. Once it was shown that neither Mrs. Warburton nor the appellant could have taken part in the telephone conversation on which
- B the whole of the case for the prosecution was built, it was not only the duty of the judge but it was the prisoner's right to say that the case against the prisoner had collapsed, and that he was not called on to answer the case any further. If it were said to the prisoner that he should go into the box and satisfy the jury that he did not have any of this money, that would be putting the onus on the prisoner. He was kept there with his fellow prisoner, she had still to give evidence, she had
- C a very strong case to answer, and her answer was to try to put the blame on this man.

For these reasons, the court comes to the conclusion that this verdict cannot stand on any standard we can apply. Therefore, the appeal is allowed, the conviction is quashed and the prisoner is discharged.

Appeal allowed.

- D Solicitors: *A. Bieber & Bieber* (for the appellant); *Cyril C. Harrison*, Manchester (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

E LEONG AND ANOTHER v. LIM BENG CHYE.

[PRIVY COUNCIL (Lord Radcliffe, Lord Tucker and Mr. L. M. D. de Silva), June 7, 8, July 13, 1955.]

- F *Will—Condition—Forfeiture—Restraint of marriage—Partial restraint—Gift of personallty to widow provided she remain a widow—No gift over on re-marriage.*

G By his will, the testator provided that, at a certain date, his residuary estate, which was given on the usual trusts for sale and conversion, was to be divided equally between, among others, his sons and a nephew, with a proviso that if any of the sons should die before the date of distribution leaving male issue, such male issue should stand in his place, but that if such deceased son should not leave male issue but "shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son . . . and lead a chaste life". There was no gift over on the re-marriage of a widow or her failure to lead a chaste life.

H After the testator's death and before the date of distribution one of his sons died leaving a widow and a daughter and the widow re-married.

I **Held:** the widow's re-marriage did not cause a forfeiture of the interests given to her and her daughter because, although the will showed an intention that widows who re-married should not benefit, yet mere weight of intention was not enough in the absence of a gift over or something equivalent to it, and, as the will contained no gift over, the proviso was ineffective to destroy the interests given.

Reasoning of LORD HARDWICKE, L.C., in *Wheeler v. Bingham* (1746) (3 Atk. 364) applied.

Appeal allowed.

[As to conditions in a will in restraint of marriage, see 34 HALSBURY'S LAWS (2nd Edn.) 107, para. 142; and for cases on the subject, see 44 DIGEST 454-458, 2763-2788.]

Cases referred to:

- (1) *Harvey v. Aston (Lady)*, (1737), 1 Atk. 361 (26 E.R. 230); 2 Eq. Cas. Abr. 539 (22 E.R. 454); sub nom. *Hervey v. Aston*, Willes 83 (125 E.R. 1067); 44 Digest 507, 3257.
- (2) *Wheeler v. Bingham*, (1746), 1 Wils. 135 (95 E.R. 535); 3 Atk. 364 (26 E.R. 1010); 44 Digest 483, 3026.
- (3) *Re Dickson's Trust, Ex p. Dickson*, (1850), 1 Sim. N.S. 37 (61 E.R. 14); 20 L.J.Ch. 33; 16 L.T.O.S. 168; *subsequent proceedings*, (1851), 17 L.T.O.S. 283; 44 Digest 462, 2825.
- (4) *Re Catt's Trusts*, (1864), 2 Hem. & M. 46 (71 E.R. 377); 33 L.J.Ch. 495; 10 L.T. 409; 44 Digest 461, 2810.
- (5) *Stackpole v. Beaumont*, (1796), 3 Ves. 89; 30 E.R. 909; 44 Digest 484, 3031.
- (6) *Re Whiting's Settlement*, [1905] 1 Ch. 96; 74 L.J.Ch. 207; 91 L.T. 821; 44 Digest 484, 3036.
- (7) *Yeap Cheah Neo v. Ong Cheng Neo*, (1875), L.R. 6 P.C. 381; 43 Digest 593, 423.

Appeal.

Appeal from an order of the Court of Appeal at Penang in the Supreme Court of the Federation of Malaya, dated Feb. 13, 1953, reversing in part an order of SPENSER WILKINSON, J., in the High Court at Penang in the Supreme Court of the Federation of Malaya, dated Apr. 15, 1952, on an originating summons taken out on Nov. 9, 1951, by the administrators of the testator's estate. The appellants, Sally Leong and Lim Eang Hoong, were the widow and daughter respectively of one of the sons of the testator. The respondent, Lim Beng Chye, was appointed by an order of court to represent all persons claiming to be residuary legatees under the testator's will other than the appellants. The facts appear in the judgment.

Lionel Edwards, Q.C., and *W. S. Wigglesworth* for the appellants.

H. E. Salt, Q.C., and *W. Lindsay* for the respondent.

LORD RADCLIFFE : This appeal from an order of the Court of Appeal, Supreme Court of the Federation of Malaya, dated Feb. 13, 1953, relates to two questions which arise in carrying out the testamentary provisions of a resident of Penang, Lim Kia Joo deceased (hereinafter called "the testator"). The testator died on Nov. 19, 1936, leaving a will made in Penang on Aug. 21, 1936. Letters of administration de bonis non with the will annexed were granted to two administrators on May 7, 1939, and it was they who instituted an originating summons to determine the questions that are the subject of the present appeal. The persons who appear respectively as appellants and respondent before the Board are interested parties whose interests will be apparent later when the terms of the testator's will have been referred to. Briefly, the main question in the appeal is whether the interest of the appellants, Sally Leong and her daughter, Lim Eang Hoong, or the interest of Sally Leong alone, has been forfeited by a provision in the will requiring widows not to re-marry. There is a subsidiary question as to the destination of the income of residue accruing prior to the date of distribution.

The testator's will is a document of some length, and contains numerous dispositions. For the purposes of the appeal, the important clause is cl. 13, which constitutes a bequest of residue. By earlier clauses, the testator had given legacies to named grandchildren and daughters; had provided marriage portions for daughters by each of his two wives; had made certain dispositions by way of maintenance for his widows, infant sons and unmarried daughters, and provided for his house, 47 Northam Road, Penang, to be kept up as a place of residence for his family until the date when his residuary estate became distributable.

A Clause 13 is a residuary bequest embracing all the testator's property except his property in China. It sets up the usual trusts for sale, conversion and investment and then proceeds as follows:

B "Upon trust to pay out of the income of my residuary estate in the first place and out of the capital thereof if such income be insufficient the sums directed to be paid under cl. 9, cl. 10, cl. 11 and cl. 12 hereof and until my youngest son living at my death shall attain the age of twenty-one years or if he shall die without having attained the age of twenty-one years then until such time as he would if living have attained such age. Upon trust as to both the capital and income of my residuary estate to pay and divide the same equally among my said wives Yeoh Ah Eong and Queh Ah Gaik and my sons Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah and my nephew Lim Joo Huat the son of my elder brother Lim Niah Sah and any other sons that may hereafter be born to me by my said wives Yeoh Ah Eong and Queh Ah Gaik. Provided that if either of my said wives shall not remain my widow or lead a chaste life or shall die before the period fixed for the division of my residuary estate her share shall go equally to my said sons D Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah my nephew Lim Joo Huat and any other sons that may hereafter be borne to me by my said wives Yeoh Ah Eong and Queh Ah Gaik. And Provided that if any of my said sons E Lim Beng Hong, Lim Beng Choon, Lim Beng Sai, Lim Cheng Hooi, Lim Weng Hooi, Lim Beng Chye and Lim Chit Bah, my nephew Lim Joo Huat and any other sons that may hereafter be born to me by my said wives shall die before the period fixed for the division of my residuary estate leaving male issue his share shall go to such male issue equally if more than one but if he shall not leave any male issue but shall leave a lawful widow and female issue his share shall go to such lawful widow and female issue equally if more than one provided such lawful widow shall remain the widow of such deceased son or nephew and lead a chaste life."

The youngest son of the testator living at his death attained the age of twenty-one years on Mar. 8, 1952, and this date, therefore, was the date fixed by the will for the distribution of residue. In the meantime, however, another son, Lim Beng Sai, had died on Dec. 22, 1942, leaving a widow, Sally Leong, and a daughter, Lim Eang Hoong. His widow, Sally Leong, married again on Aug. 13, 1949.

G It was in these circumstances that the originating summons was taken out on Nov. 9, 1951. The summons asked for, and later obtained, a representation order to cover the interests of all persons claiming to be residuary legatees under the will other than the present appellants. The court appointed the present H respondent to appear in that capacity. Apart from that the summons, as later amended, raised two questions for the decision of the court. They were as follows:

I "2. That it may be determined to whom, upon the true construction of cl. 13 of the will of the said deceased and in the events which have happened, the share in the residuary estate of the said deceased bequeathed to Lim Beng Sai deceased provided that he survived the period of distribution, will be payable.

"2a. Whether the surplus income of the said deceased's estate is divisible, and if so amongst whom, or whether the same should be accumulated until the period of distribution."

The courts in Malaya have returned divergent answers to question 2. In the High Court at Penang, SPENSER WILKINSON, J., decided that the appellants were entitled to share equally between them the share of residue bequeathed

to Lim Beng Sai, notwithstanding the re-marriage of Sally Leong, and made a declaration accordingly. The Court of Appeal, on the other hand, made an order to the effect that neither of the appellants was entitled to any interest in the share of residue bequeathed to Lim Beng Sai, although the members of the court were not unanimous as to the forfeiture of the interest of the infant appellant. As to question 2a, both courts agreed in giving the answer that the surplus income of the residuary estate ought to be accumulated until the date of distribution and then distributed as part of residue.

The divergence of view that has separated the two courts arises in the application of the rule of English law which relates to conditions in partial restraint of marriage when imposed on bequests of personalty made by will. It is common ground that a condition as to the re-marriage of a widow is a partial restraint for this purpose. Their Lordships do not think that it is possible to solve the disputed question without saying something as to the origin and nature of the English rule.

In English law property, whether real or personal, can be validly limited to a person until marriage. The ambit of this rule is confined to conditions attached to devises or bequests of property, and it does not relate to limitations themselves. Moreover, although it was the view of Mr. JARMAN that, subject to certain established exceptions, conditions precedent were as much within the rule as conditions subsequent, it is only necessary for the present purpose to tread on the surer ground of conditions subsequent. As to these, while a condition in general restraint of marriage is *prima facie* void, at any rate when imposed on a gift of personalty, a condition in partial restraint of marriage is certainly not void and is capable, therefore, of receiving legal recognition; but, on the further point, how far and under what conditions such recognition should be given, the law differed in its treatment of realty and personalty. For, whereas a condition subsequent in partial restraint of marriage was effective to determine the estate in the case of a devise of realty even without any new limitation to take effect on the forfeiture, so that a residuary devisee or heir came in of his own right, it was early determined, and consistently maintained, that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, was ineffective to destroy the gift unless the will in question contained an explicit gift over of the legacy to another legatee. And for this purpose a mere residuary bequest was not treated as a gift over.

One thing, at least, is certain about this rule: it exists. As early as 1737, a court consisting of COMYNS, J., WILLES, L.C.J., LEE, L.C.J., and HARDWICKE, L.C., thought it settled law that, in the absence of a gift over, such a condition was ineffective to defeat a bequest (*Harvey v. Lady Aston* (1) (1 Atk. 361)); and the note appended by Mr. SANDERS, the editor of the reports (*ibid.*, at p. 381), shows how abundant the authority was for that proposition. When it was referred to again in 1746, in *Wheeler v. Bingham* (2) (3 Atk. 364), LORD HARDWICKE, L.C., reaffirmed it as a settled rule of the court that the condition was void without a gift over. There are many other cases in which it has been asserted, and at least several in which the rule or the general branch of the law to which it belongs has been criticised as being undesirable and unsatisfactory (see, e.g., *Re Dickson's Trusts, Ex p. Dickson* (3) (1850) (1 Sim. N.S. at p. 44); *Re Catt's Trusts* (4) (1864) (2 Hem. & M. at p. 52); *Stackpole v. Beaumont* (5) (1796) (3 Ves. at p. 89); *Re Whiting's Settlement* (6) ([1905] 1 Ch. 96)). LORD LOUGHBOROUGH, L.C. (3 Ves. at p. 96), indeed thought it "beyond imagination" how a Christian country could have adopted the rule of the Roman law with regard to conditions as to marriage, and complained (*ibid.*, at p. 95) that it was

"impossible to reconcile the authorities, or range them under one sensible, plain, general rule" (*Stackpole v. Beaumont* (5)).

A But LORD LOUGHBOROUGH did not have the occasion to propound a plain general rule of his own; and his observations in the case were later characterised by Mr. JARMAN as failing to

“evince that respect for authority and established principles which has characterised his successors” (JARMAN ON WILLS, 7th Edn., vol. 2, p. 1503).

B So, with this possible exception, it would be true to say that not even the critics have doubted the validity of the rule, so long as it is confined to the limited terms in which it has been stated above.

It is a more difficult task to rationalise such a rule or to ascertain precisely what are its limits or of what exceptions it may permit. That is the difficulty which has led to the difference of opinion in the present case. It is commonly said that such a condition is treated by the courts, in the absence of a gift over, as being “merely in terrorem” (see, e.g., THEOBALD ON WILLS, 11th Edn., p. 534; JARMAN ON WILLS, 7th Edn., vol. 2, p. 1442). The phrase is scarcely a happy one if its only purpose is to describe a situation in which the law will not permit the legatee to have anything to be afraid of. In any event, the phrase merely describes the effect of the rule; it does not account for it. Not unnaturally, judges have, from time to time, sought to explain its basis. They have not always agreed in their explanations. WILLES, L.C.J., thought that it was “laid down as a rule to construe the testator’s intention”, treating the gift over as being one, but not necessarily the only, way by which a testator could unequivocally express his intention that the condition he imposed should be effective (*Harvey v. Lady Aston* (1) (1 Atk. at p. 377)). But an explanation that is based on the testator’s presumed intention does not offer any satisfactory answer to the query why, in that case, adequate evidence of serious intention is not provided by the very condition that the legacy is to be forfeited; a condition which, in the case of realty, effectively performs its apparent purpose. So, in *Wheeler v. Bingham* (2), LORD HARDWICKE, L.C., dealt with the matter rather differently. In his view (3 Atk. at p. 367):

F “... the strength of the evidence of the testator’s intent that the legacy should cease ... is not the reason that has governed the court. There have been abundance of cases here, where the intention of the testator was full as strong that the legacy should cease ... yet the intention only did not prevail.”

G He concluded, therefore, that the true ground for making the condition effective as a forfeiture was not intention, but the right of a third party to come in and claim his bequest if there was a gift over.

In their Lordships’ opinion, it is not possible, at this stage of its history, to give an account of the origin of the rule that is wholly logical. It is known that the general conception of public policy on which is based the invalidity of any conditions tending in restraint of marriage was derived by the ecclesiastical courts of this country from Roman law by way of the civil law, and the Courts of Chancery related their own rules to the rules of the ecclesiastical courts. But this general conception was never adopted by English law as a whole, and all that can be said is that the courts of this country settled for themselves within what limits and under what conditions they would treat bequests of personalty in English wills as subject to the principle of the civil law. Once the rule had become established, it was probably convenient to attribute its operation to an intention ascribed to the testator himself, rather than to the influence of a principle of public policy adopted from the civil law, and never more than partially recognised in this country. At the same time, it is obvious that it is only in a special sense that the presumed intention of the testator can be treated as the ground of the matter, for, in truth, the intention is forced on him by the law rather than displayed by himself. No doubt it is quite satisfactory to say that, if the will contains an express gift over, that gift shows

beyond doubt that the testator did not intend that the condition should be merely in *terrorem*. It is equally satisfactory, however, and perhaps less complicated an approach, to follow LORD HARDWICKE in saying that it is the presence in the will of the express gift over that determines the matter in favour of the forfeiture. So, it has been suggested, would an express revocation of a bequest that is bound by a similar condition. In any event, in so far as the rule is rested on intention, their Lordships do not feel any doubt that the intention relied on must be found within the four corners of the will itself and extracted from the contents of the will. To introduce any method of ascertaining the intention which goes beyond this and allows it to be found or guessed at from extraneous circumstances, or on a balance of probabilities, is to introduce a principle which is foreign to the very basis of testamentary construction, and their Lordships know of no authority in support of it. Certainly the judgment of WILLES, L.C.J., in *Harvey v. Aston* (1), which was cited by counsel for the respondent in this connection, is not to be treated as such an authority; for when the report in ATKYNS is compared with the report in WILLES, which was prepared by Mr. DURNFORD from the actual manuscript of WILLES, L.C.J., it is seen that the learned judge's reference to "other ways" of discovering intention relates to expressions of intention contained in a will, and not evidence of intention imported aliunde (see 1 Atk. at p. 377, and Willes at pp. 95, 96).

If the rule is applied in this sense to the testator's will, it does not appear to their Lordships that there can be any doubt as to the result. The bequest that is in question is the share of residue originally destined for Lim Beng Sai but given over in the event to the appellants, his widow and daughter. To this bequest is annexed the simple proviso that the widow is to remain a widow and lead a chaste life. There is no gift over in the event of that condition not being fulfilled; nor does the share fall back into residue, if forfeited. As a lapsed share of residue, it would pass on intestacy as undisposed of by the will. The condition or proviso must, therefore, be treated as "merely in *terrorem*," that is as intended merely in a monitory sense, and the appellants are entitled to take the share equally between them, notwithstanding the re-marriage of Sally Leong. This conclusion is in accordance with the order of the High Court at Penang, dated Apr. 15, 1952, in disposing of question 2 of the originating summons, and, in their Lordships' view, the learned judge, SPENSER WILKINSON, J., correctly applied the relevant law. It is necessary now to say something as to the reasons which led the three members of the Court of Appeal at Penang to take a different view and to reverse his order on this point.

The reasons given by the learned judges were not in all respects the same. All of them, however, were impressed by the fact that, taking the will and its many separate provisions as a whole, they could feel confident that the testator did not intend the proviso at the end of cl. 13 to be "merely in *terrorem*." He "meant what he said." It is, of course, true that, in several places in the will, the testator showed a wish that widows should not re-marry, or that their interests should be forfeited if they did, in one case expressly giving over a share in such event. In fact, the provisions vary in expression and, possibly, in result. But their Lordships do not see how it is possible to deduce from the different provisions attached to other bequests in other parts of the will anything more that throws light on the testator's intention than what is afforded by the particular provision itself. And that is a provision that a widow is not to re-marry. The question still remains what legal effect is to be given to such a provision; and, as LORD HARDWICKE pointed out long ago, mere weight of intention, in the absence of a gift over or something equivalent to it, is not sufficient to displace the rule. Indeed, it might be argued with equal force that the fact that the testator did attach a gift over to a similar condition in another part of cl. 13, but did not make any gift over after this proviso, tells against an intention to make an effective forfeiture of Lim Beng Sai's share. Their Lordships think

A that the method of construction thus adopted is an unsound one when a rule such as the "in terrorem" rule is in question.

PRETHEROE, J., supported his conclusion by treating Lim Beng Sai's share as returning to the general fund of residue on the widow's re-marriage, and so as avoiding a partial intestacy and any necessity for a gift over. But this conclusion is based on a mistaken view as to the law, since the share, if forfeited, could not go back to residue; it must go as on intestacy. MURRAY-AYNSLEY, C.J., attached special importance to the fact that the testator was a Chinaman and that, as he said, the re-marriage of widows is contrary to custom among Chinese of the old-fashioned kind. From this, he drew the inference that the testator did not intend his provision to be "merely in terrorem", and did intend an effective forfeiture. But this approach appears to their Lordships to be open to the serious objection that, even supposing intention to be the sole determining consideration, it derives its evidence of intention from a speculation as to what the testator would have been likely to intend, and not from any particular expressions that are found in the will itself. And the reasons relied on by MATHEW, C.J., are open to the same criticism, although he supports his conviction as to the testator's intention not so much by reliance on racial custom as on the fact that his basic intention was to preserve his estate for those members of his family who remained within it.

Having regard to what has been said earlier as to the origin and scope of the rule, it does not appear to their Lordships that considerations such as those which weighed with the learned members of the Court of Appeal are sufficient to affect its application. To determine the construction of a will by them is to open the door to the uncertainty of what is not unfairly called speculation as to a testator's intentions and, in the long run, it is not in the interest of testators or their beneficiaries that this should be permitted. Nor is this particular rule one that can be simply dismissed as a rule for ascertaining and giving effect to intention.

It is not difficult to see that the considerations which have influenced the Court of Appeal can be plausibly restated in the proposition that the rule of English law ought not to be applied by the courts in Malaya, having regard to the differences of race and social custom that separate the one country from the other. Something like this proposition was, indeed, advanced by counsel for the respondent in his argument on the appeal. The rule in question, it was said, was a rule of construction only, which, originating with an attempt to correct a social malady that prevailed in one period of the Roman Empire, had found an ambiguous and rather restricted lodging in one part of the law of England. It would be wrong to resort to it when dealing with the construction of wills made by residents of Malaya, many of whom inherit customs and traditions very different from those of the English race.

Their Lordships are far from denying that there is force in an argument on these lines. It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But English law itself has been introduced into Penang, as part of the Straits Settlement, "so far as it is applicable to the circumstances of the place" (*Yeap Cheah Neo v. Ong Cheng Neo* (7) (1875) (L.R. 6 P.C. at p. 393)); and, while so much of that law as can be said to relate to matters and exigencies peculiar to the local conditions of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. It is any solid ground of that sort which is lacking in this case; not the less when it is recalled that the testator made his will in the English language, and employed in it forms and legal conceptions that are wholly derived from English law. In fact, if the English law was so far imported into Penang as to nullify, through the rule against perpetuities, a Chinese lady's testamentary

disposition relating to a family burying place and a house for performing religious ceremonies to the memory of her dead husband (see *Yeap Cheah Neo v. Ong Cheng Neo* (7)), it would be very hard to say why there was not also imported the English rule as to the effect of conditions in partial restraint of marriage. It was said that the rule against perpetuities was a rule of law, whereas the rule now in question was no more than a rule of construction; but the distinction proposed does not appear to their Lordships to be a significant one. This rule, too, is a rule of law in the sense that every court is bound to apply it and give effect to it, once it is clearly ascertained what are its terms and under what conditions it is required to operate. It is not merely a rule of construction, since its history shows that it owes its existence to a particular conception of what public policy required, even though that conception never prevailed in the English law as a whole. Yet there is nothing that is peculiar to the local conditions of England or, for all that appears, anything necessarily inappropriate to the circumstances of Malaya, in a reluctance on the part of courts of law to allow a person's decision whether or not to enter the state of matrimony to be overhung by a condition that forfeits his or her interest in property according to the decision, or in a rule that requires any forfeiture, if it is to be enforced by the courts, to be carried through in explicit terms by a gift of the forfeited property to some other person. And this, where it is applicable at all, is what the "in terrorem" rule, in effect, amounts to.

Their Lordships note, for the purposes of record, that counsel for the appellants desired to argue that the provision against re-marriage was also void as infringing the rule against perpetuities. As no such point appears to have been raised in the courts below and their Lordships would not have had the benefit of the opinions of the courts in Malaya on it, they did not think it right to allow it to be argued for the first time before them.

With regard to the question 2a raised by the summons, counsel for the appellants stated that he did not wish to dispute the propriety of the order made in the High Court, if the decision on the main question were to go in their favour. There is no cross-appeal on the point, and their Lordships therefore assume, without deciding, that the decision of the High Court was correct.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed so far as relates to that part of the order of the Court of Appeal that declares that the appellants are not entitled to the share of the residue of the estate of the testator bequeathed to Lim Beng Sai, deceased; and that, in lieu of that declaration, there should be substituted the declaration that appears under sub-head (1) in the order of the High Court, dated Apr. 15, 1952. Both the appellants and the respondent are willing that the costs of this appeal, taxed as between solicitor and client, should be paid out of the testator's estate, and their Lordships direct accordingly.

Appeal allowed.

Solicitors: *Bull & Bull* (for the appellants); *Bulcraig & Davis* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

Re M (an infant).

[COURT OF APPEAL (Denning, Birkett and Romer, L.J.J.), June 22, 23, July 6, 1955.]

Adoption—Consent of parents—Illegitimate child—Whether natural father a “parent”—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 2 (4) (a).

B

The natural father of an illegitimate child is not a “parent” of the child within the meaning of the Adoption Act, 1950, and his consent to the adoption of the child is therefore not required by those words in s. 2 (4) (a) of the Act which forbid an adoption order being made without the consent of every person who is a parent of the child.

C

Per DENNING, L.J.: the word “parent” in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires (see p. 912, letter F, post).

Appeal allowed.

D

[**Editorial Note.** The proposition for which the judgments in the present case are authority is a limited one. Section 2 (4) (a) of the Adoption Act, 1950, makes requisite not only the consents of parents but also the consent of every person who is liable by virtue of any order or agreement to contribute to the child's maintenance. A father of an illegitimate child may be so liable, and his consent may thus be needed in that capacity. It is also to be observed that a father of an illegitimate child is within the definition of “relative” in s. 45 (1) of the Act, but that the mother of such a child is the only “parent” of the child within the Act (see per BIRKETT, L.J., at pp. 914, 915, post, citing CLARKE HALL AND MORRISON ON CHILDREN AND YOUNG PERSONS (4th Edn.), p. 433).

E

As to consents to the adoption of a child, see 17 HALSBURY'S LAWS (2nd Edn.) 682, para. 1410; and for cases on the subject, see DIGEST 2nd Supp., Infants and Children, Part XIa.

F

For the Adoption Act, 1950, s. 2 (4), see 29 HALSBURY'S STATUTES (2nd Edn.) 469.]

Cases referred to:

G

(1) *Butler v. Gregory*, (1902), 18 T.L.R. 370; 15 Digest 856, 9400.

(2) *Humphrys v. Polak*, [1901] 2 K.B. 385; 70 L.J.K.B. 752; 85 L.T. 103; 3 Digest 382, 211.

(3) *R. v. Soper*, (1793), 5 Term Rep. 278; 101 E.R. 156; 3 Digest 381, 201.

(4) *Ex p. St. Mary Abbotts Guardians*, (1887), 51 J.P. Jo. 740; 3 Digest 383, 213.

(5) *Re Kerr (otherwise M'Ilwrath)*, (1889), 24 L.R.Ir. 59; 24 I.L.T. 3; 3 Digest 383, r.

(6) *Re Connor*, [1919] 1 I.R. 361; Digest Supp.

(7) *Re A., S. v. A.*, (1940), 164 L.T. 230; 2nd Digest Supp.

H

(8) *Horner v. Horner*, (1799), 1 Hag. Con. 337; 161 E.R. 573; 3 Digest 383, 219.

(9) *Barnardo v. McHugh*, [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 3 Digest 382, 207.

(10) *R. v. Brighton (Inhabitants)*, (1861), 1 B. & S. 447; 30 L.J.M.C. 197; 5 L.T. 56; 25 J.P. 630; 121 E.R. 782; 3 Digest 375, 157.

I

Appeal.

The applicants appealed against an order of His Honour JUDGE MYLES ARCHIBALD made in chambers in Huddersfield County Court on Apr. 5, 1955, refusing an application for an order for the adoption by the applicants of the illegitimate daughter of the applicant wife on the ground that the consent of the natural father of the child had been refused, and not unreasonably refused, under s. 2 (4) (a) of the Adoption Act, 1950. The applicants contended that the natural father was not a “parent” within the meaning of the Act, and that, as

he was not liable to contribute to the maintenance of the child under any order or agreement, his consent was not required to the adoption order; and further that his consent, if required, was unreasonably withheld. A

J. G. Wilmers for the applicants.

F. P. Neill for the respondent.

Cur. adv. vult. B

July 6. The following judgments were read.

DENNING, L.J.: In 1942 a married man then aged forty, who was separated from his wife, had sexual relations with a single woman then aged twenty, as a result of which a child—a girl—was born to them on Apr. 1, 1943. The man and woman lived together as if they were man and wife for eleven years, until on Apr. 10, 1954, the woman left taking the child with her. A month later, on May 15, 1954, she married another man. She and her husband, the applicants, now wish to adopt the little girl so as to make her legally their own child. The natural father, the respondent, objects. The question is whether he has any right to object. This depends on whether he is “a parent” of the child within the Adoption Act, 1950. That Act provides in s. 2 (4) (a) that an adoption order shall not be made C D

“except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant.”

No affiliation order has been made against the respondent, and he has never entered into any agreement to contribute to its maintenance. His consent is only necessary if he is “a parent” of the infant. E

I must say that, if the word “parent” is to be read in its ordinary meaning, I should have thought that the natural father was a parent just as much as the natural mother is: but I do not think that it is to be so read in this Act.

In my opinion the word “parent” in an Act of Parliament does not include the father of an illegitimate child, unless the context otherwise requires. This is implied in the decision in *Butler v. Gregory* (1) (1902) (18 T.L.R. 370) with which I agree. The reason is that the law of England has from time immemorial looked on a bastard as the child of nobody, i.e., as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognisance of him, except that it will make him pay for the child’s maintenance if it can find out who he is. The law recognises no rights in him in regard to the child, whereas the mother has several rights. She has the right to the custody of it during her lifetime until it is fourteen years of age (*Humphrys v. Polak* (2), [1901] 2 K.B. 385) whereas the natural father has no right to the custody of it, either during her lifetime (*R. v. Soper* (3) (1793), 5 Term Rep. 278) or after her death (*Ex p. St. Mary Abbotts Guardians* (4) (1887), 51 J.P. Jo. 740). (I may say that there are observations in some Irish cases such as *Re Kerr* (5) (1889), 24 L.R. Ir. at p. 62) and *Re Connor* (6) ([1919] 1 I.R. at p. 390), which seem to suggest that, after the mother’s death, the natural father has the legal right to the custody, but I do not agree with those observations.) The mother has a right by deed or will to appoint a guardian for the child after her death (*Re A., S. v. A.* (7) (1940), 164 L.T. 230): but the natural father has no such right (*Horner v. Horner* (8) (1799), 1 Hag. Con. at pp. 351, 355). The mother has the right to give or withhold consent to the marriage of the child whilst under twenty-one, but the natural father has no such right either during the mother’s life or after her death (see the Marriage Act, 1949, s. 3 (1) and Sch. 2). The natural father has no right at law to succeed on intestacy. He has no rights at all, so far as I can see, though no doubt he can apply for the child to be made a ward of court just as anyone else can. The truth is that the law does not recognise the natural father at all. The only father it recognises as having any rights is the father of a legitimate F G H I

A child born in wedlock. As SIR WILLIAM SCOTT said in *Horner v. Horner* (8) long ago (1 Hag. Con. at p. 351):

“ . . . it is perfectly clear that the only father whom the law of the country has armed with the patria potestas is the father ‘quem nuptiae demonstrant’.”

B Once it is accepted that in an Act of Parliament the word “parent” prima facie does not include the natural father of an illegitimate child, I ask myself whether the context otherwise requires. The answer is that in this Act of 1950 it does not so require. Everything points to the word “parent” being used in its legal sense, so as to exclude the natural father: Thus: (i) The Act has classed the natural father as a “relative” and not as a “parent”. That appears from s. 45 (1), which says that “relative” includes, when the infant is illegitimate, the father of the infant. (ii) If the natural father has had an affiliation order made against him, or has agreed to contribute to the maintenance of the infant, his consent is necessary under the Act. That is because of the order against him or his agreement. It is not because he is a “parent”. (iii) Section 10 (1) of the Act of 1950 extinguishes the rights of the “parents” in the child: if the natural father had any rights, the section would go to show he was a parent: but as he has no rights, it goes to show that he is not a “parent”. (iv) The rules made by the Lord Chancellor in 1952* proceed on the footing that the consent of a natural father is not required, unless an affiliation order has been made against him. In my opinion, therefore, the natural father has no right to object to this adoption. His consent was not required, and the judge was wrong in thinking it was.

E There is only one further point. It was suggested that the natural father was still a respondent to the application and should be heard on the merits of the adoption order. I do not think this is correct. He was only added as a respondent because it was thought that his consent was necessary. Now that it is found to be unnecessary, he disappears from the scene.

F It is reasonably plain that the judge would have made an adoption order except for his erroneous belief that the consent of the natural father was necessary. Now that it is seen to be unnecessary, we should, I think, make an adoption order. The appeal should be allowed and an adoption order made.

G **BIRKETT, L.J.:** This was an appeal by the applicants, the mother of a twelve-year old girl and her husband, whom she had married in May, 1954, against a decision of His Honour JUDGE MYLES ARCHIBALD in chambers at Huddersfield. The learned county court judge had refused to make an adoption order in favour of the applicants, the mother and her husband, on the ground that the father of the child was a parent within the meaning of the Adoption Act, 1950, and the father had refused his consent to the adoption.

H The child was admittedly an illegitimate child and the father was known, and was living, and in fact appeared before the learned county court judge. An affidavit was read, which had been made by the applicant mother, and that showed that, when she was twenty years old, she went to live with a married man of forty years of age, who was separated from his wife, and the child in question was born in 1943. The mother left the father in 1954 and took the child with her. She had then been living with the father for twelve years.

I The mother of the child married her present husband in May, 1954, and the child continued to live with her. The mother and her husband, the applicants, wished the child to go to her school in the name of her step-father, and it was for that main reason that the adoption order was applied for. Counsel for the applicant mother and husband raised two points: (i) that the father of an illegitimate child was not a “parent” within the meaning of the Adoption Act, 1950, and (ii) that, if he was to be regarded as a “parent”, his withholding of his consent

* Adoption of Children (County Court) Rules, 1952 (S.I. 1952 No. 1258); 11 HALSBURY'S STATUTORY INSTRUMENTS 196.

in the present case was unreasonable. If the first submission was good in law, A
the second point did not arise.

The Adoption Act, 1950, in s. 2 (4) defined the persons whose consent was necessary to be obtained before an adoption order could be made, and it stated by para. (a) that:

“ . . . except with the consent of every person . . . who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant ” B

no adoption order should be made. The learned county court judge had himself taken the view that the father of the child must give his consent, presumably on the ground that he was a “ parent ” within the meaning of the sub-section.

Nowhere in the Act is the word “ parent ” defined. It is profitless to speculate C
on the reason for this omission. It may be said that, as the rest of the Act makes it quite plain that the father of an illegitimate child cannot be a “ parent ”, it was not necessary to define the word with more precision. But that it is not quite plain is evident from the fact that Mr. Neill, counsel for the respondent, was able to present so attractive an argument as he did.

In the Children Act, 1948, s. 59 (1), the word “ parent ” is defined and that definition reads: D

“ ‘ parent ’ . . . (b) in relation to a child who is illegitimate, means his mother, to the exclusion of his father. ”

But in the Adoption Act, 1950, it was apparently not thought necessary or expedient to make any definition. The ordinary sense, of course, in which the word “ parent ” is used in everyday life is to describe a father or a mother. But a word may take on a particular meaning according to the context in which it is used, and the subject-matter of the statute in which it is used. For example, in *Butler v. Gregory* (1) the father of an illegitimate child had been summoned under s. 1 of the Prevention of Cruelty to Children Act, 1894. He was summoned as a “ parent ” within s. 23 and one who was presumed to have the custody of the child in question. But the Divisional Court dismissed the summons on the ground that the father of an illegitimate child was not the “ parent ” of the child within the meaning of the section. Counsel in the case (Mr. Clarke Hall, as he then was), later to be known as a great authority on the law relating to children, submitted for the prosecution that the section must be interpreted “ in a broad sense and not in a legal sense ”, and thereby tacitly admitted that, if the section was construed in a legal sense, the prosecution must fail, on the ground that the father of an illegitimate child was not the parent in the legal sense at all. The definition in the Children Act, 1948, previously quoted, follows the law in *Butler v. Gregory* (1) in excluding the father from the definition of “ parent ”. E

Furthermore, in s. 28 (1) (a) of the Adoption Act, 1950, reference is made to the F

“ placing of an infant . . . in the care and possession of a person who . . . is not the parent or guardian or a relative of the infant ”. G

In s. 45 (1) of the Act, which is the definition section, when “ relative ” is defined, it is said to include “ (b) where the infant is illegitimate, the father of the infant . . . ”. “ Guardian ” is defined in s. 45 (1), “ relative ” is defined in the same section, but “ parent ” is not defined. It seems to be clear that “ parent or guardian or a relative ” of the infant refers to three distinct persons, and, if the father of an illegitimate child was a “ parent ”, there would be no need to include him in “ relative ”, as s. 28 (1) has included him. In *CLARKE HALL AND MORRISON ON CHILDREN AND YOUNG PERSONS* (4th Edn.), at p. 433, it is said: H

“ This Act [the Adoption Act, 1950] gives no definition of the word. Primarily ‘ parent ’ means a legitimate father or mother and does not (apart from statute) include the natural father of an illegitimate child . . . I

- A The mother of an illegitimate child is its parent and for the purposes of the Adoption Act is its only parent."

Again, the use of the words "parent" and "guardian" and "person who is liable by virtue of any order or agreement to contribute to the maintenance of the infant" would seem to emphasise once more the fact that the father of an illegitimate child is not a "parent", because a person adjudged to be the putative father becomes a person liable to contribute to the support of the infant, and is thus in a special category.

- B In s. 3 (1) of the Adoption Act, 1950, which gives power to the court to dispense with the consents required by s. 2 (4) (a), the distinction is made again between "parent" and "guardian" and "person liable by virtue of an order or agreement to contribute to the maintenance of the child". Section 40 (1) (a) of the Act makes the same distinction.

- C Counsel for the respondent made several submissions to the court in the course of his interesting argument, and the chief points may be summarised in this way. He submitted that: (i) The word "parent" in its ordinary meaning is a person who has gotten or borne a child, and there is no settled rule of law that "parent" in any statute means a lawful parent: and if there be any such rule, it can be displaced by the context in which the word "parent" appears. (ii) If "parent" includes mother, it must include father. (iii) The father of an illegitimate child has certain rights, and, apart from this, s. 1 (3) of the Adoption Act, 1950, conferred the express right there mentioned on the father.

- D In my opinion these submissions fail. The word "parent" must be construed in the light of the sections of the Act itself, and the various sections I have cited all seem to me to point unmistakably to the fact that the father of an illegitimate child cannot be a "parent" within the meaning of the Act. The rights of the mother of the child have been dealt with by my Lord and I will not repeat the account of them. It only remains for me to say that the argument that the respondent, the natural father, had some right to object to this particular adoption, and that his consent was necessary, and that he was not withholding his consent unreasonably is not in my opinion an argument of any validity. Section 3 (1) (c) reads:

"in any case, that the person whose consent is required . . . is incapable of giving his consent or that his consent is unreasonably withheld."

- G I am clearly of opinion that the consent of the father of an illegitimate child is not required, and that, in the present case, the respondent, the father of the illegitimate child, is not a person liable by virtue of an order or agreement to contribute to the maintenance of the infant and, therefore, his consent is not required under that head. The question whether the consent is unreasonably withheld therefore does not arise. The learned county court judge mistakenly supposed that the consent of the father of an illegitimate child was necessary before an adoption order could be made. He made a careful note for the assistance of the court and it was plain that he insisted on the consent of the respondent, the father of the illegitimate child, being obtained, and in the absence of such consent he said he felt bound to refuse to make the adoption order because the father did not desire "to abandon his parenthood", as the judge expressed it. The child was being properly looked after by the applicant mother, and there was no complaint to be made about the mother's husband, and the learned judge was satisfied that the child was being well looked after. In these circumstances, I would allow the appeal and make the adoption order asked for.

I ROMER, L.J.: By s. 59 (1) of the Children Act, 1948, the term "parent" is defined, for the purposes of the Act, as meaning, in relation to an illegitimate child, "his mother, to the exclusion of his father". There is no definition of

"parent" in the Adoption Act, 1950, but the interpretation section of that Act, s. 45, contains in sub-s. (1) a definition of "father" which does not appear in the Children Act, 1948, namely, "in relation to an illegitimate infant, means the natural father". Both Acts define "relative", but, whereas the Act of 1950 includes in that expression the father of an illegitimate infant, the Act of 1948 did not—although it does now by reason of s. 13 (2) of the Adoption of Children Act, 1949. It is not easy to understand why the legislature did not define "parents" in the Adoption Act, 1950, although it had thought proper to do so in the Children Act, which had been passed only a short time previously; and, having regard to the obvious importance of the part which "parents" play in relation to the adoption of their children, the omission of a definition in the Act of 1950 is the more surprising. It is this omission which has given rise to the main question in this case, namely, whether under s. 2 (4) (a) of the Adoption Act, 1950, the consent of a father is required to the adoption of his illegitimate child.

In the absence of a definition of "parent" in the Act of 1950, an argument which is not without strength can be advanced, and was advanced before us by counsel for the respondent, in support of the view that a putative father is a "parent" for the purposes of s. 2 (4) (a) of the Act. I will summarise the points on which counsel's contention was based without elaborating them at any length.

(i) By analogy to the general principle that the word "child", when used in a statute, deed, will or other instrument, is confined in our law to a child lawfully begotten, so also is the word "parent" confined to the father or mother of legitimate children. But in an Act such as the Adoption Act, which is bringing within its ambit children generally, whether legitimate or illegitimate, the presumption is that the term "parent" should also be correspondingly widened.

(ii) This presumption is fortified by the undeniable fact that the mother of an illegitimate child is put by the Act on the same level as the mother of a legitimate child; both are "parents" for the purposes of the Act.

(iii) The legislature has thus shown that, in speaking of "parents", it was departing from the strict signification of lawful parents; and, if the mother of a bastard is brought within the category of "parents", it would be illogical to suppose that Parliament was giving to the expression a hybrid interpretation which would exclude the natural father.

(iv) The illogicality of this supposition is further demonstrated by the fact that, by reason of the definition of "father", Parliament was expressly conferring on a putative father the right to apply for the adoption of his natural child. Having regard to this recognition of his status under the Act, it would be curious that he should have no voice whatever in the matter, if an adoption order was being sought by somebody else.

(v) The contrary view would lead to unexpected results. For example, if the mother and the natural father of a child made more or less simultaneous applications for its adoption, the consent of the mother, as a "parent", would be required on the father's application but his consent would not be required on hers.

(vi) The consent of a father who is so heedless of his moral obligations that an affiliation order has to be made against him is requisite to the adoption of his natural child, notwithstanding that he would benefit from the adoption if, as is usual, it resulted in the cesser of all liability under the affiliation order (s. 12). In these circumstances it would be surprising if the views and wishes of a father who voluntarily undertakes the maintenance of his illegitimate child should be disregarded.

(vii) There are other sections of the Act in which the word "parent" was apparently not intended to exclude the father of a bastard. For example, s. 37 makes it a criminal offence for (inter alia) a parent of an infant, except with the sanction of the court, to receive any payment or other reward in consideration of the adoption of the infant under the Act; and s. 38 (1) prohibits advertisements indicating that the parent of an infant desires to cause the infant to be adopted. It was suggested (and it is not necessary to express any decided opinion on it) that a putative father who received a reward on the adoption of his natural child, or who

A advertised his desire to have the child adopted, could not escape prosecution under these sections on the ground that he was not a parent of the child. (viii) In defining "parent" in the Children Act, 1948, the legislature thought it necessary to exclude expressly the father of an illegitimate child; and no such exclusion appears in the Act of 1950.

It must be conceded in my opinion that the collective force of these submissions cannot lightly be disregarded. It is, however, in my judgment more than neutralised by two considerations. The first is that the consents referred to in s. 2 (4) (a) of the Act are, in my judgment, essentially linked with the transfer of rights which results from an adoption order under the provisions of s. 10. On such an order being made, all the rights, duties, obligations and liabilities of the parents in relation to the adopted infant pass automatically from them to the adopters; and it accords with ordinary principles of natural justice that no person is to be deprived of rights without having an opportunity of being heard. The mother of an illegitimate child has both rights and obligations towards it (see, e.g., *Barnardo v. McHugh* (9) ([1891] A.C. 388) and *Humphrys v. Polak* (2)), and it therefore follows that she should not be subjected unheard to the operation of s. 10 (1). The father of a bastard, however, has under our law no rights in respect of it at all and to the best of my belief he never has had.

"The father of an illegitimate child is not recognised by the law of England as to civil purposes; but in that it differs from the law of other countries"

(per COCKBURN, C.J., in *R. v. Brighton (Inhabitants)* (10) (1861), 1 B. & S. at p. 451). Certain Irish cases* were cited to us in which the view was taken that a putative father has rights, subordinate only to those of the mother, which the courts will recognise and enforce; that view does not, however, in my judgment, accord with the law of England. I am of opinion, therefore, that a father is not deprived by s. 10 (1) of the Act, on the adoption of his natural child, of any rights, for he has no rights on which the section could operate.

It was suggested by counsel for the respondent that, even assuming that such a father has no rights at common law, he is possessed of rights which would be recognised in the exercise of the equitable jurisdiction over wards of court. In my opinion this is not so. If the natural child of a man were to become a ward, the court would certainly permit the father to express his views and wishes on matters affecting the welfare of the child, and would give effect to them if it thought they were best calculated to promote the interests of its ward. He has no right of audience, however, in these matters which gives him precedence over other people, and effect will certainly not be given to his wishes with regard to the infant merely because he is the child's natural father. Section 10 (1) of the Act of 1950 is concerned with "rights", and in my opinion such locus standi as a man possesses with regard to any natural child of his who becomes a ward of the Chancery Division falls very far short of qualifying as a "right". In my judgment, therefore, a putative father is in no way affected by the operation of s. 10 (1) of the Adoption Act, 1950, in that he is not deprived of any rights by an adoption order made in relation to his illegitimate children, and this in itself constitutes a very cogent reason for rejecting the view that his consent to the adoption, as a parent, is required.

A second reason, equally cogent in my opinion, is that he is expressly brought, by s. 45 (1) of the Act, within the definition of a "relative". As I have indicated earlier, the definition of "relative" in the Children Act, 1948, did not originally include the father of an illegitimate child, and the inclusion of such a father in the category of relatives for the purposes of the Adoption Act, 1950, is a consideration of important significance. If in fact a putative father was intended to share in the rights which the Act confers on "parents", it is difficult in the extreme

* *Re Kerr* (5), *Re Connor* (6).

to perceive any reason why he should have been expressly included in the subordinate class of "relatives". In my judgment the inference, and the only legitimate inference, from such inclusion is that his status, for the purposes of the Act, was to be that of a relative of an adoptive child and nothing more. A

These considerations far outweigh, in my opinion, those on which counsel for the respondent relied, and which I have already summarised, and lead inevitably to the conclusion that the father of an illegitimate child is not, per se, a "parent" within s. 2 (4) (a) of the Adoption Act; from which it follows that an order for the adoption of a child can be made without his consent. B

It was alternatively contended on the respondent's behalf that, even so, he is entitled to present his views on the desirability or otherwise of the proposed adoption in the present case on the ground that he was made, and still is, a respondent to the summons. This appears to me to be an untenable proposition. C
He was only made a respondent because of the mistaken belief that his consent was required as that of a "parent"; now that this impression has been shown to be unfounded, he has no locus standi to intervene in the matter at all. I accordingly agree that the appeal should be allowed and that, as the learned county court judge expressed his approval of the adoption and of the suitability of the applicants, we ought to make the order for which they ask. D

Appeal allowed and adoption order made. Leave to appeal to the House of Lords refused.

Solicitors: *Jaques & Co.*, agents for *Mary E. Sykes & Co.*, Huddersfield (for the applicants); *Vizard, Oldham, Crowder & Cash*, agents for *Whitfield, Son & Hallam*, Dewsbury (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.] E

R. v. HEPWORTH, R. v. FEARNLEY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Finemore and Devlin, JJ.), F
July 18, 1955.]

Criminal Law—Receiving stolen property—Summing-up—Onus of proof—Satisfaction of jury as to prisoner's guilt.

In a summing-up to the jury at the trial of a prisoner on a charge of receiving stolen property, where the prisoner has been found in possession of property recently stolen, it is particularly desirable that emphasis should be placed on the principle that it is for the prosecution to prove their case, because the prisoner will be entitled to be acquitted if the jury, after hearing his explanation, are left in any doubt whether he received the property dishonestly, knowing it to be stolen. Although there is no particular formula of words whose use is essential in order to express effectively the burden of proof which lies on the prosecution, and the words "you must feel sure of the prisoner's guilt" would suffice, yet a summing-up on a charge of receiving, in such circumstances as those indicated above, will not be satisfactory if the jury are told merely that they must feel satisfied, without qualification such as "completely satisfied", that the prosecution have proved their case. G H

Observations in *R. v. Kritz* ([1949] 2 All E.R. at p. 410), and *R. v. Summers* ([1952] 1 All E.R. 1059) confirmed. I

Appeals allowed.

[As to contents of summing-up, see 10 HALSBURY'S LAWS (3rd Edn.) 424, para. 780; and for cases on the subject, see 14 DIGEST 296-303, 3124-3195.]

Cases referred to:

- (1) *R. v. Schama*, *R. v. Abramovitch*, (1914), 84 L.J.K.B. 396; 112 L.T. 480; 79 J.P. 184; 14 Digest 430, 4545.

- A (2) *R. v. Summers*, [1952] 1 All E.R. 1059; 116 J.P. 240; 3rd Digest Supp.
(3) *R. v. Kriz*, [1949] 2 All E.R. 406; [1950] 1 K.B. 82; [1949] L.J.R. 1535;
113 J.P. 449; 2nd Digest Supp.

Appeals against conviction.

- B The appellants, George Alfred Hepworth and Norman Fearnley, were convicted at Bradford City Sessions on Apr. 19, 1955, of two counts of receiving, and were sentenced to two years' and eighteen months' imprisonment respectively. They now appealed against conviction.

Rudolph Lyons, Q.C., and *E. Lyons* for the appellant Hepworth.

E. Lyons for the appellant Fearnley.

J. S. Snowden for the Crown.

- C LORD GODDARD, C.J., delivered the judgment of the court: The appellants were convicted before the learned recorder of Bradford of the offence of receiving wool, an offence which is by no means uncommon in Yorkshire. I have no doubt that, for the most part at any rate, juries drawn from the citizens of Bradford know perfectly well what their duty is in trying offences of that description. Before they convict they have to feel sure that the goods have been stolen, that they have got into the possession of the prisoners and that the prisoners knew they were stolen. Having read the evidence, one is not surprised that the jury found the appellants guilty, but complaint is made that the learned recorder, in summing-up, did not give the jury any direction with regard to the burden of proof, and did not give them a sufficient direction with regard to the duty of the jury, viz., how they were to regard the evidence, and the degree of certainty they were to feel.

- E It is always desirable that a jury should be told that the burden of proof is on the prosecution. I have no doubt that they know it, or in most cases know it, but it is desirable that they should be told that it is for the prosecution to prove their case. It is also most desirable in a case where the offence of receiving stolen goods is charged that it should be emphasised that it is for the prosecution to prove their case. In a receiving case it is generally desirable, although there may be circumstances in the particular case which would render it not necessary, first to remind the jury that the burden of proof remains on the prosecution, and, secondly, to tell them that the prosecution will not have proved their case, if an explanation of possession of the goods is given by the prisoner which, although the jury may not be convinced that it is true, they think may be true. It is not necessary to use on all occasions the formula which was used in *R. v. Schama, R. v. Abramovitch* (1) (1914) (84 L.J.K.B. 396) because that case, which is constantly cited in matters relating to receiving, lays down no more than this:—if the explanation given by the prisoners which, when they have given it, becomes part of the sum of evidence in the case, leaves the jury in doubt whether the prisoners honestly or dishonestly received the goods, they are entitled to be acquitted because the case has not been proved. A case is never proved if the jury is left in any degree of doubt.

- H Another thing that is said is that the recorder only used the word "satisfied". It may be, especially considering the number of cases recently in which this question has arisen, that I misled courts when I said in *R. v. Summers* (2) ([1952] 1 All E.R. 1059) that I thought it was very unfortunate to talk to juries about reasonable doubt, because the explanations given as to what was, and what was not, a reasonable doubt were so very often extraordinarily difficult to follow. It is very difficult to tell a jury what is a reasonable doubt, and I still adhere to what I said. To tell a jury that it must not be a fanciful doubt is something that is without any real guidance. To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another

member might say that that would not cause him to hesitate at all. I, therefore, suggested that it would be better to use some other expression, by which I meant to have it conveyed to the jury that they should only convict if they felt sure of the guilt of the accused. It may be that, in some cases, the word "satisfied" is enough. Then it is said that the jury in a civil case have to be satisfied and, therefore, one is only laying down the same standard of proof as in a civil case. I confess that I have had some difficulty in understanding how there are, or can be, two standards. One would be on safe ground if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt". One could also say—"You, the jury, must be completely satisfied"—or, better still—"You must feel sure of the prisoner's guilt". I desire to repeat what I said in *R. v. Kritz* (3) ([1949] 2 All E.R. at p. 410):

"It is not the particular formula of words that matter. It is the effect of the summing-up. If the jury are made to understand whether in one set of words or in another, that they must not return a verdict against a defendant unless they feel sure of his guilt and that the onus all the time is on the prosecution and not on the defence . . ."

that is enough. I should be very sorry if it were thought that these cases should depend on the use of a particular formula or of particular words. The point is that the jury should be directed first, that the onus is always on the prosecution, and secondly, that, before they convict, they must feel sure of the prisoner's guilt. If that is done, that will be enough.

Comment has been made on the use by the learned recorder of only the word "satisfied", and we have come to the conclusion that the summing-up was not satisfactory. Again, however, I emphasise that this is a receiving case, and, in a receiving case, it is always more important that the onus of proof should be emphasised and explained. The jury should be told that the possession of goods recently stolen calls for an explanation, and, if none is given, or one is given, which the jury are convinced is untrue, that entitles them to convict. But, if the explanation given leaves them in doubt whether the accused received the goods honestly or dishonestly, the prosecution have not proved the case and they should acquit. I hope it will not be thought that we are laying down any particular form of words. We are saying it is desirable that something more should be said than merely that the jury must be "satisfied". For the reasons which I have endeavoured to give, we think that the convictions should be quashed.

Appeals allowed.

Solicitors: *Sidney Torrance & Co.*, agents for *J. Levi & Co.*, Leeds (for the appellant Hepworth); *Registrar, Court of Criminal Appeal* (for the appellant Fearnley); *Town Clerk, Bradford* (for the Crown).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law.*]

A

NOTE.

B

In the Estate of NUTTALL (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), June 29, 1955.

Probate—Will—Lost will—Application ex parte for probate of reconstructed contents—Application to registrar—Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 53 (1).

C

[As to probate of contents of a lost will, see 14 HALSBURY'S LAWS (2nd Edn.) 196, para. 323; and for cases on the subject, see 23 DIGEST 110, 1035-1038.]

Probate motion.

D

The executors applied ex parte for a grant of probate of the reconstructed contents of a lost will and an original codicil.

Peter Giffard for the executors.

E

KARMINSKI, J., said that r. 53 (1) of the Non-Contentious Probate Rules, 1954,* should be interpreted as meaning that ex parte applications should, in the first instance, be made to the registrar unless the matter was clearly one which merited an application to the judge direct. Should the registrar, on an ex parte application under the rule, consider that the matter was one which should be dealt with by a judge, he had power under r. 60 of the rules so to direct. At the conclusion of the hearing HIS LORDSHIP granted the order as sought.

Order accordingly.

F

Solicitors: *Bracewell & Leaver*, agents for *Pollard & Pollard*, Bolton (for the executors).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* Rule 53 (1) of the Non-Contentious Probate Rules, 1954, provides: "An application for an order admitting to proof a nuncupative will, or a will contained in a copy, a completed draft, a reconstruction or other evidence of its contents where the original will is not available, may be made to the court on motion or to a registrar of the principal registry . . ."

DIPLOMA LAUNDRY, LTD. v. SURREY TIMBER CO., LTD. A

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Parker, L.J.J.),
July 5, 6, 1955.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to use premises for own business—Surrender of intermediate lease less than five years before end of tenancy—Less than fourteen months of surrendered term remaining (but for merger) at time of request for new tenancy—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (2), s. 44 (1). B

Immediately before Mar. 25, 1953, business premises were vested in fee simple in the freeholder subject to and with the benefit of a lease expiring on Mar. 25, 1955, vested in F. O. Co., Ltd. which lease was subject to a sub-lease vested in the tenant for a term expiring on Mar. 24, 1955. On Mar. 25, 1953, F. O. Co., Ltd., surrendered its lease to the freeholder and the lease merged with the freehold reversion. On Sept. 29, 1954, the tenant made a request to the freeholder for the grant of a new tenancy under the Landlord and Tenant Act, 1954, s. 26 (1), and in October, 1954, in compliance with s. 26 (6) of the Act the freeholder gave notice to the tenant of the freeholder's intention to oppose an application to the court for the grant of such a tenancy on the ground specified in s. 30 (1) (g) of the Act. The tenant contended that the freeholder was precluded from opposing on this ground by s. 30 (2) of the Act* as being a landlord who had an interest which had merged in the freehold and "but for the merger would be an interest of the landlord" within the sub-section. By definition† a landlord's interest within the enactment had to be one which would not come to an end for fourteen months. C

Held: section 30 (2) of the Landlord and Tenant Act, 1954, did not apply to the freeholder because the interest of the landlord for the purposes of the sub-section was to be considered as at a particular time (viz., either the time of the tenant's making the request for a new tenancy or the time of the landlord's giving notice of opposition) and at that time the interest of the F. O. Co., Ltd. was not such as but for its merger would have been an interest of a landlord within the meaning of the enactment, since if the lease to F. O. Co., Ltd. had been subsisting it would not then have had fourteen months to run. D

Appeal dismissed. E

[For the Landlord and Tenant Act, 1954, s. 30 (2) and s. 44 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 415, 427.] F

Case referred to:

(1) *X.L. Fisheries, Ltd. v. Leeds Corpn.*, ante, p. 875. G

Appeal. H

Appeal by the tenant from an order made by His Honour JUDGE DAYNES, Q.C., at Southwark County Court, dated May 9, 1955, dismissing an application by the tenant for a new tenancy of business premises adjoining Nos. 185-195, Grove Street, Deptford, S.E. By an underlease dated June 16, 1935, the premises were sub-demised by Fleetwing Oil Co., Ltd., to the tenant for a term of twenty-one years less one day from Mar. 25, 1934 (i.e., it expired on Mar. 24, 1955). The freeholder purchased the freehold in December, 1949. On Mar. 25, 1953, the freeholder for valuable consideration accepted from Fleetwing Oil Co., Ltd. a surrender of their lease of the premises which was due to expire on Mar. 25, I

* The relevant terms of s. 30 (2) are printed at p. 923, letter G, post.

† The relevant terms of the definitions (s. 44 of the Landlord and Tenant Act, 1954) are printed at p. 925, letter C, post.

- A 1955. The tenant's application to the county court was made on Sept. 23, 1954. It was conceded that the freeholder intended to occupy the premises for business purposes within s. 30 (1) (g) of the Landlord and Tenant Act, 1954. The county court judge dismissed the tenant's application on the ground that the interest which the freeholder acquired from Fleetwing Oil Co., Ltd. was neither "purchased" nor "created" within the period of five years (viz., five years commencing on Mar. 24, 1950) limited by s. 30 (2) of the Landlord and Tenant Act, 1954.

A. R. Campbell for the tenant.

N. C. Bridge for the freeholder.

- C SIR RAYMOND EVERSHED, M.R.: In *X.L. Fisheries, Ltd. v. Leeds Corpn.* (1) (ante, p. 875), this court two days ago had to consider the construction of s. 57 of the Landlord and Tenant Act, 1954. In the present case a question of construction concerned primarily with s. 30 and s. 44 of the same Act has arisen. As I said in the earlier case, the language of Parliament in this Act, I must confess, appears highly complex; but the subject-matter is notoriously difficult, and I do not know what were the particular problems which faced the draftsman.

- D In this case, as in *X.L. Fisheries, Ltd. v. Leeds Corpn.* (1), the tenant of a relevant tenancy within Part 2 of the Act had made a request for the grant of a new tenancy. The date in the present case on which the request had been made was Sept. 29, 1954. It is provided by s. 26 (6) in Part 2 of the Act, that within two months of the making of the tenant's request the landlord may give notice to the tenant that he will oppose the tenant's application; and it is required that the landlord who gives such a notice shall state in the notice on which of the grounds mentioned in s. 30 he proposes to rely. In this case the landlord gave notice of his intended opposition in October, 1954, and in compliance with s. 26 (6), stated that he proposed to rely on the ground set forth in para. (g) of s. 30 (1). That paragraph is as follows:

- F "subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein . . ."

It is not in doubt that in this case the landlord, the Surrey Timber Co., Ltd., who put in that notice of opposition, does intend so to occupy the holding.

- G The initial four words of the paragraph I have just read—"subject as hereinafter provided"—anticipate the provisions of s. 30 (2), and they are the provisions which, in conjunction with s. 44, we are now called on to construe. Section 30 (2) provides:

- H "The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing sub-section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . ."

- I The question which is here posed for our determination is whether the interest of the landlord, within that sub-section, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created within the period stated.

I will now give the few remaining facts which serve to fix the beginning of the five years' period specified in s. 30 (2). The Surrey Timber Co., Ltd. (whom I call hereinafter the freeholder) is, and has been since a date in 1949, a date which is beyond any doubt outside any relevant disqualifying period, the freeholder of the premises. There was at one time a head lease vested in the Metal Box Co., Ltd., but that head lease came to an end by surrender or otherwise,

also at a date which makes it wholly irrelevant for our consideration. But there was another leasehold interest which, after the elimination of the Metal Box Co., Ltd., became the head leasehold interest and was vested in a company called Fleetwing Oil Co., Ltd., and that was for a term of years which, if it had run its course in the ordinary way, would have expired on Mar. 25, 1955. Out of the Fleetwing Oil Co.'s interest there had been carved the interest of the tenant here before us, the Diploma Laundry, Ltd. (whom I call hereinafter "the tenant"), and that company had been granted a term of years expiring one day before the date of expiration of the Fleetwing Oil Co.'s lease, i.e., expiring on Mar. 24, 1955. It follows from my last statement that the five years' period indicated in s. 30 (2), for the purposes of the present case, began on Mar. 24, 1950, and so much is agreed by the learned counsel appearing before us. So that the question may now with more precision be put in this way: Has the interest of the landlord been purchased or created since Mar. 24, 1950?

So far as that interest is a freehold interest, what I have already said plainly answers negatively that question; but I must return to the interest of the Fleetwing Oil Co., which would have continued in the ordinary course until Mar. 25, 1955. In March, 1953, an arrangement was made between the freeholder and the Fleetwing Oil Co., to which the tenant adhered, for the surrender of the unexpired remainder of the Fleetwing Oil Co.'s lease to the freeholder. If, as I will assume, the effect was to merge the Fleetwing Oil Co.'s lease in the freehold, then the practical result was that after March, 1953, the freeholder, as freeholder, held the interest immediately expectant on the tenant's tenancy. That was the state of affairs when the request for a new lease was sent to the freeholder by the tenant in September, 1954.

I will now return to the language of s. 30 (2), viz.:

"The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing sub-section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy [i.e., after Mar. 25, 1950]."

What is meant by "the interest of the landlord"? I shall have presently to refer to s. 44 which defines the word "landlord", but I have no doubt as a matter of construction of this sub-section that the words "the interest of the landlord" mean the relevant interest of the landlord for the purpose in hand, viz., that of considering whether the landlord is or is not on a particular date entitled to oppose, on the ground of para. (g) of sub-s. (1), the tenant's request. The court is, therefore, required to consider what was the interest of the freeholder, when the request was made, or when the opposition was put in—and for the present purposes it matters not which is the more correct date. That such is the sense of the words, seems to me to follow from the language which I have also read: "or an interest which *has* merged in that interest and but for the merger *would be* the interest of the landlord". Those are words which, as it seems to me, point inevitably to the date when the landlord is saying: "I wish to oppose this application".

If I am right, I think there is at once to be discerned the answer to the present appeal. I have already said that, so far as the freehold is concerned, which was the interest in fact of the freeholder at the relevant date, it had been acquired in 1949; but then come the words "or an interest which has merged in that interest and but for the merger would be the interest of the landlord". Apart from the definition section, the narrative which I have given would lead, I think, clearly to the conclusion that those words would be apt to cover the merged interest of the Fleetwing Oil Co.; because, had it not been for the merger, that interest would be the interest of the landlord, meaning thereby the landlord of the tenants,

A the Diploma Laundry, Ltd. If that had been the right conclusion, the court would then have had to consider whether that leasehold interest had been purchased or created after March, 1950.

The learned county court judge came to the conclusion that a surrender for valuable but not monetary consideration was not a "purchase" within the meaning of the section, and he concluded also that there had been no "creation" of that or any relevant interest within the meaning of the sub-section. On the view I take, it is unnecessary for me to express my view on those matters, and I do not do so. The question which, I think, must be answered adversely to the tenant and is fatal to his appeal is: What is the effect, on the language I have read and emphasised in s. 30 (2), of s. 44 and the definition there to be found of the word "landlord"? That definition, so far as it is relevant, is in these words:

C ". . . the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions".

D The extraordinary elaboration of that definition is, at first sight, surprising. It inevitably contemplates that there may, in relation to any relevant tenancy, be more than one landlord. That is, no doubt, in order to secure that a tenant is not to be deprived of his claim to a new tenancy, or limited in the effect to be given to his application, by the circumstance that the interest immediately expectant on his existing interest is one which has but a very short time to run.

E In other words, the Act, as I understand it, contemplates the grant of a new tenancy which will bind not only the immediate and limited reversion, but a more remote interest as well; and so in this definition appear the words "whether immediately or not". At the same time it is made clear that for the purposes of this section—and, therefore, for the purposes of Part 2—certain reversionary interests which have but very little time to run are excluded from relevant consideration.

G I have said that the requirement of s. 30 (2) is that one has to consider at the date of the application who are the landlords or the possible qualifiers as landlords, and what are then their interests. If I go back to s. 44, the freehold interest of the freeholder was plainly the interest of a landlord within the meaning of that section, since it fulfilled the condition, first, that it was an interest in reversion expectant, in fact immediately, on the termination of the relevant tenancy, second that it was a fee simple, and third that it was not itself a reversion expectant on an interest which fulfilled both the first two conditions I have mentioned. The language makes it clear, in my judgment, that the freeholder is in a situation to say: "We are the landlords within the meaning of s. 30 (2), being immediate reversioners, and our interest is that of freeholders, which we acquired in 1949". Then I have to consider the words: "or an interest which has merged in that interest and but for the merger would be the interest of the landlord". I must therefore ask the question: But for the merger, would the Fleetwing Oil Co.'s interest be the interest of "the landlord" (as defined by s. 44), or would it have been the interest of the landlord on the date of the application? The answer in my judgment is that it would not. It is true that it was or would have been an interest in reversion expectant on the termination of the relevant tenancy within the terms of s. 44 (1) (a), but it would not have

satisfied condition (b) because it was not a fee simple, nor was it a tenancy which would not have come to an end within fourteen months or less by effluxion of time. The Fleetwing Oil Co.'s interest would have come to an end by the effluxion of time in March, 1955, five or six months after the date which we are considering, of the tenant's application or the landlord's opposition. Therefore it seems to me that it necessarily follows that in the autumn of 1954 the Fleetwing Oil Co.'s leasehold interest, merged or not merged, would have been an irrelevant interest for the purposes of s. 30 (2). The Fleetwing Oil Co.'s interest, in the hands of the freeholder or in the hands of anybody else, would not have been an interest of a "landlord" within the relevant definition. It therefore follows that the question whether that interest might be said to have been purchased or created by the freeholder within s. 30 (2) need not be further considered. If the Fleetwing Oil Co.'s interest had by effluxion of time or would by effluxion of time have expired before the tenant made his application, the result, as counsel for the tenant concedes, would have been clear; and I do not think it makes any difference that it would still have subsisted in October, 1954, because then it would have had but five months left of life.

For these reasons, I think, with all respect to the argument of counsel for the tenant, that the freeholder is not disqualified as being one whose interest for the purposes of s. 30 (2) was purchased or created after March, 1950. Although I have based my conclusion on different grounds from those with which the learned judge dealt, and in so basing my conclusion I have not had to consider the grounds on which he decided in the freeholder's favour, I conclude none the less that the result he arrived at was correct, and accordingly this appeal must be dismissed.

JENKINS, L.J.: I agree, and have nothing to add.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Benham, Synnott & Wade* (for the tenant); *John F. Chadwick* (for the freeholder).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

R. v. McCARTHY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Donovan, JJ.),
July 4, 1955.]

B

Criminal Law—Sentence—Corrective training—Corrective training a form of imprisonment—Whether sentence of three years' corrective training appropriate—Petty offence but previous convictions.

C

The appellant, who was twenty-eight years old, was sentenced, having regard to previous convictions, to three years' corrective training for the larceny of a shirt and a pair of trousers and to a concurrent sentence of three years' corrective training for the breach of a probation order. The appellant had previously only had three months' imprisonment, but in February, 1955, he had pleaded guilty to larceny of a bicycle and had been put on probation for three years and told that if he broke the probation order he would be dealt with severely.

D

Held: if a court had been considering the matter apart from the power to impose a sentence of corrective training, which was in substance a sentence to imprisonment, the court would have come to the conclusion that a sentence of eighteen months' imprisonment was appropriate, and therefore, although the appellant was eligible for corrective training and deserved a substantial sentence, the sentence of three years' corrective training imposed on him was too severe and would be varied to one of eighteen months' imprisonment.

E

[**Editorial Note.** Under s. 21 of the Criminal Justice Act, 1948, which confers power to sentence to corrective training, a sentence of corrective training for less than two years cannot be imposed. In general three years is regarded as the minimum sentence for corrective training; see *R. v. Grant* ([1951] 1 All E.R. at p. 30, letter E).

F

As to severe sentences on persistent offenders for trifling offences where there are many previous convictions, see 10 HALSBURY'S LAWS (3rd Edn.) 489, para. 890, note (y).]

Appeal against sentence.

G

The appellant had been sentenced in March, 1952, to three months' imprisonment for larceny, and in June, 1954, had been fined £5 with the alternative of one month's imprisonment for larceny. In February, 1955, he pleaded guilty at Middlesex Quarter Sessions to stealing a bicycle and being in possession of housebreaking implements by night; the deputy chairman ordered that he be put on probation for three years and told the appellant that he was being treated with exceptional leniency and that if he broke the probation order he would have to be dealt with severely. On May 2, 1955, the appellant pleaded guilty before the Uxbridge magistrates to stealing a shirt and trousers and was committed to Middlesex Quarter Sessions for sentence. The appellant was then twenty-eight years old. The deputy chairman sentenced him to three years' corrective training for the offence of stealing a shirt and trousers and to three years' corrective training for the breach of the probation order, the sentences to run concurrently.

H

I

The appellant did not appear and was not represented.

DEVLIN, J., delivering the judgment of the court, stated the appellant's previous convictions as set out above and continued: The appellant said that he had been sleeping rough for a week and that he wanted a clean shirt and trousers to look respectable for a job and that he went to a bakery where he found the shirt and trousers and that he took them. If he had been endeavouring to take any advantage of the probation which had been given to him he would have asked the probation officer, who would no doubt have helped him and put him

in touch with someone who would provide him with the clothes, but the probation officer says he was bad at reporting and was not taking advantage of the opportunity given. He is qualified for corrective training and it is not surprising that the deputy chairman came to the conclusion that corrective training was the right course because it is quite clear he deserved a substantial sentence of imprisonment. A

What has caused this court to intervene is this: corrective training, although it provides a system of training from which men who are suitable can benefit and which gives them advantage in that way over and above the ordinary forms of imprisonment, is in substance a form of imprisonment. It is, therefore, necessary when one is passing a sentence of three years' corrective training to bear in mind that it is a sentence of three years' imprisonment and to consider whether that is the right length. In this particular case the man had previously had only three months' imprisonment. It was his third offence and he was a young man; and if a court had been considering the matter before 1948, we think the court would have come to the conclusion that a sentence of eighteen months' imprisonment ought to be imposed. That means that with good behaviour he would be in prison for twelve months, which is a substantial period. The court on the whole has come to the conclusion that that is the right sentence in this case and that where there is a disparity between eighteen months and three years, it makes a term of three years' corrective training too severe a punishment for an offence of this kind, which after all in itself was a petty offence. Accordingly the court will substitute the sentence of eighteen months' imprisonment; and to mark the fact that the gist of the wrongdoing here was the breach of the probation order rather than the comparatively petty offence of stealing the shirt and trousers, that sentence of eighteen months will be a sentence imposed in respect of the offence he committed in February, 1955. There will be a sentence of three months for stealing, which will run concurrently, so that he will serve eighteen months in all. B C D E

Sentence varied.

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.] F



[END OF VOLUME TWO.]

